COMPANIES BILL 2011 VIS-À-VIS COMPANIES ACT 1956

The Companies Act, 1956 has been in force for about 55 years and has been amended several times. The main object of the said Act has been to play a balancing role between the two competing factors, namely, management autonomy and investor protection. In view of the changes and expansion of economy in our country and to provide for a legislation to meet this growth, the Companies Bill was introduced for the first time in the Lok Sabha in 2008. However, it lapsed with the dissolution of the 14th Lok Sabha. It was reintroduced in 2009. This time it was not cleared due to technical differences between the Ministry of Finance and Corporate Affairs over the delegation of power to stock market regulator, Securities Exchange Board of India (SEBI). The differences were later resolved by the Finance Minister, Pranab Mukherjee, the deputy chairman of Planning Commission, Montek Singh Ahluwalia and the Corporate Affairs Minister, Veerappa Moily. The Companies Bill 2011(**"The Bill"**) incorporates most of the recommendations made by the parliamentary panel. It addresses the public concern over corporate accountability and responsibility.

The Companies Act, 1956 consists of 13 parts, over 750 sections and 15 schedules. The Bill, on the other hand, represents the condensed version of this voluminous piece of legislation. It includes only 29 chapters, 470 sections and 7 schedules. It aims at revising the Act in accordance with the changing national and international economic conditions, modifying and deleting various provisions of the Act that had become redundant over time in order to facilitate easy interpretation and to enable flexibility in rule making to adapt to changing times and conditions. The bill also prescribes as many as 33 new definitions, major ones being associate company, small company, employee stock option (ESO), promoter, related party turnover, Chief Executive Officer (CEO), Chief Financial Officer (CFO) and Global Depository Receipt (GDR). Apart from reducing the number of sections drastically and introducing new definitions, it also brings about a lot of other changes.

The Bill introduced the concept of "One Person Company" for the first time. It has been defined as "a company which has only one person as a member." However, the Memorandum of such a company should indicate the name of the person who shall, in the event of the subscribers' death, disability or otherwise becomes the member of the company. A One Person Company is required to be registered as a "Private Limited Company". The maximum number of members in a private company has been increased to 200 as against 50 under the Act. The bifurcation of the object clause into main, ancillary and other objects in the Act has also been done away with by the Bill. The memorandum of association requires only the object for which the company is incorporated and the matters considered essential

for its furtherance to be mentioned.

The Act makes the shares of the public company freely transferable. The Bill, however, adds on to it that the arrangement between two or more individuals in respect of transfer of security shall be enforceable as a contract. In case of buy back of shares, if it is made by the Board of Directors, the Act does not permit further buy back within a period of 365 days from the date of the preceding offer. The Bill provides that there cannot be a buy back of shares upto a period of 365 days whether approved by the Board of Director or shareholders. The scope of transfer and transmission of shares has been broadened. The Bill governs the issue of all types of securities as opposed to the Act which covered only shares and debentures under its ambit. The mandatory transfer of profits to its reserves has been done away with and the Bill provides only for voluntary transfer of portion of profit as considered appropriate. The right of preference shareholders to vote has also been changed. They can exercise such voting rights only when dividends payable in respect of class of preference shares are in arrears for a period of 2 years or more. The Companies Act, 1956 provided for no restrictions for declaring dividends or interim dividend. The Bill, on the other hand, states that the interim dividend may be declared out of the profit and loss account as well as the profits of the financial year in which the dividend is sought. However, in case of loss, the interim dividend shall not be declared at a rate higher than the average dividends declared by the company during the immediately preceding three financial years.

The Bill has introduced the new concept of registered valuer wherein if valuation is required to be made in respect of any stocks, shares, assets, debenture, goodwill or net worth of a company or its liabilities, it has to be done by a registered valuer. Such valuer has to be appointed by the audit committee or the Board. Any chartered accountant, cost and work accountant, company secretary or any other person possessing such qualification as may be prescribed may apply to the Central Government for being registered as the valuer. No provision for the registered valuer was provided under the Act.

The eligibility for acceptance of deposit from public and shareholders has been changed. Under the Act, public companies are permitted to accept deposits from public and shareholders in accordance with Companies (Acceptance of Deposits) Rules. Under the Bill, only banking company, NBFC and such other company as the CG may specify, are permitted to accept deposits from public. A company is allowed to accept deposits from its members by passing a resolution in general meeting subject to the following conditions: (i) obtaining credit rating; (ii) providing deposit insurance; (iii) depositing such sums which shall not be less than 15% of the amount of the deposit maturing in the financial year and the following financial year and kept in a scheduled bank in a separate bank account to be called deposit repayment reserve account; (iv) certifying that the company has not committed any

default in the repayment of deposits. There is no place for suo moto action by tribunal for directions to repay the deposits or interests thereon in case of default of such repayments.

Companies Bill restricts the classes of holding companies from having layers of subsidiaries beyond the prescribed numbers. It has widened the concept of independent directors (probably after the much heated debate on the Satyam scam) so as to dedicate an entire schedule along with a couple of sections to independent directors. The relevant provisions in this regard are clauses 149, 150 and schedule IV. The definition of "independent director" includes that the candidate must be "a person of integrity and possess the relevant expertise and experience" in the opinion of the board. The Central Government has also been vested with the power to prescribe the qualifications for independent directors. The bill requires that at least one-third of the total number of directors in a public listed company should be independent directors. The company and the independent directors have to abide by the provisions specified in schedule IV. For the appointment of the independent director, the bill necessitates the establishment of data bank IDs, from which persons may be chosen by the companies.

The Bill provides that in case of merger of listed company into unlisted company, the tribunal can order that the unlisted company shall continue to be unlisted. No compromise or arrangement can be sanctioned by the tribunal unless a certificate by the company's auditor has been filed to the effect that the accounting treatment proposed in the scheme is in conformity with the accounting standards under section 133. Separate provisions have been provided for amalgamation of two small companies or between a holding company and a wholly owned subsidiary company. This is against the provision of the Act where the Indian company could not be merged with the foreign company. It also makes provision for the merger of foreign companies into Indian companies or vice versa, with the prior approval of the RBI. The Bill further makes specific provisions for the purchase of minority shares in cases where the acquirer becomes the holder of 90% of the equity shares as a result of the amalgamation, conversion of securities, stock exchange or any other reason. The Bill also abolishes the concept of Treasury Stock /Trust Shares.

The Bill has deleted some of the criteria for the winding up of the company by NCLT (National Company Law Tribunal) such as non-commencement of business for one year, etc. The additional grounds for winding up mentioned in the Bill includes: if the NCLT is of the opinion that the company was formed for unlawful and fraudulent purpose or that the affairs of the company have been conducted in an unlawful manner or that the person concerned in the formation or management of the company is guilty of misconduct, fraud or misfeasance.

The Bill is, therefore, an updated version of the Act for the changing global

environment introducing various new concepts such as corporate social responsibility (CSR), fixed tenure for independent directors and class action suit.

The Global Market Place And The Significance Of IP Audit

Overview

Over the years, the value of intangible assets has not only increased significantly, but gone onto become more valuable than tangible assets in most cases. These intangible assets may be used to generate more returns in a business than tangible assets, if they are kept track of and managed suitably, if IP audits are done at the right time. The purpose of an IP audit is to help manage a company's IP assets by measuring them; an IP audit can uncover under-utilised assets and identify any threats to a company's net income, and enable business planners to formulate strategies to maintain and improve the company's market position with the information received from the audit.

An IP audit is a methodical review of the intellectual property assets owned, used or acquired by a company, and analyses the importance and usefulness of intangible assets in the business. A business will have taken up measures to protect its assets, and an IP audit will examine the strengths and weaknesses of these measures by quantifying the intangible assets. By conducting an IP audit, the management of a company will be able to make appropriate strategies for the improvement of the company's market position and make safe intellectual property rights.

An IP audit may be general or very particular that needs to be conducted in specific situations, such as mergers and acquisitions, as the circumstances may necessitate. IP audits can be incredibly valuable, especially in SMEs, for the simple reason that a business cannot manage its assets if it cannot measure them. In most cases with SMEs, the businesses do not have the necessary resources to conduct an IP audit and will find it especially difficult to weigh up every component that makes up an IP portfolio, but these difficulties should be overcome, as it is crucial for every business to document and find the worth of what is, in most cases, its most valuable intangible assets.

Steps

The easily identifiable intellectual property in the business or company is singled out first; this helps with keeping the process of the IP audit organised. This sort of IP includes any registered trademarks, copyrights, designs or patents owned by the businesses, licences to or from third parties including cross-licences. Such things as in-house work manuals, databases, recipes, franchise agreements, publications

and product/process know-how are also included in under this category of IP.

Once categorised, the intellectual property is scrutinised to determine who owns them and whether they are being used effectively. The singular components are also rated by virtue of their importance- this is done by looking into factors such as whether they are included in core technologies, the life expectancy of the underlying IP in the technology and the potential or actual selectiveness of the technology.

The next step is to enumerate what can be listed down as external or market influences. These will include the company brand, the product brands, company and product get-ups, goodwill, reputation, certification, regulatory approvals, distribution and raw material networks, client lists and marketing and advertising programs. In an attempt to find out the value of any of these items, it would be appropriate to find out how much it would cost to replace the item if it were lost, what sort of income can be generated by the underlying IP assets in a particular time period, and how the IP asset is being used. Several methods of evaluating IP assets can be used to establish the value of an underlying IP asset.

Importance

An IP audit can make possible the identification of importance, in terms of contribution to the company's competiveness and net income, different IP assets it owns or uses.

The most valuable assets are made clear by an IP audit. Having assessed the IP assets, a company's management may make educated decisions and take measures to protect their IP assets or to formulate a plan for what happens when IP assets are infringed. Additionally, with an IP audit, management would be competent to set forth a strategy with the objective of ensuring the company's intangible assets are used effectively and appropriately.

The most valuable assets are made clear, and the company may take decisions and measures if the IP is infringed. Understanding which assets are most important enables a company to realise and protect their full value.

Scope of IP Audit

The appropriate scope is situation-specific. If a company is conducting an audit of its company-wide procedures for acquiring, perfecting and enforcing its IP rights, an IP audit of a broad scope is appropriate. Audits more narrow in focus may be appropriate when a company is facing possible trademark litigation and an investigation limited to the trademark at hand may be all that is required.

Competition Law Updates

The Competition Commission of India (CCI) clears Indian Railways and SAIL Memorandum of Understanding.

The complaint dates back to December 2009, when Jindal Steel and Power (JSPL) had alleged that the exclusive arrangement between SAIL and Indian Railways debarred JSPL, which also manufactures rail steel, from supplying rail steel to Indian Railways. SAIL, in its counter arguments, had argued that the company had to undertake an investment of over INR 700 crore solely for the manufacture of rail steel which it was not producing till then andit was because of this that the two sides had decided to enter into an arrangement in 2003 as per which SAIL would be the sole supplier of rail steel to Indian Railways CCI observed that there is no case of abuse of dominant position by SAIL in the matter.

CCI decides to go active on suo moto investigations

CCI has now decided to undertake suo moto investigations into anti-trust practices, beginning with key sectors like construction, highways, education and health. The CCIhas so far taken up only five suo moto cases, including price rise in onions, air tickets and cartelisation of sugar rates. Sections 3 and 4 of the Competition Act empower the CCI to take up cases relating anti-competitive agreements and abuse of dominant position, respectively. The investigations would be ordered under section 26 of the Competition Act, 2002. The section empowers the Commission to order an inquiry by the Director General into a matter if it finds that a prime facie case exists with respect to violation of competition laws.

CCI clears Sugar Mills Associations of cartelization and price manipulation

Earlier, the competition regulator had sent a notice to sugar mills associations and their members charging them of cartelisation and price manipulation. The suo motu action charged Indian Sugar Mills Association (Isma), National Sugar Mills Co-operative Federation, and some private sugar firms of cartel violation. CCI had alleged that industry members had decided to increase the ex-factory price of sugar by 4-6% in order to prevent prices from falling below production cost. The private companies that had been charged by CCI included Shree Renuka Sugars, DCM Shriram Consolidated, Bajaj Hindustan and Mawana Sugar, among others.

International Contribution

Document: A Delicate Balance

The Reserve Bank of India (RBI) is having to balance delicately between the dangers of high inflation and a slowing economy. Patrick Crowley, Country

Executive at ABN AMRO Jersey examines the outlook for the Indian economy ar the challenges that lie ahead for the RBI.

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News 10 @ a glance

Vodafone Taxation Case

In a landmark judgement, the Supreme Court on 20th January, 2012 had set aside the Bombay High Court ruling asking Vodafone International Holdings to pay Rs 11,000 crore in income tax on acquisition of interests in Hutchinson-Essar Limited in 2007 overseas.

Godrej Consumer up 10% on preferential issue to Temasek

Godrej Consumer Products has rallied 10% to Rs 445 after the personal care products maker decided to sell 4.9% stake to Baytree Investments, an arm of Singapore-based investment firm Temasek, to raise Rs 685 crore for acquisitions and reduce debts. Baytree will subscribe to over 16.7 million shares at Rs 410 a share on a preferential allotment basis, subject to the signing of a share subscription agreement and shareholders' approval.

Kodak files for bankruptcy

Eastman Kodak Co, which invented the hand-held camera has filed for bankruptcy protection. U.S. Bankruptcy Judge Allan Gropper in New York gave Kodak permission to borrow an initial $650 million from

Citigroup. He also set a June 30 deadline for Kodak to seek his approval of bidding procedures for the sale of 1,100 patents that analysts estimate could fetch at least $2 billion. No buyers have emerged since Kodak started shopping them around in July.

Nippon Life Insurance signs MoU with Reliance Capital Asset Management

Japanese life insurance major, Nippon life insurance, signed a memorandum of understanding to acquire a 26 per cent stake in Reliance Capital Asset Management(RCAM) for Rs. 1, 450 crore. It is one of the largest foreign direct investment in the Indian mutual fund sector.

Coal imports cheaper

The government may ease import of coal to meet the requirement for power generation companies and other infrastructure utilities. While custom duty may not be completely rolled back, a partial rollback of the countervailing duty (CVD) on imports done for power infrastructure projects is being considered by the finance ministry.

Minimum Wage Law

The Minimum Wages Act, 1948, is to be amended to empower the Union government to fix a lower figure for payment to those employed under the Mahatma

Gandhi National Rural Employment Guarantee Scheme (MGNREGS). The decision comes in the wake of the high court in Karnataka agreeing with a public interest suit which had challenged the payment of Rs. 82 a day to those hired under the scheme, when the state government had fixed Rs. 119.42 a day as the minimum legal wage for the category in question.

100% FDI in single-brand

The government notified the rules allowing 100% Foreign Direct Investment in single-brand retail paving the way for several international brands to set up stores in the country. The notification came six weeks after the Union Cabinet approved the proposal.

RBI allows banks, NBFCs to set up infrastructure debt funds

The Reserve Bank of India (RBI) has issued guidelines to allow banks and non-banking financial companies (NBFCs) to sponsor infrastructure debt funds (IDFs), to support long-term finance in infrastructure. According to the guidelines, NBFCs trying to set up IDFs should have been operational for at least five years, should have minimum net owned funds of Rs 300 crore and a capital adequacy ratio of 15 per cent.

Ban on commercial use of Hollywood Movies

The Delhi High Court today imposed an injunction on the sale of original or copied movies of the ten Hollywood Companies who claimed that their movies are being sold in the Indian market without their permission infringing their intellectual property rights. The Hollywood companies which moved the High Court included Warner Brothers Entertainment, Columbia Pictures, Disney Entertainment, Paramount Picture Corporation, Tristar, Century Fox Film Company, Universal Studios, New Line Productions and Orion Movies. The companies through their counsel Chander Lal sought an injunction on the sale of their movies in India without their permission.

National Seeds Corporation to compensate farmers

The Supreme Court has directed a state-run company to compensate farmers for supplying defective seeds to them. The Court rejected the plea of the National Seeds Corporation that it was not liable to pay compensation as it was governed by the provisions of the Seeds Act 1966 and not the Consumer Protection Act 1986. The Supreme Court rejected the plea saying that there is nothing in the Seeds Act that indicates that the provisions of the Consumer Act do not apply to farmers, who are covered under the wide definition of ‘consumer’ under section 2(d) of the Consumer Protection Act.