HIGHLIGHTS OF THE COMPANIES BILL, 2009

MCA is set to approve the Companies Bill already placed in the table of Parliament since long in this budget session.

The Companies Bill 2008 was introduced in Lok Sabha on 23rd of October 2008 but eventually it was lapsed due to dissolution of Lok Sabha and it was re-introduced on 3rd August, 2009 as Companies Bill 2009 without any change from the previous bill. Companies Bill, 2009 provides stringent rules, penalties and better transparency & accountability of Key Managerial Persons.

The bill has only 426 sections divided into 28 chapters but number of rules may come out after the bill turns into Act. Many new chapters have been introduced like that of Registered Valuers, Government companies, Companies to furnish information or statistics, Nidhis, National Company Law Tribunal & Appellate Tribunal, Special Courts, etc. It is observed that it would ensure more flexibility with more emphasis over self-regulations by the corporates.

THE SALIENT AND UNIQUE FEATURES OF THE BILL ARE AS UNDER →

<u>I.CLASSIFICATION AND REGISTRATION</u> :-

- **Concept of One Person Company (OPC limited)** has been introduced :
  OPC is defined as a company having one member hence even a single member is allowed to start a company thereby requirements such as of AGM is not required to be held. The MOA of the OPC shall indicate the member and the subscriber who shall be the member in case of death or inability to continue or ensuring perpetual succession.

- **Small companies have been defined** (maximum paid-up share capital not exceeding Rs.5 crores) and have been subjected to a **less stringent regulatory framework**.

- Provision for **re-registration of companies** already registered, has been introduced.

- The memorandum of a company shall be in such form as may be prescribed.

- For the first time, **provision for entrenchment** has been proposed in the Bill.

- A declaration in the prescribed form is required to be filed with the Registrar at the time of registration of a company that all the requirements of the Act in respect of registration and matters precedent or incidental thereto have been complied with. Company Secretaries continue to be recognized for the purpose of giving this declaration.

II.BOARD AND GOVERNANCE :-

"**Key Managerial Personnel (KMP)**, in relation to a company, means—

(i) the Managing Director, the Chief Executive Officer or the Manager and where there is no Managing Director or Manager, a whole-time director or directors;
(ii) **the Company Secretary**; and
(iii) the Chief Financial Officer;"

- Every company belonging to such class or description of companies as may be prescribed shall have Whole-Time Key Managerial Personnel.

- **Every Company Secretary being a KMP shall be appointed by a resolution of the Board** which *shall contain the terms and conditions of appointment including the remuneration*. If any vacancy in the office of KMP is created, the same shall be filled up by the Board at a meeting of the Board within a period of six months from the date of such vacancy.

- If a company does not appoint a Company Secretary, the penalty proposed is :
  On company – one lakh rupees
  On every director and KMP who is in default – 25,000 rupees for each such default.

- Every company shall have at least **one director resident in India**.

- Concept of **independent directors** has been introduced:
  - All listed companies are required to appoint independent directors.
  - Such other public companies and subsidiaries of public companies as may be prescribed by the Central Government shall also be required to appoint independent directors.
  - **At least one-third of the Board should comprise of independent directors.**
  - The independent director has been clearly defined in the Bill.
  - **Nominee director** appointed by any institution, or in pursuance of any agreement, or appointed by any government to represent its shareholding **shall not be deemed to be an independent director**.
  - An independent director shall not be entitled to any remuneration other than sitting fee, reimbursement of expenses for participation in the Board and other meetings and profit related commission and stock options as may be approved by the members.
  - Only an independent director can be appointed as alternate director to an

independent director. [clause 142(2)].

- There is a comprehensive revision of the provisions relating to payment of **managerial remuneration**. **No limits have been laid down on the quantum of remuneration to be paid or sitting fees to the directors.**

- **Participation of directors at Board Meetings has been permitted through video-conferencing or other electronic means**, provided such participation is capable of recording and recognizing. However, Central Government may **specify such matters which shall not be dealt with in the meeting through video-conferencing** and such other electronic means as may be prescribed.

- Besides the Audit Committee, the **constitution of Remuneration Committee has also been made mandatory** in the case of listed companies and other as may be prescribed.

  The **Audit committee** shall consist of a minimum of three directors with **independent directors** forming a majority and at least one director having financial knowledge. The Remuneration Committee shall consist of non-executive director(s) with at least one independent director.

- Where the **combined membership** of the shareholders, debenture holders and other security holders **is more than one thousand** at any time during the financial year, the company shall constitute a **Stakeholders' Relationship Committee**.

- **At least seven days notice is required to be given for a Board meeting. The notice may be sent by electronic means** to every director.

- **If all the directors of a company resign from their office or vacate their office, the promoter or in his absence the Central Government shall appoint the required number of directors to hold office till the directors are appointed by the company in General Meeting.**

- **Duties of directors have been specified in the Bill**.

- The premium paid on any insurance taken by a company on behalf of its managing director, whole-time director, manager, Chief Executive Officer, Chief Financial Officer or **Company Secretary** for indemnifying any of them against any liability in respect of any negligence, default, misfeasance, breach of duty or breach of trust for which they may be guilty in relation to the company, **shall not be treated as part of the remuneration** payable to any such personnel.

III.GENERAL MEETINGS:-

- To encourage wider participation of shareholders at General Meetings, **the members have been permitted to exercise their vote at meetings by electronic means.**

- Every listed company shall prepare **a Report on each Annual General Meeting**

including confirmation to the effect that the meeting was convened, held and conducted as per the provisions of the Act and the Rules made there under. The report shall be prepared in the manner to be prescribed. A copy of the report shall be filed with the Registrar within 30 days of the conclusion of the AGM with such fee as may be prescribed. Non-filing of the report has been made a punishable offence.

- For the first time, **the concept of Secretarial Standards has been introduced. Every company is required to observe such Secretarial Standards as may be prescribed with respect to General and Board Meetings.**

IV.INVESTOR PROTECTION MEASURES:-

- An **act of fraudulent inducement** of persons to invest money is **punishable with imprisonment** for a term which may extend to three years and with fine which shall not be less than one lakh rupees, but which may extend to fifty lakh rupees.

- **A suit may be filed by a person who is affected by any misleading statement** or the inclusion or omission of any matter in the Prospectus or who has invested money by fraudulent inducement.

- A company may accept **deposits subject to fulfilment of the following conditions**:
  1. passing of **resolution** in a general meeting.
  2. **issue of circular to members** including therein a statement showing the financial position of the company, the credit ratings obtained, the total number of depositors and the amount due towards deposits in respect of any previous deposits accepted by the company and such other particulars in such form and in such manner as may be prescribed.
  3. **filing a copy of the circular along with such statement with the registrar** within 30 days before the date of issue of the circular.
  4. Providing deposit **insurance**.
  5. Certification by the company that **it has not defaulted** in the repayment of deposits.
  6. **Provision of security** in respect of deposit and interest and creation of charge on company's properties and assets.
  7. An amount of not less than 15% of the deposits maturing during a financial year shall be deposited in **deposit repayment reserve** account.

- **The penalty for failure to repay deposit** has been made extremely stringent. Now the default is punishable with fine which shall not be less than **one crore rupees but which may extend to ten crore rupees.** And every officer of the company who is in default, shall be punishable **with imprisonment which may extend to seven years or** with fine which shall not be less than 25 lakhs rupees, but which may extend to two crore rupees, or with both.

- Annual Return being a public document is now required to have **more disclosures** especially on matters relating to certification of compliances, disclosures etc.

V.ANNUAL RETURN:-

Apart from the existing disclosures regarding the registered office, shares, debentures, indebtedness of the company etc., the **following additional information is to be given**:

(i) principal business activities, particulars of its holding, subsidiary and associate companies;
(ii) its promoters, directors, key managerial personnel along with changes therein since the close of the last financial year;
(iii) **meetings** of members or a class thereof, Board and its various committees **along with attendance details**;
(iv) **remuneration** of directors and key managerial personnel;
(v) penalties imposed on the company, its directors or officers and details of compounding of offences;
(vi) **matters related to certification of compliances, disclosures;** and
(vii) such other matters as may be prescribed.

Annual Return is required to be signed by:

(i) A director and the Company Secretary, or where there is **no Company Secretary**, by a **Company Secretary in whole-time practice**.

It means that now in respect of all the companies, whether private or public, listed or unlisted, if no Company Secretary is appointed by the company, the Annual Return is **compulsorily required to be signed by the Company Secretary** in practice.

(ii) a Company Secretary in whole-time practice in respect of:

(a) A company having such paid-up capital and turnover as may be prescribed, and

(b) a company whose shares are listed on a recognized stock exchange.

The Practising Company Secretary has to certify that the annual return states the facts correctly and adequately and that the Company has complied with all the provisions of the Act.

It means, in case of **a listed company**, even if the Annual Return is signed by the Company Secretary in employment of the Company, **it is further required to be signed by the Company Secretary in Whole time practice**. Also, in case of a company **having such paid up capital and turnover as may be prescribed and even if the company is not listed**, the Annual Return is required to be **signed by the Company Secretary in whole time practice in addition to the Company Secretary in employment.**

(iii) In relation to a One Person Company and Small Company, the annual return is required to be signed by the Company Secretary, or where there is no Company Secretary, by one director of the company.

Certification regarding compliances

By signing the return, a Company Secretary certifies that the annual return **states the facts correctly and adequately** and that the company **has complied with all the provisions of the Act**. In addition, the adequacy of **disclosures made are** required to be **certified by** the Company Secretary in the Annual Return. It is a great opportunity as well as a challenge for the Company Secretaries.

Penalty

In case a Company Secretary in whole-time practice certifies the annual return otherwise than in conformity with the requirements of this section or the rules made there under, such Company Secretary shall be punishable with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees.

VI.BOARD'S REPORT *:-* has been made more informative and includes extensive disclosures like –

(i) extract of annual return
(ii) report of the committee on directors' remuneration
(iii) a declaration by independent directors wherever they are appointed
(iv) particulars of loans, guarantees, or investments made
(v) particulars of contracts or arrangements entered into

The Boards' Report is to be signed by the Chairman if he is authorized by the Board and where he is not so authorized, it shall be signed by at least two directors, one of whom shall be a managing director, or where there is only one director, by such director.

New clause has been introduced with respect to prohibition of insider trading of securities. The definition of price sensitive information has also been included.

- **Related Party Transactions :**
  Every contract or arrangement entered into with a related party, shall be referred to in the Board's Report along with the justification for entering into such contract or arrangement.

- Any arrangement between a company and its directors in respect of acquisition of assets for consideration other than cash shall require **prior approval by a resolution in general meeting** and if the director or connected person is a director of its holding company, approval is required to be obtained by passing a resolution in general meeting of the holding company.

- Where a one person company limited by shares or by guarantee enters into a contract with the sole member of the company who is also its director, the company shall, unless the contract is in writing, ensure that the terms of the contract or offer are contained in a memorandum or are recorded in the minutes of the first Board meeting held after entering into the contract. The company shall inform the Registrar about every contract entered into by the company and recorded in the minutes.

- Directors and the key managerial personnel of a company are **prohibited from forward dealings in securities of the company**.

***VII.SHARE CAPITAL AND DEBENTURES**:-*

- Equity share capital has now been defined as:

  Equity share capital, with reference to any company limited by shares, means that part of the issued share capital of the company which has no limits for participation, either with respect to dividend or with respect to capital, in distribution of profits or otherwise.

  The existing Section 85 of the Companies Act, 1956 defines Equity share capital as share capital which is not preference share capital.

- If a **company with intent to defraud, issues a duplicate certificate of shares**, the company shall be **punishable** with fine which shall not be less **than five times the face value of the shares** involved in the issue of the duplicate certificate but which may extend to ten times the face value of such shares. Stringent penalties have also been imposed for defaulting officers of the company.

- Where any **depository** has transferred shares with an intention to defraud a person, it shall be punishable with fine which **shall not be less than rupees three lakh but which may extend to rupees twenty five lakh.**

- Security **Premium Account** may also be applied **for the purchase of its own shares or other securities.**

- A company **can not issue share at a discount** except in case of **sweat** equity shares. Any share issued by a company at a discounted price shall be void.

- A company limited by shares **can not issue any preference shares which are irredeemable**. However, a company limited by shares may, if so authorised by its articles, can issue preference shares which are liable to be redeemed within a period not exceeding twenty years from the date of their issue. This period of twenty years may, however, be excluded in case of such infrastructural projects as may be prescribed.

- The Tribunal on receiving an application for reduction of share capital, shall give notice to the Central Government and to the SEBI and consider the representations received in this behalf.

***VIII.INSPECTION, ENQUIRY AND INVESTIGATION**:-*

- New clauses has been added to provide that :-

  -where any enquiry is to take place regarding the transfer or disposal of funds, properties or assets which is **prejudicial to the interest of the company**, then the Tribunal may order for the freezing of such transfer, removal or disposal of assets for a period of three years.

-No suit or proceedings shall lie in any court or Tribunal in respect of any action taken by the Central Government in respect of an investigation, etc. till such investigation report is submitted.

-The provisions of inspection or investigation applicable to Indian companies shall also apply to foreign companies.

CLASS ACTION SUITS:-

- A provision has been made for class action suits. It is provided that any **one or more members or one or more creditors** may file an application before the Tribunal on behalf of the members and creditors, if they are of the opinion that the management or control of the affairs of the company are being conducted in a manner **prejudicial to the interests of the company or its members or creditors**. The order passed by the Tribunal shall be binding on the company and all its members and creditors.

RESTRUCTURING AND LIQUIDATION:-

- The entire rehabilitation and liquidation process has been made **time bound**.

- Winding up is to be resorted to only when revival is not feasible.

- The Tribunal may appoint Company Secretaries, Advocates, CAs, CWAs, etc as an **interim administrator or a company administrator**.

- The Company Administrator shall prepare a scheme of revival and rehabilitation.
  If revival scheme is not approved by the creditors, the Tribunal shall order for winding up of the company.

COMPANY LIQUIDATORS :-

The Tribunal may appoint Provisional Liquidator or the Company Liquidator from a panel maintained by the Central Government consisting of Company Secretaries, Chartered Accountants, Advocates and Cost and Works Accountants.

On an appointment as provisional liquidator or Company Liquidator, such liquidator is required to file a declaration in the prescribed form disclosing conflict of interest or lack of independence in respect of his appointment, if any.

Professional assistance to Company Liquidator : The Company Liquidator may, with the sanction of the Tribunal, appoint **one or more professionals including Company Secretaries** to assist him in the performance of his duties and functions under the Act.

Any person appointed under this clause shall disclose forthwith to the Tribunal in the prescribed form any conflict of interest or lack of independence in respect of his appointment.

REGISTERED VALUERS :-

- **A CS, CA, CWA or other persons possessing** prescribed qualifications may apply to the Central Government to be registered as valuers. No company or body corporate shall be eligible to apply as registered valuers.

- The Central Government shall be empowered to provide for appointment of a committee of experts to recommend suitable names for the purpose of inclusion in the Register of Valuers.

QUALIFICATIONS OF PRESIDENT AND MEMBERS OF TRIBUNAL:-

Company Secretary in practice is eligible to become a **Technical Member** of National Company law Tribunal, if he is practising for at **least twenty years.**

Special Courts

- For the speedy trial of offences, the Central Government has been empowered to **establish special courts in consultation with the Chief Justice of the High Court** within whose jurisdiction the judge is to be appointed.
- All offences under this Act shall be triable by the Special Court established for the area in which the registered office of the company in relation to which the offence is committed or where there are more special courts than one for such area, by such one of them as may be specified in this behalf by the High Court concerned.

- The Special Court would have the liberty **to try summary** proceedings for offences punishable with imprisonment for a term **not exceeding three years**, although it may order for the regular trial.

☺ ☺ THANKING YOU☺ ☺