



LEY BOLETÍN

Companies (Amendment) Bill, 2017

The Companies (Amendment) Bill, 2017 was passed by the Lok Sabha on 27th July 2017 and now only the approval of Rajya Sabha along with the President's Assent is pending to give it the stature of Companies (Amendment) Act, 2017.

The major amendments proposed in the New Bill include clarity on definitions for identifying associate companies, holding & subsidiary companies, related parties etc; aligning disclosure requirements in the prospectus with the regulations made by Securities and Exchange Board of India (SEBI), providing for maintenance of register of significant beneficial owners and filing of returns in this regard with the Registrar Of Companies (ROC), simplification of the private placement procedure, removal of requirement for annual ratification of auditor, rationalization of provisions related to loan to directors, omission of provisions relating to forward dealing and insider trading and doing away with the requirement of approval of the Central Government for managerial remuneration above prescribed limits.

Some of the Amendments are as follows:

- **S.2(76)(vii): Definition of "Related Party":** Instead of only a company, any body-corporate which is holding, subsidiary or an associate company of such company or a subsidiary of a holding company shall be considered as a related party.
Further, a new sub-clause has been inserted in the definition of related party to include any investing company or the venturer of the company.
- **S.2(87): Definition of "Subsidiary Company":** A Company will be treated as subsidiary in case the holding company exercises or controls more than one-half of the total voting power either at its own or together with one or more of its subsidiary companies. Currently the Act provides for exercise or control of more than half of the total share capital (which includes equity + preference share capital).
It would remove all the practical difficulties faced by companies as holding status would be based on ownership of the company (i.e. equity holding only).
Also, during consolidation, the Accounting standards don't recognize preference shareholders as the owners of the Company and hence the equity shareholder would show it as its subsidiary in its books of account and thus the change in definition is a welcome move.
- **S.47: Voting Right:** Since a member who is a related party cannot vote on a resolution to be passed under section 188 of the Companies Act 2013, it is proposed to clarify that the right of every member holding equity shares to vote on all resolutions placed before the meeting would be subject to sub-section (1) of section 188 of the Act.
- **S.54 (1): Issue of Sweat Equity Shares:** It is proposed to allow issue of sweat equity shares at any time after registration of the company. Currently such shares can be issued only after the expiry of one year from the date of commencement of business.
- **S.92: Annual Return:** It is proposed to omit the requirement of MGT-9 i.e. extract of annual return to form part of the Board's Report. Instead, the copy of annual return shall be uploaded on the website of the company, if any, and its link shall be disclosed in the Board's report.
The Central Government may prescribe abridged form of annual return for One Person Company (OPC), Small Company and such other class or classes of companies as may be prescribed.
It is also proposed to omit the requirement related to disclosing indebtedness and details with respect to name, address, country of incorporation etc. of FII (Foreign Institutional Investors) in the annual return of the company

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Time limit of 270 days within which annual return could be filed on payment of additional fee has been done away with. It is proposed that a company can file the annual return with ROC at any time on payment of prescribed additional fee.

- **S.101: Notice of Meeting:** Post the amendment, general meeting may be held at a shorter notice if in case of an Annual General Meeting consent is given by not less than 95% of the members entitled to vote and in case of other general meetings consent is given by members holding not less than 95% of the total voting power exercisable at that meeting.

In case where any member of a company is entitled to vote only on some resolution or resolutions to be moved at a meeting and not on the others, then his vote with respect to shorter notice shall only be counted for the purpose of the resolution on which he can vote.

Currently for calling both AGM and EGM at shorter notice, consent of 95% of members entitled to vote at the meeting is required.

- **S.135: Corporate Social Responsibility:** Eligibility criteria for the purpose of constituting the CSR Committee and incurring expenditure towards CSR is to be calculated based on immediately preceding financial year. Currently this eligibility is decided based on preceding three financial years.

Further it is proposed that where a company is not required to appoint an independent director, it shall have in its CSR Committee two or more directors.

It also proposed to empower the Central Government to prescribe sums which shall not be included for calculating 'net profit' of a company under section 135.

- **S.178: Nomination and remuneration committee and Stakeholders Relationship Committee:** It is proposed that, instead of every listed company, every listed public company shall constitute a Nomination and Remuneration Committee ("NRC").

It is proposed that committee will specify methodology for effective evaluation of performance of Board and

committees and individual directors either by the Board, NRC or an independent external agency and NRC can review the implementation of evaluation system.

It is further proposed that instead of disclosing the policy in the Board's report, such policy shall be placed on the website of the company, if any and only the salient features of the policy and the changes therein need to be disclosed in the Board's report.

- **S.185: Loan to Directors:** The amendment retains the prohibition on loans advances, etc., only on the directors of the company or its holding company or any partner of such director or any firm in which such director or relative is a partner.

It however, allows a company to give loan or guarantee or provide security to any person in whom any of the directors is interested subject to passing of special resolution by the company and utilization of loans by the borrowing company for its principal business activities.

This is a very welcome change and should open lending between group companies with common directors across the group.

- **S.188(1): Vote on a Related Party Transaction:** The restriction on the eligibility of a related party to vote on a related party transaction (in which they are interested) shall not be applicable in cases wherein 90% or more members, in number, are relatives of Promoters or are related parties.
- **S.196: Appointment of Managing Director, Whole-time Director or Manager:** It is proposed that a person beyond the age of 70 years can be appointed as managing director or whole time director or manager even when such appointment has not been approved by special resolution provided that the resolution for such appointment is passed with votes cast in favour of the motion exceed the votes, if any, cast against the motion and the Central Government is satisfied, on an application made by the Board, that such appointment is most beneficial to the company, the appointment of the person who has attained the age of 70 years may be made.

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- S.197: Overall maximum managerial remuneration and managerial remuneration in case of absence or inadequacy of profits:** The amendment does away with requirement of obtaining approval of Central Government in case the total managerial remuneration exceeds 11% of the net profits of that company.

Further, post the amendment, the Company needs to pass a special resolution for payment of managerial remuneration in excess of prescribed individual limits.

It also seeks to provide that, before approval of shareholders prior approval of bank or public financial institution or non-convertible debenture holder or secured creditor shall be obtained where any term loan is subsisting.

The requirement of obtaining prior approval of the Central Government in case of absence or inadequate profits has been done away with.

- S.403: Fees for Filing:** It brings more clarity with respect to late filings of documents under sections 89, 92, 117, 121, 137 and 157 and defaults in filings, consequences, etc.

Document, fact or information required to be submitted under section 92 (Annual Return) or 137 (Copy of financial statement to be filed with registrar) may be submitted, after expiry of the period so provided in those sections, on payment of such additional fee as may be prescribed which shall not be less than Rs. 100 per day and different amounts may be prescribed for different classes of companies.

BITCOIN - CREATION OF A PARALLEL ECONOMY

INTRODUCTION:

Bitcoins are crypto currency. Unlike other fiat currency, Bitcoins are decentralized, and are not issued by any National Bank or Government. The concept of crypto-currency, was first advanced in the 1998 by Wei Dai on the cypherpunks mailing list, suggesting a new form of money that uses cryptography to control its creation and transactions, rather than a central authority. Bitcoins were issued much later in the year 2009 when the world witnessed Great Recessionⁱ due to which the banks and the stock exchange were on a verge to collapse and the government had to bail out the financial institutions with the money of the taxpayers. Thus, this debacle in the economy caused wariness about the economic system and therefore investors adopted alternative means to invest their money. Bitcoins have witnessed steady growth in the market, creating a Bitcoin friendly environment and has been recognised widely in many countries, such as United Kingdom, U.S.A, Australia and few others. Recently Japan has declared Bitcoin as a Legal Tender.

HOW BITCOIN FUNCTIONS:

A Bitcoin, is a data ledger file called a blockchain. Each Bitcoin blockchain contains (i) identifying address (the

Bitcoin system does not record the names of the individuals who own wallets) (ii) sale and purchase history of the Bitcoin (the ledger) (iii) the private key. This private key is a sophisticated digital signature that is captured to confirm each and every transaction of a Bitcoin. Every private key is assigned to each individual user of the wallet which acts as a security system. Every single trade of Bitcoin blockchains are tracked and tagged and publicly disclosed, in the network. Every Bitcoin transaction is digitally confirmed and are pseudonymous. In Bitcoin, such pseudonym is the address to which the Bitcoin is bought or sold. The history of every transaction can be accessed and stored in the blockchain with such pseudonym.

POSITION OF BITCOINS IN INDIA:

India has over the years taken a surge in investing in Bitcoins. Indian domestic Bitcoin exchange is adding over 2,500 users a dayⁱⁱ. However, there is lack of any official circular claiming to legalise the use of Bitcoins in India. Although Reserve Bank of India (RBI) has issued circulars from time to time to caution the citizens over the use of Bitcoins but the same has not been prohibited. Therefore Indian Investors and facilitators may deal in Bitcoins in India considering the following:

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❖ MANDATORY TO ADHERE TO THE KYC NORMS:

It is important that the Investors and facilitators comply with all the necessary KYC Norms in order to have hassle free transactions and maintain the log of transactions undertaken by the Account holders for trading in the market place. This shall also facilitate constant monitoring of Bitcoins so that they are not used for any illegal purpose/activities.

❖ REGULATION OF FEMA PROVISIONS:

- As per section 2 of the Coinage Act, 2011 is the Definition Clause and Sub-Section (a) deals with the definition of “Coin” which includes any metal or any other material stamped by the government or the appropriate authority empowered by government to be a legal tender.
- Section 2 (h) of the Foreign Exchange Management Act, 1999 (FEMA) deals with the definition of “Currency” which includes all the currency notes or the bank notes or the special notes to be a legal tender if it is issued/notified by the RBI under the Reserve Bank India Act (RBI Act) and Sub-Section (i) deals with the definition of “Currency Notes” which means and includes Cash in form of Coins and Bank Notes. The aforesaid definition does not cover Virtual Currency as they are neither notified nor covered under the Coinage Act or the RBI Act. Henceforth Virtual Currency fails to be determined as a legal tender.
- Under FEMA, Indian Currency is considered to be a currency, which is expressed or drawn in Indian Rupees and issued by relevant Notification by the Reserve Bank of India.

Virtual Currency not being a legal tender, does not fall within the definition of “Currency” under the FEMA and therefore it only is considered to be classified as goods, as defined under the Sale of Goods Act, 1930, as it is moveable and incorporeal in nature and therefore the provisions of FEMA are not attracted as there is no

exchange or purchase of Foreign Exchange included in the transaction.

The existing mobile or web platforms in India facilitate buying and selling of Bitcoins. However, those platforms permit only those Account holders to trade on their platform, who submit the required KYC documents and associate their Indian Bank Account on the said Platform. Therefore, it is recommended that facilitators or the investors refrain from dealing with other fiat currencies at the time of trading Bitcoins, at this stage, as that may attract FEMA regulations.

CONCLUSION:

To understand whether Bitcoin market is a boon or a bane is a farfetched question as the concept of Bitcoin is very novice and there is still a lot of commotion relating to the same in the global market. Numerous concepts are propelled everyday as more investors are venturing into the market and new theories are evolving. Although the concept is highly contested, but yet the market of Bitcoin is soaring. The investors of the Bitcoins are not only investing in the same with a point of view of investment and future gains, but also speculating to withstand situations like the great recession or any economic catastrophe that dooms the economy of a country. The world due to globalisation is getting smaller day by day in terms of business perspectives and the economy has become volatile. Any change in any part of the country does not keep the other parts of the world in oblivion and has a worldwide impact. It is worthy to note that an alternative currency has proved to be a savoir in the past if we look back to the 2013 crises in Cyprus when the government had then announced a bailout of the money in the banks or look at the hyper-inflation situation in Zimbabwe and Venezuela due to erroneous government policies have proved to be advantageous. However the Mt. Gox currency exchange collapseⁱⁱⁱ cannot be foreseen either.

Therefore, it is too early to affirm on the stability of Bitcoins as there is already a lot of speculation in the marker. However, the investor’s may keep both the possibilities open and invest in Bitcoins pragmatically and cautiously.

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BANKS HAVE TO BE MORE CAUTIOUS!

Due to significant growth in the cyber crimes pertaining to credit card, ATM, debit card and Internet banking, Reserve Bank of India (RBI) has issued Cyber Security Framework for the Banks, mandating Banks to put in place a Board-approved Cyber-Security Policy, which covers the risks from Cyber threats and the measures to address/ mitigate these risks. The Banking Ombudsman Scheme is also formulated under which an Ombudsman is appointed to investigate Individual's complaint against the grievances and shall also have the power to compensate up to Rs. 20 Lakhs to the Customer for loss, suffered by the Customer due to an act of omission of the Bank, and also compensate up to Rs. 1 Lakh for mental agony and harassment.

ATITHI-DEVO-BHAVA FOR FOREIGN LAW FIRMS?

As of the current scenario, the Advocates Act, 1961, does not permit Foreign Lawyers to practice law in India. The Legal profession in India has undergone a major shift in past two decades. Economic globalization has given an opportunity of constant interaction with Foreign Lawyers and Law Firms and an International Clientele. As a result there has been transfer of knowledge, system and practice to Indian Law Firms so as to undertake much larger role in cross-border transactions. The future of the Country always depends on how the Legal Profession in the Country develops. The future of democracy and the rule of law in the fastest and the largest growing economic region of the world may depend on commitment of making the legal profession in India the most responsive, educated and forward thinking of all nations. Considering the same Prime Minister of India Shri Narendra Modi has instructed the Law Ministry and Commerce Ministry to allow the liberalization of the legal market, and to submit a Draft Notification in four weeks.

20th GST COUNCIL MEETING:

The Goods and Services Tax (GST) Council approved implementation the electronic way bill system across the Country by removing the check-posts system. The Council also created necessary structural framework for anti-profiteering mechanism that aims to ensure passing of benefits of reduced rate of tax or increased availability of credits under GST to customers. The Council has also considered and provided relief to the agitating textiles sector and has fixed the liability on e-commerce operators in respect of small housekeeping services provided through them. GST Council will meet at Hyderabad, on 9th September, 2017 for its 21st meeting.

DOCTORS AND DRUG MAKERS – BEWARE!

With an intention to curb the increasing commercialisation in health care industry, regulations governing drug marketing is proposed for review by the Law Ministry to crack down on the freebies given to doctors (trips/gift) to a maximum value of Rs. 1,000 and forbid the drug makers from making false curative abilities. Non-compliance could result in a ban of 1 or more years and/or confiscation of the highest selling drug brands which will be given to government hospitals.

SC SETS ASIDE TRIPLE TALAQ:

A five-judge bench of the Supreme Court struck down the practise of triple talaq (instant divorce) (i.e. the practice of Muslim men divorcing their wives by uttering 'talaq' thrice consecutively) as unconstitutional, directing the Parliament to bring legislation within 6 months.

SC RECOGNIZES RIGHT TO PRIVACY AS A FUNDAMENTAL RIGHT

A nine-Judge bench of the Supreme Court delivered a controversial judgment on 24th August, 2017 acknowledging the right to privacy as a fundamental right under Article 21 of the Constitution. While 'privacy' is too vague to be defined, concrete clarifications will be welcome in respect of the ambit of coverage to clarify the abound queries rising regarding the fate of Section 139AA of the Income-Tax Act (quoting of Aadhar in IT returns), DNA Profiling Bill, 2015 and other similar legislations.

ⁱ The Great Recession was the period of general economic decline in world markets during the late 2000s and early 2010s. The major factors that attributed to the same are International trade imbalances and lax lending standards contributing to high levels of developed country household debt and real-estate bubbles that have since burst.

ⁱⁱ Despite RBI warning, 2,500 Indians investing in Bitcoins daily. Here is all you should know about its usage & dangers, Economic Times, May 17, 2017.

ⁱⁱⁱ Mt. Gox was a bitcoin exchange based in Shibuya, Tokyo, Japan. Launched in July 2010, by 2013 and into 2014 it was handling over 70% of all bitcoin transactions worldwide, as the largest bitcoin intermediary and the world's leading bitcoin exchange. In February 2014, Mt. Gox suspended trading, closed its website and exchange service, and filed for bankruptcy protection from creditors. In April 2014, the company began liquidation proceedings. Mt. Gox announced that approximately 850,000 bitcoins belonging to customers and the company were missing and likely stolen, an amount valued at more than \$450 million at the time.