



Knowledge Connect

Monthly Newsletter

Partner's column

"Imagination is the beginning of creation. You imagine what you desire, you will what you imagine and at last you create what you will." George Bernard Shaw.

Dear Professionals,

I take this opportunity to apprise you about the plans, recent developments and the achievements at R & A.

The Vision of R & A is to be an integrated legal and advisory services firm having pan India presence providing real time, quality and value added service to its clients. We know that when vision is combined with venture, it becomes substantive. Thomas Edison rightly opines that in the absence of execution, vision is merely hallucination.

As a first step, to fulfilling the vision of R &A's presence across India, we opened the first branch of R &A in Delhi and Gurgaon in March 2011. There has been a good acceptance of our 15yrs of expertise by the corporate entities in Delhi and Gurgaon and this indeed has given a lot of impetus and boost to our future expansion plans.



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We at R & A strongly believe in sharing our knowledge gained internally as well as externally. We were the knowledge partners for the Seminar on IPO and Private Equity Conclave conducted by A chromic Point, an event management company in the cities of Delhi, Mumbai, Bangalore, Chennai and Hyderabad. The program was very well received and the participants appreciated the content and knowledge imparted by the experts. We also have plans to organize training sessions on specific topics under FEMA, Company Law, SEBI regulations and so on for the corporate executives.

Keeping in view the dynamics of the economic and business environment globally, moving forward there will be enhanced opportunities available to expand our horizon. New Company Law, renewed focus on Corporate Governance, Secretarial Standards, high focus on Corporate Social Responsibility, convergence with IFRS, XBRL, Direct Tax Code and Goods and Sales tax etc. are further expected to provide more and more diversified opportunities.

This paradigm would certainly be more demanding and require us to look beyond the traditional and conventional services to focus on a larger canvas in a wider perspective. Value addition and clients value maximization shall be the key mantra's to survive and grow in the market place. Multi-tasking and versatile knowledge would be required to reach the pinnacle.

We are in the process of implementation of the system driven applications as today technology and technological advancements has embraced every facet of human endeavour. A new orientation in our thinking, perception and action is a call we have taken so as to bring about maximum efficiency in our services to our esteemed clients.

I strongly believe that tomorrow belongs to those who prepare for it today.

With kind regards,

Rashida Adenwala

Founder partner

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Compliance Calendar by CS. Naresh & CS Khusboo

Listed below are the Compliances for the month of August

S. No.	Compliance	Form to be filed	Relevant Law	Due date
1.	Excise Duty payment	GAR 7	Central Excise Rules, 2002,	5th August
2.	Payment of service tax collected to the department	GAR 7	Service Tax Rules, 1994	5th August
3.	Profession Tax Monthly Return	Form V	Andhra Pradesh Tax on Professions, Trades, Callings and Employments Act, 1987.	15th August
4.	Submission of VAT return along with the Payment due for the previous month after considering input credit	VAT 200 & CST VI	AP VAT Rules	15th August
5.	Return of Employees	Form 5	Employees' Provident Funds Scheme, 1952	15th August
6.	ESI monthly deposit	ESI Challan	Employees State Insurance Act, 1948	21st August
7.	EPF Monthly remittance	EPF Challan	Employees' Provident Funds Scheme, 1952	25th August
8.	Consolidated Statement of dues & Remittances	Form 12A	Employees' Provident Funds Scheme, 1952	25th August
9.	Return of Members leaving the organization	Form 10	Employees' Provident Funds Scheme, 1952	25th August

Updates / Amendments by CS. Ritesh & CS. Parul

MINISTRY OF CORPORATE AFFAIRS

- 1. Filing of Balance Sheet and Profit and Loss Account in eXtensible Business Reporting Language (XBRL) mode:** MCA vide [Circular No. 57/2011 dated 28th July, 2011](#) has extended the time limit for filing the financial statements in XBRL mode up to 30-11-2011 or 60 days from date of AGM whichever is later for all applicable companies without any additional fee. MCA has also notified that Company Secretaries/Chartered Accountants/Cost Accountants in whole time practice can verify and certify the XBRL document of Financial Statements.
- 2. Blocking of DIN consequent to non-filing of Statement of Affairs (SOA):** [MCA has vide Circular No. 56/2011 dated 28th July, 2011](#) has considered the non filing of Statement of Affairs (SOA) on time very seriously in terms of Section 454 of the Companies Act, 1956 . MCA has decided that the directors of such companies where winding up orders have been passed by the Hon'ble Court, will be given one months notice to file SOA before action for blocking their DIN is initiated. The Official Liquidators shall furnish list of all such directors who have failed to furnish SOA (giving their details) to the Ministry on 3rd working day of every month starting from 5th September, 2011 by e-mail to respective RD, ROC, e-Governance Cell and Insolvency Section of this Ministry.
- 3. Scrutiny inspection and investigation in all winding up cases:** MCA has noticed that winding up petitions are being filed by management after having committed major violations under the Companies Act, 1956 as well as misappropriation of funds of the company. MCA vide [Circular No. 55/2011 dated 26th July, 2011](#) has laid down the procedure that has to be followed in case of winding up in order to curb mal-practices.
- 4. Pro-active action in case of winding up petitions:** MCA vide [Circular No. 54/2011 dated 26th July, 2011](#) has casted the responsibility on the Official Liquidator in order to speed up the winding up process and to introduce best international practices in this regard.
- 5. Scheme of arrangement/amalgamation:** MCA vide [Circular No. 53/2011 dated 26th July, 2011](#) has issued guidelines with regard to the issues to be examined by the Regional Director's/Registrar of Companies in the matter of scheme of arrangement/amalgamation under Section 391-394 of the Companies Act, 1956 along with the timelines for strict compliance.

- 6. Online approval of Central Government under Section 297 of the Companies Act, 1956:** MCA vide [Circular No. 52/2011 dated 25th July, 2011](#) has decided to simplify the procedure under Section 297 of the Companies Act, 1956 and to give online approval, if the proposed contract has been approved by the shareholders by way of special resolution in a general meeting and if the e-form is certified by a practising professional who shall certify the correctness of the information and declarations given by the Company in the e-Form.
- 7. Rectification of Register of Charges:** MCA vide [Circular No.51/2011 dated 25th July, 2011](#) proposes to shift the jurisdiction from the Company Law Board to the Central Government (power delegated to the respective Registrar of Companies) with effect from 24th September, 2011 with regard to rectification of register of charges under Section 141 of the Companies Act, 1956.
- 8. Shifting of registered office from one state to another:** MCA vide [Circular No. 50/2011 dated 25th July, 2011](#) proposes to shift the jurisdiction from the Company Law Board to the Central Government (power delegated to the respective Registrar of Companies) with effect from 24th September, 2011 for shifting of the registered office from one state to another state and consequent alteration to Memorandum of Association of the Company under Section 17 of the Companies Act, 1956.
- 9. Online Incorporation of Companies within 24 hours:** MCA vide [Circular No. 49/2011 dated 23rd July, 2011](#) is proposing online incorporation of the Companies within 24 hours if the incorporation application is certified by a practicing professional regarding the correctness of the information and is likely to be implemented with effect from 11th August, 2011.
- 10. Name Availability Guidelines:** MCA vide [Circular No.48/2011 dated 22nd July, 2011](#) has revised e-Form 1A as provided under Companies (Central Government's) General Rules and Forms (Amendment) Rules, 2011 dated 14th July, 2011 along with the change in the fee as provided in the said circular effective from 24th July, 2011.
- 11. Prosecution of Directors:** MCA vide [Circular No. 47/2011 dated 14th July, 2011](#) has amended the General Circular No.08/2011 dated 25th March, 2011 as per which the Nominee Directors on behalf of Public Financial Institutions, Financial Institutions and banks on the Board of Companies should be treated in the same manner as provided in the para 2 of the said Circular. The Registrar of Companies & Regional Directors have been issued guidelines while initiating prosecution proceedings against Directors and avoidance of wrongful prosecutions.

12. **Waiver of Central Government approval:** MCA vide [Circular No.46/2011 dated 14th July, 2011](#) has waived the requirement of Central Government approval for the payment of remuneration to professional managerial person by listed companies and their subsidiaries having no profits or inadequate profits subject to compliance certain conditions as mentioned in the circular.
13. **Name Availability Guidelines, 2011:** MCA vide [Circular No. 45/2011 dated 8th July, 2011](#) has amended the guidelines pertaining to name availability which shall be effective from 24th July, 2011. As per the new guidelines, where e-form 1A has been certified by the professional in the manner specified, the name will be made available by the system online to the applicant without backend processing by the Registrar of Companies (ROC). However, this facility is not available for applications for change of name of existing companies.
14. **Integration of DIN and DPIN:** MCA vide [Circular No. 44/2011 dated 8th July, 2011](#) has integrated Directors' Identification Number (DIN) issued under Companies Act, 1956 with Designated Partnership Identification Number (DPIN) issued under Limited Liability Partnership (LLP) Act, 2008 to avoid duplicity with effect from 9th July, 2011.
15. **Filing of Financial Statements in eXtensible Business Reporting Language (XBRL) Mode:** MCA vide [Circular No. 43/2011 dated 7th July, 2011](#) has notified that the filings in XBRL mode will be effective in respect of financial statements closing on or after 31.3.2011 instead of the year 2011-12. The circular also notifies that besides signing by signatories as specified under Section 215 of the Companies Act, the statutory auditor has to certify the financial statements prepared in XBRL mode for filing on MCA -21 portal.
16. **Payment of fees to CA's:** MCA vide [Circular No. 42/2011 dated 7th July, 2011](#) has notified the process through which the payment of fees can be made to CA's in cases where payments are not permitted from Common Pool Fund. The payment of fees to CA's in this respect will be made out of the Budget Head "Office Expenses".
17. MCA vide [Circular No 41/2011 dated 6th July, 2011](#) has the notified the process for e-filing of Income Tax Return in respect of companies under liquidation.
18. **Amendment to Schedule XIII of the Companies Act, 1956:** MCA has vide notification [GSR 396 \(E\) dated 23rd May, 2011](#) notified that the approval of the Central Government is not required for a listed company or subsidiary of a listed company for the payment of remuneration to its managerial personnel, if the specified conditions are fulfilled.

- 19. Amendment in Rule 4A of Companies (Central Government) General Rules and Forms, 1956:** MCA vide notification [dated 14th July, 2011](#) amended the rules regarding change of name of the Company.
- 20. Monthly remuneration under Section 314 of the Companies Act, 1956:** MCA vide notification [dated 7th July, 2011](#) has substituted Rule 10C of the Companies (Central Government) General Rules and Forms, 1956 modifying the monthly remuneration payable under Section 314 (1)(b) and Section 314(1B) to not less than rupees fifty thousand and rupees two lakhs and fifty thousand respectively.
- 21.** MCA has vide notification [dated 5th July, 2011](#) amended the Companies (Director Identification Number) Rules, 2006 which has come into effect from 9th July, 2011.
- 22.** MCA vide notification [dated 5th July, 2011](#) has amended Limited Liability Partnership Rules, 2009 regarding Designated Partnership Identification Number (DPIN) which has come into force with effect from 9th July, 2011.

B) SECURITIES AND EXCHANGE BOARD OF INDIA

- 1. Admission of Limited Liability Partnerships (LLP) as members of Stock Exchanges:** Securities and Exchange Board of India (SEBI) vide circular [dated 11th July, 2011](#) has issued a clarification regarding the inclusion of LLP, being a body corporate as members of Stock Exchanges subject to compliances laid down in Rule 8(4A) of the Securities Contract Regulations Rules, 1957 so far as it can apply to LLP's.

C) RESERVE BANK OF INDIA (RBI)

- 1. Facilitating Rupee Trade:** RBI vide [A.P. \(DIR Series\) Circular No.3 dated July 21st, 2011](#) has decided to allow non-resident importers and exporters to hedge their currency risk in respect of exports from and imports to India, invoiced in Indian Rupees.
- 2.** RBI vide [A.P. \(DIR Series\) Circular No. 02 dated July 15th, 2011](#) has regularized the Liaison/Branch offices of foreign entities established in India before the FEMA came into force.
- 3. Redemption of Foreign Currency Convertible Bonds (FCCBs):** Reserve Bank of India vide [A.P. \(DIR Series\) Circular No.1 dated July 04, 2011](#) has decided to consider applications for refinancing of FCCBs by Indian Companies under Automatic route subject to compliance of terms and conditions as specified in the said circular.

CASE LAWS by CS. Vanaja & CS. J. Smita

COMPANIES ACT, 1956

1) Infringement of trademark: In order to constitute infringement, it is not necessary that the impugned trademark should be an absolute replica of the registered trademark

GREAVES COTTON LIMITED V MOHAMMAD RAFI & ORS[DEL] Section 28,29(1) of Trade-marks Act, 1999.

Decided on : 03/06/2011

The plaintiff Company ("GREAVES COTTON LIMITED") engaged in the manufacture of a wide range of industrial products and equipments had a registered trademark "GREAVES" in its name. Defendant No.1 who is the proprietor of Defendant No.2, made an application for registration of the trademark "GREAVES INDIA" claiming use of aforesaid mark since 1.12.2004 in respect of products which are exactly of the same type as the pumps of the plaintiff company. The plaintiff company sent a legal notice dated 26.12.2007 to the defendant No.1 calling upon it to cease and desist from using the aforesaid mark.

The High Court of Delhi passed an order for permanent injunction on the following grounds:

- i) The word/mark "GREAVES" is an essential and prominent feature of plaintiff's trade name, corporate name and business style and also the trademark GREAVES is the surname of the founder of the plaintiff's predecessor GREAVES COTTON AND COMPANY LIMITED.
- ii) By using the word "GREAVES INDIA" the defendant No.1 lifted and adopted the whole of the registered trademark of the plaintiff company, thereby causing infringement of that trade mark.
- iii) Mere use of the word "INDIA" would make no difference since the word "GREAVES" is not only an essential but also the main component of the trademark "GREAVES INDIA" being used by the defendant No.1. Use of the word "INDIA" as a suffix and not as a prefix is also a strong indicator that the defendant No.1 wanted to encash upon the popularity, goodwill and reputation of the word "GREAVES."

- 2) **A person/accused who is required to answer the charge must know not only the accusation but also the testimony by which the accusation is supported, when a request is made for the same.**

PRICE WATERHOUSE v. SEBI [SAT] Appeal No. 8 of 2011

Decided on : 01/06/2011

The appellant "Price Waterhouse", was the auditor of Satyam from April 1, 2000 to September, 2008. According to the Securities and Exchange Board of India (Board), the inaccurate financial statements on the basis of which the audit report were prepared and certified by the auditors, distorted the decision of millions of investors and induced them to trade in the securities of Satyam.

Accordingly, the appellants were asked by the Board to show cause as to why appropriate action should not be taken against them under Section 11 and 11B of the Act and Regulation 11 the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 (for short the FUTP Regulations) .The appellants replied to the show cause notices and requested to provide the statements of certain persons recorded by the Board during investigations and also requested for cross examination of certain witnesses whose statements have been relied upon. The Board refused their request. An appeal to the Securities Appellate Tribunal was made by the appellant.

The Securities Appellate Tribunal (SAT) allowed the appeal of the auditors on the following grounds:

- i) It is an elementary principle of law that a person who is required to answer the charge must know not only the accusation but also the testimony by which the accusation is supported.
- ii) They must be given a fair chance to hear the evidence in support of the charge and to put such relevant questions by way of cross-examination and must also be given a chance to rebut the evidence led against them.

3) Conversion of unsecured loans into shares on Rights Issue does not attract Sec. 81(3) of Companies Act, 1956 if the existing loan does not carry an option to convert them into shares and when the issue is made to all on right basis under section 81(1) of the Companies Act, 1956

SRM ENERGY LIMITED V. SEBI & ANR [SAT] DECIDED ON 06/ 06/2011

SRM Energy Limited (Appellant Company) has come out with a rights issue and decided to issue shares on rights basis to its shareholders. The Spice Energy Pvt. Ltd (SEPL), the promoter of the appellant was holding 71.19 per cent shares, its entitlement in that issue worked out to 4,19,25,000 shares. On a oral understanding between appellant company and SEPL, an amount of Rs. Rs. 4052.05 lakhs was brought in and which were shown as unsecured loans in the books of the appellant and authorized the appellant company to adjust the unsecured loans hitherto in the proposed rights issue making it clear that if there was any short fall, the same would be subscribed by the promoter (SEPL). The Securities and Exchange Board of India (SEBI) on receipt of the letter of offer examined the same and informed the merchant banker that it does not approve the adjustment of loan against the share money as it falls under Section 81(3) of Companies Act, 1956.

The Securities Appellate Tribunal (SAT) has set aside the order of the SEBI on the following grounds:

1. Payment by adjustment in the books of account is a well recognized mode by all accounting standards and there is no fault with this mode being adopted.
2. In the strict sense of the term, it is not a conversion of a loan into equity. The debt equity ratio has improved and this may enable it to get further loans from financial institutions but this does not mean that the promoter loses its right to make payment for the shares by way of adjustment of its unsecured loans.
3. The promoter of the appellant do not meet the requirements of section 81(3) of the Companies Act. The methodology adopted was only a mode of payment for the shares received in the rights issue and since all the necessary disclosures have been made by the appellant in the offer document(s), it was satisfied that in the circumstances of this case, Section 81(1) of the Companies Act alone is applicable.

4) Procedural aspects of notice & quorum in the court convened meetings has to be judged on the basis of Chairman's report and the Regional Director cannot object to the scheme of arrangement u/s 391 and 394 of Companies Act, 1956

ALCHEMIST LTD AND ALCHEMIST FOODS LTD DECIDED ON 1ST NOVEMBER 2010 BY DELHI HIGH COURT

The petitioner Alchemist Ltd (" the transferor company") has filed this petition under sections 391 and 394 of the Companies Act, 1956 for the demerger of its "Food Division" and its merger with its subsidiary Alchemist Foods Ltd. ("the transferee company") as per the scheme of arrangement.

The Regional Director in his reply has objected to the scheme of arrangement due to the following reasons:

- The quorum was not present in the meetings of unsecured creditors and the fixed deposit shareholders.
- The appointed date in the scheme is before the date of incorporation of transferee company.

The Delhi High Court upheld the contention of the Regional Director and approved the scheme of arrangement under Section 391 and 394 of the Companies Act, 1956 on the following grounds:

- The Chairman's report has mentioned about the fact of service of notice under certificate of posting and actions taken during the creditors'/deposit holders' meeting to accommodate the "Quorum" in order to comply with the provisions of the Companies Act, 1956 .
- The appointed date is only for the purpose of identifying the assets and liabilities, which form part of the "food division" and for the quantification of the value of the food division.

Legal Jargons by CS. Khusboo

Word : Exparte

Meaning: Word *ex parte* is derived from Latin word meaning "for one party," referring to motions, hearings or orders granted on the request of and for the benefit of one party only. This is an exception to the basic rule of court procedure that both parties must be present at any argument before a judge, and to the otherwise strict rule that an attorney may not notify a judge without previously notifying the opposition. *Ex parte* matters are usually temporary orders (like a restraining order or temporary custody) pending a formal hearing or an emergency request for a continuance. Most jurisdictions require at least a diligent attempt to contact the other party's lawyer of the time and place of any *ex parte* hearing.

Example: Only most exceptionally should the order be made **ex parte**.

Pronunciation: ex-par-tay

Word : Mens rea

Meaning : Word *mens rea* is derived from latin word which basically means "guilty mind," or criminal intent in committing the act. In criminal law, it is viewed as one of the necessary elements of a crime. The standard common law test of criminal liability is usually expressed in the Latin phrase, "actus non facit reum nisi mens sit rea", which means "the act does not make a person guilty unless the mind be also guilty".

Example: The *mens rea* for murder is intent to cause grievous bodily harm.

Pronunciation: mens-re-aa

Article of the Month by CS. Suchi Goyal

Role of a Company Secretary in finalization of Accounts of a Company:

There is a pondering question in all of our minds that whether a Company Secretary can be held liable for wrong entries in the books of accounts or falsification of accounts of the company in discharge of his statutory duties or not ?

By looking into various sections, judgments and Case Laws, I am of the opinion that,

A Company Secretary is not held liable for wrong entries in the books of accounts or falsification of accounts of the company in discharge of his duties, **merely on the basis of signing the annual accounts** of the Company if, he has not been authorized by the Management or the Board of Directors, specifically to look into the accounts or maintenance of the accounts or records, and also he has not been given the responsibility to prepare the accounts of the Company.

However, merely upon signing or authenticating the Accounts of the Company, as a Company Secretary, renders no liability on the Secretary of the Company for falsification of accounts of the company, as authentication does not mean that the facts and figures or truth or accuracy of the transactions in the accounts are all certified as true but it only implies, that the documents authenticated are genuine and not faked.

Authentication of the Annual Accounts by the Company Secretary

When a company employs a Secretary, he usually provides **liaison** between the Board and the executive management of the company. The secretary is also responsible for ensuring the performance by the clerical and other staff of their duties in relation to the accounts. These responsibilities of the secretary assume greater importance where the company does not have either a managing director or manager. In the absence of such managerial heads, the secretary is necessarily a responsible officer who is expected to authenticate the Balance sheet and Profit and Loss Account and testify to their correctness and also to the formal requirements as to accounts. Where the company does not have a managing director or manager, at least the secretary must join in the authentication of the annual accounts.

Authentication, however does not mean that the facts and figures or truth or accuracy of the transactions in the accounts are all certified as true. It only implies, that the documents

authenticated are **genuine** and not faked. It only means certification of its genuineness or authorship. The secretary or an ordinary director who signs the balance sheet and the profit and loss account cannot be expected to guarantee the truth and accuracy of the transactions and figures in the accounts presented, as it is **no part of the duty of the secretary** or ordinary director to vouch the truth or correctness of the items in the accounts as that duty lies in those in management and / or responsible for maintaining the accounts.

As per Lexicon Law Dictionary, by P. Ramanatha Aiyar, we need to look into these terms for better clarity,

meaning of **“Authentication”** is – To give legal validity to a document, to establish the genuineness of the document, an attestation made by a proper officer by which he certifies that the record is in due form of law, and that the person who certifies it is the officer appointed to do so.

meaning of **“authorize”** is – to give formal approval to, to sanction, approve, countenance, to empower, to give a right or an authority to act, to endow with authority or effective legal power, warrant, or right. To permit a thing to do be done in the future. It has a mandatory effect or meaning, implying a direction to act.

meaning of **“signing”** is – To “sign” a paper is to subscribe one’s own name to it. Whatever is intended as a signature is valid signing, no matter how imperfect or unfinished or illegible or even false the characters may be. The actual signing of a written instrument in legal sense may imply more than the clerical act of writing the name. The element of intent may enter into the Act, not the intent to merely place the name on the paper, but to affix it to the instrument in token of intention to be bound with the conditions, for a signing consisting of both the Act of writing a person’s name and the intention in doing this to execute, authenticate or to sign as an witness.

1. Section 54 of Companies Act, 1956 - Authentication of documents & Proceedings

The officers signing the Balance sheet and the Profit and Loss account, sign by virtue of their office and do not require any authorization. But in case of any other officer there must be actual authority.

2. Signature of Agent whether Signature of company

Signature of the Company Secretary on behalf of the Company can only hold the Company

liable in case of misrepresentations. So, if the Company Secretary is authorized to sign, then the company is bound. But, this requires evidence on the scope of Company Secretary's authority.

This judgement was delivered in the following case, wherein, *a representation signed by a duly authorized agent or officer of a company acting within the scope of his authority and on behalf of the company in the course of its business may amount to a representation and signature of the company.* **U.B.A.F. Ltd. V. European American Banking Corporation, (1984) 2 All ER 226 : 1984 BCLC 112. (CA).**

Responsibility for preparing accounts

The responsibility is placed on the directors unless they prove that the duty was entrusted by them to some other competent and reliable person who was in a position to discharge it.

While under section 210 of the Act, the responsibility as regards the annual accounts and balance sheet is laid on the directors. Even u/s 211, which deals with the form & content of Balance sheet & Profit & Loss account, it throws the responsibility on the managing director / manager, in companies having managing director / manager, and **in companies not having managing director / manager, on the directors.**

In connection to above mentioned statements, following relevant sections may be referred -

3. Section 210 (5) of Companies Act, 1956 – Director's Responsibility

This section states that, if any person, being a director of Company, fails to take all reasonable steps to comply with the provisions of this section, he shall, in respect of each offence, be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to Rs.10,000 or with both, provided that in any proceedings against a person in respect of an offence, under this section, it shall be a defence to prove that a competent and reliable person was charged with the duty of seeing that the provisions of this section were complied with and was in a position to discharge that duty

Provided further that no person shall be sentenced to imprisonment for any such offence unless it was committed willfully. **So, primarily, the Directors of the company are liable.**

4. **Section 210 (6) of Companies Act, 1956 – Annual accounts and balance sheet**

If any person, not being a director of the company, having been charged by the Board of directors with the duty of seeing that the provisions of this section are complied with, makes default in doing so, he shall, in respect of each offence, be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to ten thousand rupees, or with both:

Provided that no person shall be sentenced to imprisonment for any such offence unless it was committed willfully.

5. **Section 215 of Companies Act, 1956 –**

Authentication of Balance sheet and Profit and Loss Account

Every Balance sheet and every Profit and Loss account of the Company shall be signed on behalf of the Board of Directors, in case of Companies, other than Banking Companies by its Manager or Secretary, if any, and by not less than two directors of the Company one of whom shall be a managing director where there is one. However, in the case of a Company, not being a banking company, when only one of its director, is for the time being in India, the Balance sheet and the Profit and Loss account shall be signed by such director, but in such case there shall be attached to the Balance sheet and the Profit and Loss account, a statement by explaining the reasons for non compliance with the provisions. The Balance sheet and the Profit and Loss account shall be approved by the Board of Directors before they are signed on behalf of the Board in accordance with the provision of this section and before they are submitted to the auditors for their report thereon.

Headings or Titles prefixed to sections or group of sections can be referred to in construing an Act of the Legislature, and so, in this case also, Section 215 of the Companies Act, 1956, which deals with authentication of accounts is to be treated only as a preamble to the other provisions following them.

Also, there has been a **Government clarification on section 215 of the Companies Act, 1956. Circular No. 7/72, dated 12-5-1972.**

The Department is of the view that as the authentication by the Secretary is “ on behalf of the board of directors” and not in his personal capacity, secretary can be held responsible

regarding errors, etc., only as an “**officer**” of the **company within the meaning of section 628 and not because of authentication by him under section 215 as such**. Where, however, the secretary is charged with the responsibility of maintaining the accounts and also assisting the auditor at the time of auditing, he cannot conceivably escape the consequence of any wrong statement in the accounts.

In this connection, we need to also refer to Section 628 of the companies act, 1956 –

Section 628 - penalty for false statements –

If in any return, report, certificate, balance sheet, prospectus, statement or other document required by or for the purposes of any of the provisions of this Act, any person makes a false statement –

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

which omits any material fact knowing it to be material;

he shall be punishable with imprisonment for a term which may extend to two years, and shall be liable to fine.

“Officer in Default” (Section 5 of the Companies Act, 1956)

This section was amended by the companies (Amendment) Act, 1988, so as to revise the definition of “officer in default” so that **officers and directors, who are in charge of management or who have been charged with the responsibility of complying with any of the provisions of the Act are held responsible** for any contravention of the Act.

These statements can be supported by referring to following mentioned case laws :

(a) S.C. Bhatia v. P.C. Wadhwa,(1998) :

Where the applicants to whom debentures could not be allotted were given refund with a delay and also without interest, it was held that only those persons could be prosecuted who fell within the meaning of the expression “officer in default”. A person who was simply a director was not liable to be prosecuted. So, the person to be “officer in default” should have been charged by the Board of Directors or the Management with a specific task or responsibility, for prosecution.

(b) Bhagwan Das Sharma v. Vijay Kumar Jain, (1998)

No prosecution was allowed under the Indian Penal code where the complainant was not aware as to who was the principal officer of the company. The Company could not be prosecuted by implicating the booking clerks unless they are shown to be in – charge of affairs. They could be prosecuted as individuals without showing a position of responsibility in the Company but it would have to be shown that they were guilty of the alleged offences individually. **So, in order to make one held liable, the person in prosecution should have been entrusted / in charge of the particular responsibility.**

Accounts & Audit under the Companies Bill, 2008

Even under the recent Companies Bill, 2009, Clause 117 and Clause 120 of the Bill, throws light on the liability of the Board of Directors.

The CEO, CFO & the Company Secretary is taken to be the Key Managerial Personnel of the Company.

The authentication of accounts dealt with in section 215 of the Act is dealt with clause 120 of the Bill with the difference that the secretary of the Company is no longer required to authenticate the financial statements as contemplated u/s 215 of the Act but instead is to be authenticated solely by the Chairman of the Board, if so authorized, or if not so authorized, by at least 2 directors one of whom shall be a M.D. or by the director in the case of one man company. **So, onus lies on the Board ultimately.** In this view, we can say that, a Company Secretary is not held liable for authentication of accounts, if he is only signing the accounts, being in the position of, as a Secretary.

The financial statements are to be prepared on a going concern basis according to clause 120 and perhaps if it is not so, the Board have to specifically state that it has not been so, setting out the reasons therefore. **So, the Board is always answerable.**

However, if the financial statements have not been prepared in accordance with the provisions of the Bill, then the M.D. Whole Time Director in charge of Finance, the CFO or **any other person charged by the Board with the duty of complying with the requirements of Clause 117 of the Bill, will be punishable.**

The punishment for contravention of clause 117 shall extend to all the directors and they shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees, or with both.

Provisions of the Indian Penal code

Even some of the Provisions of the Indian Penal code may be applied to against the company and its Directors which relate to falsification and fabrication of Company Accounts and books etc. Since such offences involve penal consequences involving jail terms, the company directors are required to face prosecution; obtain bail and wait the verdict after a long drawn protracted litigation.

Sec 464 of the IPC stipulates that a person is said to make a false document who dishonestly or fraudulently makes signs or executes a document with the intention of causing it to be believed that such document was signed or executed or at a time which he knows that it was not made, signed, sealed or executed.

Sec 465 of the IPC stipulates that whoever commits forgery shall be punished with imprisonment of either description for a term which may extend to 2 years or with fine, or with both.

Further. Sec 471 of the IPC also stipulates that whoever fraudulently or dishonestly uses as genuine any document which he knows or has reason to believe to be a forged document, shall be punished in the same manner as if he had forged such document.

Again sec 477A of the IPC stipulates that whoever, being a clerk, officer or servant, willfully and with intent to defraud, destroys, alters, mutilates or falsifies any book, paper, writing or valuable security, shall be punished with imprisonment of either description for a term which may extend to 7 years, or with fine, or with both.

Source: Companies Act, 1956, Different case laws, Judgements and Opinions.

Demystify Law by CS. Prashant & CS. Vaishali

CONSUMER PROTECTION ACT 1986 ("CPA") IN INDIA

The Consumer Protection Act, 1986 was enacted for better protection of the interests of consumers. The provisions of the Act came into force with effect from 15th April, 1987. Consumer Protection Act imposes strict liability on a manufacturer, in case of supply of defective goods by him, and a service provider, in case of deficiency in rendering of its services.

The salient features of the Act are:

- (I) It covers all the sectors whether private, public and cooperative or any person. The provisions of the Act are compensatory as well as preventive and punitive in nature and the Act applies to all goods covered by sale of goods Act and services unless specifically exempted by the Central Government;
- (II) It enshrines the following rights of consumers:
 - (a) right to be protected against the marketing of goods and services which are hazardous to life and property; (b) right to be informed about the quality, quantity, potency, purity, standard and price of goods or services so as to protect the consumers against unfair trade practices; (c) right to be assured, wherever possible, access to a variety of goods and services at competitive prices; (d) right to be heard and to be assured that consumers' interests will receive due consideration at the appropriate fora; (e) right to seek redressal against unfair trade practices or unscrupulous exploitation of consumers; and (f) right to consumer education;
- (III) The Act also envisages establishment of Consumer Protection Councils at the central, state and district levels, whose main objectives are to promote and protect the rights of consumers; (v) To provide a simple, speedy and inexpensive redressal of consumer grievances, the Act envisages a three-tier quasi-judicial machinery at the national, state and district levels. These are: National Consumer Disputes Redressal Commission known as National Commission, State Consumer Disputes Redressal Commissions known as State Commissions and District Consumer Disputes Redressal Forum known as District Forum; and
- (IV) the provisions of this Act are in addition to and not in derogation of the provisions of any other law for the time being in force.

Purview of a 'complaint':

According to the CPA, 'Complaint' means any of the following allegations made in writing by a complainant-

- i. any unfair trade practice or a restrictive trade practice has been adopted by a trader,
- ii. the goods hired or bought suffer from one or more defects
- iii. the goods hired or availed of are deficient in any respect
- iv. A trader has charged price in excess of price fixed by law or displayed on the goods or any package containing goods
- v. Goods which will be hazardous to life and safety when used, are being offered for sale to the public in contravention of the provisions of any law requiring traders to display information in regard to the contents, manner and effect or use of such goods.

Grant of Reliefs under CPA:

On arriving at a finding of defect in the goods according to Section 14 CPA, the jurisdictional Consumer Forum may direct one or more of the following: (i) to remove the defect; (ii) to replace the goods with new goods of similar description which shall be free from any defect; (iii) to return to the complainant the price; (iv) to pay such amount as may be awarded as compensation to the consumer for the loss or injury suffered by the consumer due to the negligence of the opposite party; (v) to discontinue the unfair trade practice or the restrictive trade practice or not to repeat them; (vi) to cease and desist manufacture of hazardous goods; (vii) to pay such sums as orders if injury/loss is suffered by a large number of consumers not identifiable conveniently; (viii) to issue corrective advertisement for neutralizing effect of misleading advertisement; (ix) not to offer the hazardous goods for sale; (x) to withdraw the hazardous goods from being offered for sale; (xi) to provide for adequate costs to parties (the Complainant).

There exists no clear pronouncement of the Supreme Court (the apex court in India) till date on whether the liability under the CPA is strict or fault based. However, failure to conform to the standards required under any law, contract or representations of the trader are sufficient to constitute a defect. Furthermore, under Section 14 of the CPA as explained hereinabove, it is only the remedy of compensation that requires the claimant to necessarily prove negligence. In the case of *Abhaya Kumar Panda v. Bajaj Auto* [(1991) 2 CPJ 644], the Orissa State Commission directed repair

of the goods, even though there was no intentional defect. Thus, the defence of no negligence may not be accepted by Consumer forums.

Establishment of Consumer forums:

At present, there are 34 State Commissions, one in each State/UT and 571 district fora besides the National Commission. The state governments are responsible to set up the district fora and the State Commissions. States have been empowered to establish additional District Forum and also additional members in the State Commission to facilitate constituting benches and also for holding circuit benches. The Central Government is empowered to establish the National Commission. It has been empowered to appoint additional members to facilitate creation of more benches and holding of circuit benches. The second bench of the National Commission started functioning from 24 September 2003. The government is monitoring the disposal of cases by the consumer courts through National Commission. As per the current statistics, since its inception and up to 5.9.2008, 2559451 cases were filed out of which 2327035 cases were disposed of by the District forums in various states of India .

Jurisdiction under Consumer Protection Act 1986:

The District Forum has the jurisdiction to entertain complaints where the value of the goods or services and the compensation, if any, claimed, is less than INR 50,000. A State Commission has the jurisdiction to entertain complaints where the value of the goods or services and the compensation, if any, claimed exceeds 500,000 rupees but does not exceed 2 million rupees. It is also appellate forum for orders of the District forum. The National Commission has the jurisdiction to entertain complaints where the value of goods and services and the compensation exceeds two million rupees and also hears the appeals against the orders of the State Commission.

Period of limitation:

A complaint is only admitted by any of the competent forums under CPA if it is filed within two years from the date on which the cause of action has arisen but it may be entertained after the said period after recording its reasons for condoning such delay , if the complainant satisfies that he had a sufficient cause for not filing the complaint within period of two years.

Procedure to file a complaint:

A complaint can be filed in a District Forum or as per pecuniary jurisdiction in another forum within local limits of whose jurisdiction the opposite party or any of the opposite parties resides or carries on business, or has a branch office or personally works for gain.

Class actions:

Under CPA Section 2(1)(b) permits filing of a complaint by a consumer, any voluntary consumer association registered under Companies Act 1956 or under any other law, the State government or Central Government, one or more consumers where number of consumers have same interest, in case of death of a consumer, his legal representative may, make a complaint.

Penalty under Section 27 CPA:

According to CPA ,where a trader or the complainant fails to comply with an order made by the relevant consumer forum, such person is liable to a punishment with imprisonment for a term which is not less than one month but which may extend to three years or with fine of not less than two thousand rupees but which may extend to ten thousand rupees or with both.

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