MMJC

MMJCINSIGHTS

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Company book-keeping Rules in electronic mode tightened by MCA

A. Introduction:

The Companies (Accounts) Rules, 2014 prescribe the manner of maintaining books of accounts and other relevant books and papers by the Company. There is an amendment in these Rules for companies which are maintaining these documents at a place outside India.

B. Amendment:

As per the notification dated 05th August 2022, the Ministry of Corporate Affairs (MCA) has notified the Companies (Accounts) Fourth Amendment Rules, 2022 with effect from 11th August 2022.

The highlights of this amendment are as follows:-

- The back-up of the books of account/other books & papers maintained in electronic mode, including at a place outside India, are required to be be kept in servers physically located in India. **Before the amendment,** these back-ups could be kept **on a periodic basis** (i.e., Company was free to choose the frequency of updating the back-ups). **Post the amendment,** these back-ups need to be kept in servers physically located in India **on a daily basis**, and should remain accessible in India, **at all times.**

- In case of all companies maintaining books of accounts in electronic mode, the details about the service provider along with other details, are to be intimated to MCA while filing of financial statements with ROC every year, i.e., in as a part of e-Form AOC-4.
  Post amendment,an additional point is to be intimated as a **part of e-Form AOC-4** in cases where the **service provider is located outside India**. In such cases, **the name and address of the person in control** of the books of account and other books and papers **in India** is also required to be disclosed**.**

C. Conclusion:

Corporates in India - especially multinational outfits operating in India - can no longer decline real time access of their books of accounts to government authorities by reason of being maintained in electronic mode under a "cloud" infrastructure with servers located outside India. The daily backups would have to be maintained in servers physically located in India. This reflects the increased monitoring that regulatory agencies are undertaking for better compliance.

The link of the above notification amendment can be accessed at the below link: -
https://www.mca.gov.in/bin/dms/getdocument?mds=wIHQjtXEQJK%252F7i1M2jM5wQ%253D%253D&type=open

New version of form DPT-3 becomes more demanding!

I. Introduction:

The Ministry of Corporate Affairs ("MCA") has been shifting to V3 model (Web Based Filing), with first few formsw.e.f 1st September 2022.One of those forms is Form DPT-3 which is being filed under Rule 16 and 16A of the Companies (Acceptance of Deposits) Rules, 2014 for intimation of details of deposits accepted and the details of amounts which are excluded from the purview of deposits respectively.

II. Amendment:

MCA has, vide notification dated 29th August 2022, has brought some important changes in the format of the Form DPT-3 which shall henceforth be filed in V3 version.

The highlights of these changes are as follows:-

Following are important**additional information sought in the new form DPT-3 (Return of deposit to be filed by companies accepting deposits from public or from members**)

S.N.	Particulars	Pre-amendment	Post-amendment
1	Mandatory certification from statutory auditor	Earlier the statutory auditor certificate was required to be attached in the form.	Now the statutory auditor has to **mandatorily digitally certify in the form itself.** The following statement has been included in the form as a **certification statement**- "I hereby duly certify that the amount specified in 'Particular of deposits' and 'Particulars of liquid assets' is correct and in line with the relevant provisions of the Companies Act, 2013."
2	Attachment to the form	Earlier the form per se did not require any attachment.However, as per the instruction in the Helpkit of form, copy of trust deed and list of depositors, if there were any outstanding balance at the end of the relevant financial year were required to be attached.	Now trust deed and list of depositors are**mandatorily to be attached to the form**

3	Tagging of SRN of GNL 1 in which advertisement or circular (DPT 1) is filed	Any Company receiving deposit, is required to give advertisement in DPT 1 format. Companies which are accepting deposits from members are required to issue a circular to members instead of advertisement in DPT 1 format Such advertisement or circular is required to be filed with MCA in Form GNL 1.	Now, in the DPT-3 filed by companies accepting deposits from public or from members, the **SRN (challan number) of Form GNL 1 filed for filing the advertisement or circular in DPT 1 format** for that particular year, for which the Form DPT-3 is being filed, will **have to be mentioned in the Form DPT-3**, so that the **relevant financial year's DPT-1 and DPT-3 can be tagged to each other**.
4	Tagging of Particulars of charge filed in favour of deposit holders	Earlier, the form required information on details of charges created in favour of deposit holders.	New form requires specifying the number of charges and the SRN of the form filed for creation of such charges. Hence, there is tagging of the relevant charge forms also with the DPT-3
5	New Radio button added	Earlier, there was no question to select Whether deposits have been accepted from the public?	New form requires to select "yes" or "no" on the question for "Whether deposits have been accepted from the public?" Hence, there shall be segregation in the companies accepting deposits from public and companies accepting deposits from members.

B. Following are important additional information sought in the **new form DPT-3 (to be filed by companies which has received any money which has remained outstanding but exempted from the definition of deposits)**

Particulars	**Pre-amendment**	**Post-amendment**
Disclosures relating to loan amounts not considered deposits under rule 2(1)(c) of acceptance of deposits rules	Previously only amounts outstanding at the end of relevant financial year were required to be reported	Now additionally the details of loan taken/fund raising by company – **opening balance at beginning of year, repaid during the year, additional loan raised during the year along with outstanding balance as at the end of year needs to be reported.** Further, **additional disclosure of ageing schedule for all the heads of items outstanding** as at the end of the financial year needs to be given with below bifurcation a :Less than or equal to 1 year b :More than 1 year and less than 3 years c :More than 3 years

III. Conclusion:

With form DPT 3 becoming a web based form and as a result of this amendment, the MCA is tightening its oversight and monitoring mechanism as more detailed information on amounts not considered as deposits is sought. Therefore, companies will have to be more diligent in reporting these amounts.

Also, the amendment in form has casted fresh responsibility on the auditors to declare the amount disclosed in the form is correct and in line with the provisions of Companies Act 2013 thereby increasing their liability as any false statement/certificate may lead to booking u/s 448 and 449 besides punishment for proving false evidences.

Govt amends rules for physical verification of Cos' registered office addresses

A. Introduction:

On and after incorporation of any company, it should have a registered office capable of receiving and acknowledging all communications and notices. Section 12(9) of the Companies Act, 2013 ("the Act") gives power to the relevant local Registrar of Companies ("ROC") that if he has reasonable cause to believe that a particular company is not carrying on any business or operations, he may cause the physical verification of registered office and if default is found, he may initiate action to remove the name of the company from Register of companies after following the due process.

B. Amendment in Rules for physical verification of registered office:

Ministry of Corporate Affairs ("MCA") vide notification dated August 18, 2022amended the Companies (Incorporation) Rules, 2014, ("Incorporation Rules") by inserting Rule 25B to the Rules for prescribing the procedure to be carried out by ROC for conducting physical verification of registered office of the company for the purposes of above-mentioned Section 12(9). The said amendment shall come into force w.e.f August 20, 2022. Consequently, the Companies (Removal of names of Companies from Register of Companies) Rules, 2016 ("Strike off Rules") have also been amended to modify the formats of notice sent to be sent by ROC to the directors of Company and notice to be published in Official Gazette for information of general public, in cases of removal of name of company initiated by ROC.

The key highlights of the procedure of physical verification prescribed under the amended Rules are as follows:-

- The verification shall be done by the Registrar in the presence of two independent witness of the locality in which the said registered office is situated and may seek assistance of local police also, if required.
- The Registrar shall check the authenticity of documents filed by the Company in support of its registered office by cross verifying the same with supporting documents collected during the physical verification, duly authenticated from the occupant of the property.
- While causing the physical verification, the Registrar shall take a photograph of the Registered office.
- A report of the physical verification shall be prepared by the Registrar in the format prescribed in this amendment.
- Based on verification, if it is found that the registered office of the Company is not capable of receiving and acknowledging all communications and notices, the Registrar shall send a notice to company and directors for removal of name of the company from register of companies and requesting them to send their representations along with copies of relevant documents, if any, within a period of 30 days from the date of the notice before taking further actions for removal of name in accordance with Section 248 of the Act.

C. Probable situations where the above action may be taken by the Registrar of Companies:

Following aresome of the ways in which ROC may get a clue about non maintenance of registered office:

1. Complaint raised by any person to the ROC about non maintenance of registered office
2. Forms filed by the Company with the MCA attaching documents bearing incomplete information on the letterhead
3. Non delivery of any official communication sent by the MCA
4. Non maintaining name board/plate of the company

These are just some instances and there may be many other ways due to which the Registrar may initiate the physical verification of registered office of the Company under Section 12(9) of the Act.

D. Amendment in formats of notices to be sent by ROC in case of initiation of action for strike off:

MCA has, vide its notification dated 24th August, 2022, has amended the Companies (Removal of names of Companies from Register of Companies) Rules, 2016 to modify the below formats to include the below mentioned points:

- Form **STK-1 (format of notice sent by ROC to directors** under Rule 3 of above-mentioned Rules) – in the drop down list, a new point is added as *"the company is not carrying on any business or operations, as revealed after the physical verification carried out under sub-section (9) of section 12"*
- Form **STK-5and STK-5A (notice to be published for information of general public** under Section 248(1),(2) and (4) of the Act**)** – in the drop down list, a new point is added as *"the following companies are not carrying on any business or operations, as revealed after the physical verification carried under sub-section (9) of section 12…"*

E. Concluding remarks:

The MCA has amended these Rules to ensure a transparent process for the physical verification of companies' registered addresses.This shall curb the increasing practice of incorporating companies without due regard to associated compliances and many other malpractices including using such companies as a base for illegal practices such as spying, diversion of funds etc.

Further, amongst other adjudication orders passed by different ROCs in India, majority of them relates to non-compliance of Section 12 i.e.,maintenance of registered office. Hence, thetask to clean off registered office non-compliance by companies seems to be very high on radar of MCA.

On July 18 2022, the MCA informed the Lok Sabha that a total of 1,12,509 companies have been struck off from official records in a little over three years. Out of the total 1,12,509 companies, the maximum number was in Delhi at 19,464. It is followed by Maharashtra (16,023 companies), Uttar Pradesh (12,823), West Bengal (11,044) and Tamil Nadu (6,989), among other states.

In view of the aforesaid, it is of significantimportanceto the companies to maintain the registered office at all times so as to avoid unforeseen penal action by the ROC which may lead to striking off the name of the company.

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Amendment in Charge related forms and Directors' KYC related forms as MCA filings go web based!!

I. Introduction:

The Ministry of Corporate Affairs ("MCA") has been shifting to V3 model (Web Based Filing), with first few forms w.e.f 1st September 2022. Some of these forms are the forms filed for creation / modification and satisfaction of charges and the forms to be filed for intimation of KYC of Directors with MCA.

II. Amendment in Charges related forms:

MCA has, vide its notification dated 28th August 2022, amended Companies (Registration of Charge)Rules, 2014 by adding new forms in the annexures of these Rules. The MCA devised new forms as it moved towards web based filings. Charge related form includes CHG 1, CHG 4, CHG 6, CHG 8 and CHG 9 (which are explained below). These forms are available for filing on the MCA portal in V3 version w.e.f 01st September 2022.

However, there are **few changes in these forms**that are brought in by the said amendment which are described below:

Particulars	**Earlier Form**	**New Form**
Both **Form CHG 1**– Form to be filed for **creation or modification of charges** (other than debentures) &**CHG-9** – Form to be filed for creation or modification of charges **in case of debentures**		
Detailed options to select type of charge	Earlier form allowed only 15 options for selecting type of charge.	New form allows for 23 options for selecting type of charge
Only **Form CHG 1** – Form to be filed for **creation or modification of charges** (other than debentures)		
Multiple charge holders- Pari Passu ranking	In case of joint charge holders, earlier separate list was required to be attached for list of charge holders, details of their extent to charge, particulars of property charged and amount secured	New form requires the details required to be reported in the form itself even in case of joint charge holders.
All forms - CHG-1, CHG-9 (explained above) and **CHG-8** (form to be filed for **satisfaction of charges** and **CHG-8** (form to be filed for **condonation of delay** in case of any miss-out in previously filed Form CHG-1 or CHG-9		
Signing of E-form	Earlier the form allowed only Director, Manager, CS, CEO CFO for digitally signing the form	New form allows IRP/RP/Liquidator along with the existing authorities

III. Amendment in KYC of Directors related forms:

MCA vide its notification dated 28th August 2022 amended Companies (Appointment and Qualification of Directors Rules) Rules, 2014 bymodifying certain features in the DIR-3 KYC form to be filed by each person holding DIN as on 31st March of previous year (31st March 2022 presently), irrespective of whether he is a director of Company or not. KYC related forms include DIR 3 KYC (which is to be filed by DIN holders having some changes in the KYC form filed in previous year) & DIR 3 KYC Web based (which is to be filed by DIN holders who have no changes in the KYC form filed in previous year). These forms are available for filing on the MCA portal w.e.f01st September2022.

However, there are few changes in the form that are brought in by the said amendment which are described below:

Particulars	Existing Form	New Form
Changes in Form DIR 3 KYC & DIR-3 KYC web based		
Separate Mobile and email ID OTP verification	Existing form required combined verification of OTPs received on email and mobile.	New form requires separate and individual verification of OTPs received on email and mobile., i.e., first verification shall be done of any one OTP first and thereafter onl y the other OTP shall be sent, thereby reducing the changes of time-out and also confusion while filing of forms
Changes in Form DIR -3 KYC only		
Police station jurisdiction	No requirement to mention Police station jurisdiction in Present/Permanent Addres s of Directors	New form requires police station to be mentioned in Present/Permanent Address of Directors

IV. Conclusion:

As the new forms requires additional information to be disclosed, companies and directors are required to be more diligent in filling up the form as incorrect or false information may lead to company and director being liable for penalty by the regulators.

Admission of Application by NCLT filed by the Financial Creditor u/s Section 7of the IBC is discretionary?

In the matter of Vidarbha Industries Power Limited (CD/Appellant) v/s Axis Bank Limited (Respondent)in the order dated 12th July 2022 passed by the Hon'ble Supreme Court.

Facts of the Case

- Vidarbha Industries Power Limited - Corporate Debtor (CD/Appellant), a power generating company was permitted by Maharashtra Electricity Regulatory Commission (MERC) to execute power purchase agreement with Reliance Industries Limited (RIL) under which CD was required to supply power to RIL.
- During the subsistence of the said agreement, certain disputes arose regarding increase in operational cost and capping of tariff between CD and MERC which was eventually adjudicated by the Appellate Tribunal for Electricity (APTEL).
- APTEL passed an order awarding CD a sum of Rs. 1,730/- crores pursuant to which CD filed an application for implementation of the order before MERC whereas MERC moved an appeal before Supreme Court (SC) against APTEL order. In view of the appeal, CD,for time being, was short of funds and on implementation of order of the APTEL would have been at a position toclear all its outstanding liabilities.
- In the meanwhile,Respondenti.e.Axis Bank Limited,being a financial creditor (FC) of CD,filed an application u/s 7 of the Insolvency and Bankruptcy Code,2016 (IBC/Code) to initiate Corporate Insolvency Resolution Process (CIRP) against CD.
- CD filed an application seeking a stay on IBC proceedings before the National Company Law Tribunal (NCLT) as long as MERC's appeal against the APTEL order was pending before SC.
- The NCLT denied the Appellant's application for a stay on the IBC proceedings and opined that existence of debt and default by the CD are sufficient to trigger CIRP against a CD.
- The NCLT further held that, IBC does not apply to CD who isunable to service its debts or who has committed default for other reasons.
- Upon challenge to the NCLT`s order by the CD, National Company Law Tribunal (NCLAT) upheld NCLT`s view.
- The Appellant filed an appealto the SCu/s 62 of the IBC against the aforesaid NCLAT Order.

Arguments of the Appellant:

- It was argued that the appellant had applied for stay of the proceedings before NCLT,in extraordinary circumstances, where the appellant had not been able to pay the dues of the respondent, only because an appeal filed by MERC, against an order passed by APTEL in favour of the appellant, was pendingbefore SC. Since the aforesaid appeal was pending, the appellant was unable to realize a sum of Rs.1,730 Crores, which was due and payable to the appellant, in terms of the order of APTEL.
- Further argued that considering the special nature of the business of the appellant of production of electricity, tariff was regulated by MERC and APTEL and the application u/s 7 of the IBC should not have been admitted by the NCLT.
- Further stated that where the NCLTwas satisfied that a default hadoccurred, and the application was complete and that there was no disciplinary proceeding pending against the proposed resolution professional, **it may by order**, admit such application.
- A bare perusal of the provisions shows that the word used in section 7(5)(a) of the IBC is

'may', which must be interpreted to say that it is not mandatory for the NCLT to admit an application in each and every case, where there is existence of a debt.if legislature had intended that an application must be admitted upon existence of a debt, then the terminology used in section 7(5)(a) of IBC would have been **'shall' and not 'may'.**

- Section 7(5)(a) of the IBC enables NCLT **to reject an application, even if there is existence of debt, for any reason that the NCLT may deem fit**, for meeting the ends of justice and to achieve the overall objective of the IBC, which is revival of the company and value maximization.
- On a joint reading of Section 7(5)(a) of the IBC alongwithwith Rule 11 of National Company Law Tribunal Rules,2016 it makes abundantly clear that NCLT, on examining the existence of debt and its default, **has the discretion to admit or not admit an application for initiation of CIRP**. It cannot be said that NCLT has no power, except to examine whether a debt exists or not and accordingly accept or reject the application.
- Also contended that the object of the IBC is to first try and revive the company and not to spell its death knell. This objective cannot be lost sight of, when exercising powers u/s 7 of the IBC or interpreting the said section.Where there are favourable orders in favour of the CD, implementation of which would enable the CDto liquidate its debt, the NCLT is not bared of the power to defer the hearing of the petition u/s 7 of the IBC.
- Also, stated that the appellant current situation is for no fault of its own, but due to the statutory authorities as noted by APTEL. MERC has prevented the Appellant from availing the benefit of favourable orders passed by APTEL.

Arguments of the Respondent:

- It was argued and emphasized that the CD had admitted default in payment of its dues, and therefore the NCLT rightly declined stay of proceedings initiated by the respondent.
- Further, argued that Section 7(5)(a) of the IBC cast a mandatory obligation on NCLT to admit an application of the FConce it was found that a CD had committed default in repayment of its dues to the FC and that is what NCLT did.
- Further, the application u/s 7 of the IBC was filed by the respondent before the NCLT, on 15thJanuary 2020. The debt due from the appellant to the respondent was approximately Rs.553/- Crores. The total debt owed by the appellant to the consortium of lenders of which the respondentwas the lead bank was approximately Rs.2,727/- Crores.
- Further, the appellant on one pretext or the other, attempted to delay the insolvency proceedings – matter being listed on innumerable occasions without any effective hearings, notwithstanding the concurrent findings of NCLT and NCLAT that occurrence of default is not disputed.
- Further, the application for stay filed by the appellant was heard on 14thJuly 2020 and later re-heard on 29thJanuary 2021, on which date the application was rejected. Even after the order of rejection dated 29thJanuary 2021, proceedings u/s7 of the IBC have not progressed at all.
- Further, contended thatthe object of the IBC was to set up an effective legal framework for resolution of insolvency and bankruptcy in a time bound manner, to encourage entrepreneurship and facilitate investment for higher economic growth and development.
- Also, stated that the NCLT is mandatorily required to ascertain existence of the default from the records of an information utility or on the basis of other evidence furnished by the FC, within 14 days of receipt of an application. If NCLT does not ascertain the existence of default, it was bound to record its reasons in writing for not doing so.
- There was no dispute that the appellant had defaulted in payment of its dues to the respondent. The NCLT was obliged to admit the application u/s 7 of the IBC in terms of Section 7(5)(a) of the IBC. There were no grounds to interfere with the concurrent findings of

the NCLT and the NCLAT.

- Relied on the judgment of this Court in *Innoventive Industries Ltd. v. ICICI Bank* to argue that the object of the IBC was to provide a framework for expeditious and time bound insolvency resolution. Section 7(5)(a) of the IBC had, therefore, necessarily to be construed as mandatory in the light of the objects of the IBC.

Held:

- IBC enables Financial Creditors and Operation Creditors (OCs) of a CD to initiate the CIRP, u/s 7 and u/s 9 of the IBC, respectively. **Section 7(5)(a) is directory, as opposed to Section 9(5)(a), which is mandatory.**
- The SC examined the question as to whether Section 7(5)(a) of the IBC a mandatory provision isordiscretionary. It observed that, ordinarily, the word 'may' be directory and the expression 'may admit' confers discretion to admit. On the other hand, the use of the word 'shall' postulate a mandatory requirement. There is no ambiguity in Section 7(5)(a) of the IBC and there was no cogent reason in this case to depart from the rule of literal construction.
- **It was observed that the legislature has, in its wisdom, chosen to use the expression 'may' in Section 7(5) (a) of the IBC, which is contrary to the use of the word 'shall' in an otherwise almost identical provision of Section 9(5)(i) of the IBC. It was, thus, apparent that the legislature intended Section 9(5)(i) of the IBC to be mandatory andSection 7(5)(a) of the IBC to be discretionary.**
- The SC held that, in the case of an application by an FC, the NCLT might examine theexpedience of initiation of CIRP, considering all relevant facts and circumstances, including the overall financial health and viability of the CD, and may, using its discretion, not admit the application of a FC. In contrast, a CIRP application filed by an OC under Section 9(2) of the IBC is mandatorily required to be admitted if the application is complete in all respects and in compliance of the requisites of the IBC.
- SC reasoned that legislature has consciously differentiated between FCs and OCs, given the innate differences between them, and observed that the impact of the non-payment of admitted dues could be far more serious on an OC than on an FC. It also remarked that the IBC does not countenance dishonesty or deliberate failure to repay the dues of an OC.
- The SC further observed that there is no doubt that a CD who is in the red should be resolved expeditiously, following the timelines as mentioned in IBC and without any extraneous matter in the way, but that the viability and overall financial health of the Corporate Debtor are not extraneous matters.
- Specifically on the facts of CD, the SC observed that while disputes of the CD with the electricity regulator or the recipient of electricity may not be of much relevance, an award of the APTEL in favour of the CD could not be completely disregarded by the NCLT/NCLAT when it is claimed that, in terms of the award, an amount far exceeding the claim of the FC, is realisable by the CD.
- It held that the existence of a financial debt and default in payment of such debt only gave the FC the right to apply for initiation of CIRP. The NCLT is required to *apply its mind to relevant factors* including the feasibility of initiation of CIRP, in this case, against an electricity generating company operated under statutory control, the impact of MERC's appeal pending before the apex court, the order of APTEL and overall financial health and viability of the CD under its existing management.
- Observing that it was not the object of the IBC *to penalize solvent companies, temporarily defaulting in repayment of its financial debts, by initiation of CIRP*, the SCheld that Section 7(5)(a) of the IBC confers discretionary power on the NCLT to admit an application of an FC under Section 7 of the IBC. However, it added a note of caution for the NCLTs, observing that

such discretionary power cannot be exercised arbitrarily or capriciously. NCLT would have to consider the grounds made out by the CD against admission, on their own merits.

- With the above observations, the SC set aside the orders of the NCLAT and the NCLT and further directed the NCLT to reconsider CDapplication for stay on further proceedings.

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