Issue 18

# NEWSLETTER

## Legal, Compliance and ESG

06 October 2020

Dear Readers,

We bring to your reading and attention following topics:



## A. LEGAL AND REGULATORY UPDATES:

### I. The Companies (Acceptance of Deposits) Amendment Rules, 2020[1]

Ministry of Corporate Affairs vide its notification dated September 07, 2020 notified the Companies (Acceptance of Deposits) Amendment Rules, 2020, making following amendment to the Companies (Acceptance of Deposits) Rules, 2014:

i. **Rule 2(1)(c)(xvii)** - A start-up company is allowed to receive an amount of twenty-five lakh rupees or more, by way of a convertible note (convertible into equity shares or repayable within a period not exceeding ten years from the date of issue) in a single tranche, from a person.

ii. **Rule 3** - Terms and Conditions of Acceptance of Deposits by Companies - Maximum limit in respect of deposits to be accepted from members shall not apply to private companies which are a start-up, for ten years from the date of its incorporation.
The period of 10 years was 5 years prior to the amendment.
"**Start-up company**" means a private company incorporated under the Companies Act, 2013 or Companies Act, 1956 and recognized as such in accordance with notification number [G.S.R. 127 (E), dated the 19th February, 2019 issued by the Department for Promotion of Industry and Internal Trade.

1 http://www.mca.gov.in/Ministry/pdf/Rule_08092020.pdf

## II. Extension of Date of the Annual General Meeting (AGM) for the Financial Year 2019-2020[2]

In terms of the power vested under the third proviso to sub-section (1) of Section 96 of the Act, the Registrar of Companies have extended the time to hold AGM, other than the first AGM, for the financial year ended on March 31, 2020, for Companies falling within their respective jurisdiction by a period of three months from the due date by which the AGM ought to have been held i.e. September 30, 2020.

It was further clarified that the extension granted shall also cover the pending applications filed in Form No. GNL-1 for the extension of AGM for the financial year ended on 31.03.2020, which are yet to be approved. Further, the applications filed in Form No. GNL-1 for the extension of AGM for the financial year ended on March 31, 2020, which were rejected, where the approval for the extension of AGM up to 3 months from the due date of the AGM shall be deemed to have been granted without any further action on the part of the Company.

## III. Notification under section 10A of Insolvency and Bankruptcy Code, 2016[3]

MCA vide its notification dated September 24, 2020 has notified the Insolvency and Bankruptcy Code, (Second Amendment) Act, 2020.

From now on no application for initiation of Corporate Insolvency Resolution Process of a corporate debtor shall be filed, for any default arising on or after March 25, 2020 for a period of 6 months or such further period, not exceeding 1 year from such date as may be notified in this behalf.

Through this Amendment, the Central Government has notified a further period of three months from the September 25, 2020, for the purposes of the said section. This means that no insolvency proceedings can be initiated against any borrower for defaults arising on or after March 25, 2020, until such time that the IBC remains suspended. Further, no application shall ever be filed for initiation of Corporate Insolvency Resolution Process of a corporate debtor for the said default occurring during the said period.

## IV. The Insolvency and Bankruptcy (Application to Adjudicating Authority) (Amendment) Rules, 2020[4]

MCA vide its notification dated September 24, 2020 has notified the Insolvency and Bankruptcy (Application to Adjudicating Authority) (Amendment) Rules, 2020 to further, amend the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016.

Amendments are carried out in Rule 4(3) & Rule 6(2) on service of a copy of the application by the Financial Creditor and Operational Creditors shall be substituted to add electronic means as one of the ways to serve the copy of the application. Further in Form 1 on particulars of financial debt, Form 2 on written communication by proposed interim resolution professional, Form 5 on application by the operational creditor and Form 6 on application by the corporate applicant under Part V of the Rules have been substituted as per the guidelines. Accordingly, in Form 5A on the date of credit and amount of credit has been inserted.

## V. Extension of Time –Scheme for Relaxation of Time for Filing Forms Related to Creation or Modification of Charges Under the Companies Act 2013[5]

Ministry of Corporate Affairs vide its notification dated September 28, 2020[6] has extended the timeline for filing forms related to creation or modification of charges under the Companies Act 2013 till December 31, 2020.

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2 http://www.mca.gov.in/MinistryV2/extensionofagm.html

3 http://www.mca.gov.in/Ministry/pdf/Notification_25092020.pdf

4 http://www.mca.gov.in/Ministry/pdf/InsolvencyandBankruptcyRules_25092020.pdf

5 https://www.mca.gov.in/Ministry/pdf/Circular23_17062020.pdf

6 http://www.mca.gov.in/Ministry/pdf/GeneralCircularNo.32_28092020.pdf

## B. COMPANIES(AMENDMENT) ACT 2020[7]

Ministry of Corporate Affairs vide its notification dated September 28, 2020 has notified the Companies (Amendment) Act 2020 ("Amendment Act").

<u>Few key highlights of the amendment are as follows</u>:

a. **Decriminalisation of the Companies Act: Reduction in Penalties:** Decriminalisation of the Companies Act, 2013 is main feature of the Amendment Act. It removes the imprisonment for various offenses, substitutes fine by penalty in and reduces amount of payable as penalty across the board. In certain minor omissions, etc. penal consequence has been omitted. One-person companies, small companies, start-up company or Producer Company, or by any of its officer in default, or any other person in respect of such company, then such company or person shall be liable to one-half of the penalty specified and it is subject to a maximum of Rs. 2.00 lakh in case of a company and Rs. 1.00 lakh in case of an officer who is in default or any other person.

b. **Exclusion from listed companies:** The Amendment Act empowers the Centre in consultation with the SEBI, to exclude companies issuing specified classes of securities from the definition of a "listed company". The objective of according such flexibility is to exclude such private companies that list their debt securities on a recognized stock exchange upon their allotment on private placement basis, thereby falling under the definition of a 'listed company' under the Act. This can incentivise private companies seeking listing of their debt securities.

c. **Exemptions from filing resolutions:** The Act requires companies to file certain resolutions with the Registrar of Companies, which include resolutions of the Board of Directors of the company to borrow money, or grant loans. However, banking companies are exempt from filing resolutions passed to grant loans or to provide guarantees or security for a loan. This exemption has been extended to registered nonbanking financial companies and housing finance companies.

d. **Periodical Financial Results**: Now such class or classes of unlisted companies to prepare periodical financial results of the company, audit or limited review thereof and their filing with Registrar within thirty days from the end of that period as specified in the rules.

e. **Remuneration to Non-Executive Director and Independent Director in case of loss or inadequate profit**: Non-executive directors of a Company having no profits or inadequate profits, may get remuneration, exclusive of the sitting fee, in accordance with the provisions of Schedule V of the Companies Act, 2013.

f. **Related Party Transactions** :- Any director or any other employee of a company, who had entered into or authorised the contract or arrangement in violation of the provisions of this section shall:
   i. in case of listed company, be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees, or with both; and
   ii. In case of any other company, be punishable with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees.

g. **Related to Penalty/ Fine/ Imprisonment:** Out of 66 amendments, 45 amendments are relating to amendment in penalty clause of Sections like: (i) In some sub-sections, penalty has been omitted (ii) Many places imprisonment has been substituted with penalty; (iii) In some places penalty/ fine has been decreased etc.

h. **Section 129A – New Section Introduced – Periodical Financial Result by unlisted companies:** The Central Government may, require such class or classes of unlisted companies, as may be prescribed: (a) To prepare the financial results of the company on such periodical basis and in such form as may be prescribed; (b) To obtain approval of the Board of Directors and complete audit or limited review of such periodical financial results in such manner as may be prescribed; and (c) File a copy with the Registrar within a period of thirty days of completion of the relevant period with such fees as may be prescribed.

[7] http://www.mca.gov.in/Ministry/pdf/AmendmentAct_29092020.pdf

## C. Case Study: BELI RAM vs. RAJINDER KUMAR [CIVIL APPEAL NOS. 7220-7221 OF 2011][8]

~Supreme Court holds Employer liable, under Motor Vehicles Act, for permitting driver to drive with an expired license

The Supreme Court had the occasion to consider a question as to what the consequence on the Employer and the Insurance Company in case of an accident would be where the validity of a driving license had expired having expired. The claim made under the Workmen's Compensation Act was rejected against the Insurance Company as the driver did not have a valid licence on the date of the accident. While the Supreme Court fixed the liability on the Insurance Company under the Workmen's Compensation Act however held that under the Motor Vehicles Act, the employer has to, thus, bear responsibility and consequent liability of permitting the driver to drive with an expired licence over a period of three (3) years.

The Supreme Court further held that once the basic care of verifying the driving licence has to be taken by the employer, though a detailed enquiry may not be necessary, the owner of the vehicle would know the validity of the driving licence as is set out in the licence itself, it cannot be said that thereafter he can wash his hands off the responsibility of not checking up whether the driver has renewed the licence and off the responsibility of not checking up whether the driver has renewed the licence.

In this case, Rajinder Kumar was employed as a driver by Beli Ram. The former met with an accident while driving a truck owned by the latter. He led a petition under the Workmen's Compensation Act, 1923. The commissioner passed an award directing the insurance to pay compensation [Rs. 94,464/- for the injuries suffered and Rs.67,313/-towards medical expenses]. Interest was directed to be paid by the employer. In appeal, the High Court absolved the insurance company of any liability on account of there being a material breach of the insurance policy inasmuch as the driver/claimant's driving licence had expired at the relevant time.

The question of law considered by the Apex Court was whether in case of a valid driving license, if the licence has expired, the insured is absolved of its liability?

The court noted that this is not a case where a licence has not been renewed for a short period of time, say a month, as was considered in the case of Swaran Singh where the benefit was given to a third party by burdening the insurance company. The bench observed thus:

> *"We are of the view that once the basic care of verifying the driving licence has to be taken by the employer, though a detailed enquiry may not be necessary, the owner of the vehicle would know the validity of the driving licence as is set out inthe licence itself. It cannot be said that thereafter he can wash his hands off the responsibility of not checking up whether the driver has renewed the licence. It is not a case where a licence has not been renewed for a short period of time, say a month, as was considered in the case of Swaran Singh where the benefit was given to a third party by burdening the insurance company. The licence in the instant case, has not been renewed for a period of three years and that too in respect of commercial vehicle like a truck. The appellant showed gross negligence in verifying the same".*

[8] https://www.livelaw.in/pdf_upload/pdf_upload-381950.pdf

## D. ESG: What are ESG funds, big abroad, and now finding interest in India too[9]

Although big in global investments, ESG funds, which imbibe environment, social responsibility, and corporate governance in their investing process are witnessing growing interest in the Indian mutual fund industry too. There are currently three ESG schemes managing close to Rs 4,500 crore (two of these launched in the last 15 months), while at least five more fund houses have lined up new schemes. ICICI Prudential Mutual Fund, which launched its ESG fund on September 21, has already raised over Rs 500 crore in its ongoing NFO. It is learnt that Kotak Mahindra AMC is set to come out with its ESG fund NFO soon and more will follow.

### What is ESG?

ESG investing is used synonymously with sustainable investing or socially responsible investing. While selecting a stock for investment, the ESG fund shortlists companies that score high on environment, social responsibility, and corporate governance, and then looks into financial factors. So, the schemes focus on companies with environment-friendly practices, ethical business practices and an employee-friendly record.

### Why so much focus on ESG now?

Fund houses say modern investors are re-evaluating traditional approaches and look at the impact their investment has on the planet. As a result of this paradigm change, asset managers have started incorporating ESG factors into investment practices.

### How big is ESG?

There are over 3,300 ESG funds globally and the number has tripled over the last decade. The value of assets applying ESG to investment decisions today is $40.5 trillion.
In India, as of now there are three schemes — SBI Magnum Equity ESG (Rs 2,772 crore), Axis ESG (Rs 1,755 crore) and Quantum India ESG Equity (Rs 18 cr) — following the ESG investment strategy. While ICICI Prudential's scheme launched its NFO last week, Kotak Mahindra AMC is expected to launch its NFO soon and more are expected to follow.

### What change can it bring?

As ESG funds gain momentum in India, fund managers say companies will be forced to follow better governance, ethical practices, environment-friendly measures and social responsibility. Globally there has been a big shift as many pension funds, sovereign wealth funds etc don't invest in companies that are seen as polluting, don't follow social responsibility or are tobacco companies.

### Which sectors/companies will lose out?

Industry insiders say tobacco companies and companies in the coal business may find it tough to make the cut; so will companies that generate hazardous waste and do not manage them properly. Besides, sectors that use a lot of water and do not follow best practices on its reuse, or companies that discharge untreated waste in soil, water or air will find it tough to get funds parked in them.
Experts in the industry say there are conflicts at various levels and many investors worldwide who are looking at sustainable wealth creation do not wish to be associated with such conflicts. For example, while the global tobacco industry profits per year come to $35 billion, it is also a cause of nearly 6 million annual deaths and investors are growing sensitive to these realities.

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[9] https://indianexpress.com/article/explained/explained-what-are-esg-funds-and-why-are-they-becoming-popular-6619234/