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CA - FINAL LAW AMENDMENTS (MAY'18)

CORPORATE LAWS & IBC, 2016 AMENDMENTS
— CA ARPITA S. TULSYAN

ALLIED LAWS AMENDMENTS
— CA VINESH R. SAVLA

These notes cover amendments from RTP - May 2018

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HAPPY READING !!

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COMPANY LAW AMENDMENTS (MAY'18)

1. DECLARATION & PAYMENT OF DIVIDEND:
No Amendments.

2. ACCOUNTS & AUDIT:
PART 1: ACCOUNTS
No Amendments.

PART 2: AUDIT & AUDITORS
a) TERM OF AUDITOR (Sec 139(2)):

Individual Auditor → 1 term of 5 years
Firm of Auditors → 2 terms of 5 years each.

The above provisions of limits are applicable for:

Listed company	Unlisted Public co. whose PUSC ≥ ₹ 10cr.	Private ltd co. where PUSC ≥ ₹ 50cr (Earlier this was ≥ ₹ 20cr)	All companies having PUSC < ₹ 10 cr or < ₹ 50 cr but having public borrowings of ≥ 50 cr.

b) DUTIES OF AUDITOR (Sec 143):

i) Section 143(3): Matters to be stated –

One of the point in this was:
Auditor had to report, whether the company has adequate internal financial controls system in place & the operating effectiveness of such controls.

This point is now, not applicable for:

- OPC or Small company or
- Private Ltd. co. having T/O < ₹ 50 cr or whose borrowings is < ₹ 25 cr

(T/O is to be checked for latest audited FS & borrowings at any point of time in year)

(ii) In section 143, Auditor is supposed to give his views & comments on few points — One point added to already existing 3 points. New point is —
Whether the company had provided requisite disclosures in its FS as to holding/dealing in Specified Bank Notes during 8th Nov'2016 to 30th December'2016 & if so, whether these are in accordance with BOA of company.

3. E-GOVERNANCE :

No Amendments

4. COMPANIES INCORPORATED OUTSIDE INDIA :

Section 391(2) : Newly Notified Section

The provisions of Chapter XX (which talks about winding up of company) shall apply as it is for closure of Place of Business of foreign co. in India, as if it were a company incorporated in India.
However, it applies to only those foreign cos. which have issued prospectus or IDR's.

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5. APPOINTMENT & QUALIFICATION OF DIRECTORS

(a) COMPANY TO HAVE BOD (Sec. 149):

Section has prescribed minimum/ maximum directors for companies.
The above provision is not applicable to Govt. cos. & Section 8 companies.

(b) INDEPENDENT DIRECTOR:

Public companies other than Listed companies ie. Unlisted Public companies are required to have atleast 2 independent directors.
However, unlisted public companies doesnot include:
- Joint Ventures
- Wholly owned subsidiary
- Dormant Company.

(for the purpose of this section)

(c) RETIREMENT BY ROTATION (Sec. 152(6)):

Section doesnot apply to Govt cos. & its subsidiary.

(d) VACANCY IN CASE OF RETIRING DIRECTOR (Sec 152(7)):

Section doesnot apply to Govt. cos. & its subsidiary.

6. APPOINTMENT & REMUNERATION OF MANAGERIAL PERSONNEL:

No Amendments.

7. OFFENCES & PENALTIES:

No Amendments.

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8. NCLT/ NCLAT :

(a) TERM OF OFFICE OF PRESIDENT, CHAIRPERSON & OTHER MEMBERS (Sec. 413) (Newly notified)

- In case of NCLT:

Tenure : They shall hold office for a term of 5 years.
Re-appointment : For another term of 5 years.
Age bar : Minimum Age = 50 years
Maximum = 67 years for President
65 years for Other members.

- In case of NCLAT :

Tenure : They shall hold office for a term of 5 years.
Re-appointment : For another term of 5 years.
Age bar : Minimum Age = 50 years
Maximum = 70 years for Chairperson
67 years for Other members.

(b) NEW PROVISO INSERTED IN SECTION 434 :

In case of Voluntary Winding up, where notice of resolution by advertisement was given as per Companies Act, 1956 but the company was not dissolved till 1st April 2017, then such matter shall be dealt in accordance with Old Act i.e. Companies Act, 1956.

9. PREVENTION OF OPPRESSION & MISMANAGEMENT:

NO Amendments.

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10. INSPECTION, INQUIRY & INVESTIGATION :

INVESTIGATION INTO AFFAIRS OF COMPANY BY SFIO (Sec. 212 of CA, 2013) :

New Power Inserted :

After the investigation by SFIO, if any person is held guilty of fraud, then such person shall be liable to get arrested.

11. COMPROMISES, ARRANGEMENTS & AMALGAMATIONS :

(a) SECTION 230 - 232 :

For Government companies, in Sec. 230 - 232, wherever the word "Tribunal" is used, it should be substituted by "Central Govt."

(b) SECTION 247 (Newly Notified) :

Section 247 : Valuation by Registered Valuers :

- Where a valuation is required to be made for property, shares, stocks, goodwill, or any assets or Net worth of a company, it shall be valued by a person having such qualification & experience, a registered valuer & he shall be appointed by Audit Committee or BOD.
- Such valuer shall :
  - make impartial, true & fair valuation
  - exercise due diligence
  - do valuation as per rules
- If any provisions are contravened then, Fine of ₹25000 - ₹100000
- If provisions are contravened to defraud company/members then, Imprisonment of 1 year (+) fine of ₹100000 - ₹500000
- If valuer is convicted then,
  - refund back the remuneration
  - pay the damages

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12. MEETING OF BOARD & ITS POWERS :

(a) MEETINGS OF BOARD (Sec. 173) :

In Section 173(2), A director can participate through Video conferencing mode or other A/V means. However, he shall give intimation of his intention of participation through electronic mode at beginning of the calendar year & such declaration shall be valid for 1 calendar year. However, this shall not debar him to attend in person and he should intimate the company sufficiently in advance.

(b) QUORUM FOR MEETINGS OF BOARD (Sec. 174) :

Earlier Law : If number of Interested Director is $\geq 2/3^{rd}$ of total BOD, then Quorum = Atleast 2 Non-interested directors.

Amendment : Interested director can be counted for the purpose of quorum, after disclosing their interest.

(c) AUDIT COMMITTEE (Sec 177) & NOMINATION & REMUNERATION COMMITTEE (Sec 178) :

The above mentioned committees shall be formed by BOD of :

- Every listed company &
- Some specified unlisted public companies.

Here unlisted public companies exclude :

- Joint Ventures
- wholly owned subsidiary
- Dormant company.

(d) LOAN & INVESTMENT BY COMPANY (Sec 186) :

In Section 186(7), they had prescribed the minimum rate of interest at which loan can

be given.
However this clause of minimum interest is not applicable to Companies where ≥ 26% of capital is held by CG/SG/both.

13. WINDING UP :

No Amendments

14. PRODUCER COMPANIES :

No Amendments

15. SPECIAL COURTS :

No Amendments

16. MISCELLANEOUS PROVISIONS :

No Amendments

17. CORPORATE SOCIAL PRACTICE :

No Amendments

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IBC, 2016 AMENDMENTS (MAY '18)

(a) FAST TRACK INSOLVENCY RESOLUTION FOR CORPORATE PERSONS :

- It is a process where Insolvency resolution shall be completed in an expeditious manner ie. within 90 days of commencement of process.
- AA may grant 1-time extension of 45 days if it is satisfied.
- However, application for this process can be done only by following CORPORATE DEBTOR :
  - Corporate Debtor with assets/income below the level specified by CG OR
  - Corporate Debtor as notified by CG.
  - Such other category of Corporate Debtor as notified by CG.

(b) ELIGIBILITY OF AN INSOLVENCY PROFESSIONAL TO BE APPOINTED AS A RESOLUTION PROFESSIONAL:

- An IP shall be eligible to be appointed as a RP if he & all his partners & directors of IP entity of which he is a partner/director are totally independent of Corporate Debtor.
- Other points of eligibility:
  - He is eligible to be appointed as an Independent Director of Corporate Debtor (As per Sec. 149 of CA, 2013)(where Corporate Debtor is a company)
  - He is not a related party of CD.
  - He is not an employee/proprietor/partner of firm of auditors or CS in practice or Cost Auditors of CD in last 3 FY's.

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- He is not an employee / proprietor / partner of a legal / consulting firm that has / had transaction with CD amounting to ≥ 10% of Turnover of such firm in last 3 FY's.

(c) COMMITTEE OF CREDITORS (COC):

Usually COC is formed by all financial creditors (except related parties).
But, when financial creditors don't exist:
(ie. when there is no financial debt or all FC are related parties), then:
COC shall be formed as follows:
- 18 largest Operational Creditors (by value).
- 1 representative elected by all workmen.
- 1 representative elected by all employees.

If there are < than 18 OC, all OC shall form part of COC.

(d) QUORUM FOR THE MEETING:

- A meeting of COC shall quorate, if members of COC of atleast 33% of voting rights are present either in person or by A/V means. (voting rights in value)
- If quorum is not available, then meeting shall stand adjourned, at same time/place on next day.

(e) APPEAL AGAINST APPROVAL OF RESOLUTION PLAN:

An appeal against an order of AA for approving the plan, may be filed if:
- Approved plan is in contravention of law
- If there is material irregularity by RP during insolvency period.

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- If debts owed to OC is not considered.
- Insolvency resolution process cost have not been provided for repayment in priority.
- R.Plan doesnot comply with any other criteria specified by IBBI.

(f) VOLUNTARY LIQUIDATION OF CORPORATE PERSONS:

(Effective date of applicability is 1st April 2017)

A corporate person who intends to liquidate itself & has not committed any default, may initiate voluntary liquidation proceedings.

Conditions:

- Declaration from majority of directors stating -
  - they have made full inquiry into affairs of business & opined that no debt is payable or they will be able to pay after selling assets in liquidation AND
  - Company is not being liquidated to defraud any person.
- Above declaration shall be accompanied by following documents:
  - Audited FS & record of business operation of last 2 years or from date of incorporation (whichever is later)
  - A report from registered valuer (valuation)
- Within 4 weeks of declaration, there shall be -
  - SR should be passed by members requiring such liquidation (+) Appointment of Insolvency Professional, who shall act as Liquidator. OR
  - Resolution to be passed by members requiring liquidation as period fixed by AOA has expired. OR
  - On occurence of any event, for which AOA provide that company be dissolved & to appoint

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Insolvency Professional to act as Liquidator.

Note: If company owes any debt, then the above resolution must be approved by 2/3rd creditors (in value) within 7 days of such resolution.

The Company shall notify to ROC & IBBI about the resolution of liquidation within 7 days of Resolution / Approval as the case may be.

Date of Resolution = Date of commencement of Liquidation Proceedings.

When affairs of company have been completely wound up & assets are liquidated, then liquidator shall make an application to AA for dissolution.

AA, on being satisfied, shall pass an order.

Date of Order = Date of Dissolution.

Copy of above order must be passed to authority with which corporate person is registered, within 14 days of date of order.

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ALLIED LAW AMENDMENTS (MAY '18)

1. The SECURITIES & EXCHANGE BOARD OF INDIA (SEBI) ACT, 1992 :

(i) THE SEBI (ISSUE OF CAPITAL & DISCLOSURE REQUIREMENTS) (SECOND AMENDMENT) REGULATIONS, 2017 (NOTIFICATION DT. 31/05/2017)

(a) Definition of "Qualified Institutional Buyer" :
Definition amended to include "Systemically important non-banking financial companies"

"Systemically important non-banking financial companies" defined :
It means a NBFC registered with RBI & having a net worth of more than ₹500 crores as per the last audited financial statements.

(b) Regulation 16 - Monitoring Agency :
(1) If the issue size, excluding the size of offer for sale by selling SHS, exceeds 100 crore ₹, the issuer shall make arrange- -ments for the use of proceeds of the issue to be monitored by a PFI / one of the Scheduled Commercial Banks named in the offer document as bankers of the issuer.
Provided that nothing contained in this clause shall apply to an issue of specified securities made by a bank/PFI or an insurance company.

(2) The monitoring agency shall submit its report to the issuer in the format specified on a quarterly basis, till at least 95% of the proceeds of the issue, excluding the proceeds under offer for sale & amount raised for general corporate purposes, have been utilised.

(3) The BOD & management of company shall provide their comments on the findings of the monitoring agency.

(4) The issuer shall, within 45 days from the end of each quarter, publically disseminate the report of the monitoring agency by uploading the same on its website as well as submitting the same to the stock exchange(s) on which its equity shares are listed.

(ii) THE SEBI (ISSUE OF CAPITAL & DISCLOSURE REQUIREMENTS) (FOURTH AMENDMENT) REGULATIONS, 2017 (NOTIFICATION DT. 14/08/2017)

CHAPTER VII - PREFERENTIAL ISSUE :

REGULATION 70 - CHAPTER VII NOT TO APPLY IN CERTAIN CASES :

SUB REGULATION (1) :

Provisions of this Chapter shall not apply where preferential issue of equity shares is made :

(a) Pursuant to conversion of loan or option attached to convertible debt instruments in terms of Companies Act, 1956 ;

(b) Pursuant to a scheme approved by a High Court u/s 391 - 394 of Companies Act, 1956 ;

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(c) In terms of the rehabilitation scheme approved by the Board of Industrial & Financial Reconstruction (BIFR) under the Sick Industrial Companies (Special Provisions) Act, 1985 or the resolution plan approved by the Tribunal under the Insolvency & Bankruptcy Code, 2016, whichever applicable.

Provided that the lock-in provisions of this Chapter shall apply to preferential issue of equity shares mentioned in clause (c).

Sub Regulation (2):

The provisions of this Chapter relating to pricing & lock-in shall not apply to equity shares allotted to any financial institution as specified in Recovery of Debts due to Banks & Financial Institutions Act, 1993.

Sub Regulation (3):

The provisions of Regulation 73 (Disclosure) & Regulation 76 (Pricing of Equity Shares - Frequently Traded shares) shall not apply to a preferential issue of equity shares & compulsorily convertible debt instruments, whether fully or partly, where the Board has granted relaxation to the issuer.

Sub Regulation (4):

The provisions of Sub Regulation (2) of Regulation 72 (The issuer shall not make preferential issue of specified securities to any person who has sold any equity shares of the issuer during the 6-months preceding the relevant

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date) & Sub-regulation (6) of Regulation 78 (Pre-preferential allotment - Lock in) shall not apply to a preferential issue of specified securities where the proposed allottee is a Mutual Fund registered with the Board or Insurance Company registered with IRDA of India or a Scheduled Bank listed under the Second Schedule of the RBI Act, 1934 or a PFI as defined in Clause 72 of Section 2 of Companies Act, 2013.

New Sub Regulation (5):

(a) The guidelines for determining the conversion price have been specified by the RBI in accordance with which the conversion price shall be determined & which shall be in compliance with the applicable provisions of Companies Act, 2013.

(b) The conversion price shall be certified by 2 independent qualified valuers & for this purpose "valuer" shall be a person who is registered U/s 247 of Companies Act, 2013 & the relevant Rules framed thereunder.

(c) Specified securities so allotted shall be locked-in for a period of 1 year from the date of their allotment.

Provided that for the purpose of transferring the control, the lenders may transfer the specified securities allotted to them before completion of lock-in period subject to continuation of the lock-in on such securities for the remaining period, with the transferee;

(d) The lock-in of equity shares allotted pursuant to conversion of convertible securities have already been locked-in;

(e) The applicable provisions of the Companies Act, 2013 are complied with, including the requirement of Special Resolution.

New Sub Regulation (6):

The provisions of this Chapter shall not apply where the preferential issue of specified securities is made pursuant to a debt restructuring scheme implemented in accordance with the guidelines specified by RBI, subject to following conditions:

(a) The guidelines for determining the Issue Price have been specified by RBI in accordance with which the issue price shall be determined & which shall be in compliance with the applicable provisions of Companies Act, 2013;

(b) The issue price shall be certified by 2 independent qualified valuers. (Valuer as registered u/s 247 of Companies Act, 2013)
(Till Sec. 247, comes into force, valuer means an independent merchant banker registered with Board or an independent CA in practice having a minimum experience of 10 years;

(c) The Specified Securities so allotted shall be locked-in for atleast 3 years from date of their allotment;

(d) The lock-in of equity shares allotted pursuant to conversion of convertible securities issued on preferential basis shall be reduced to the extent the convertible securities have already been locked-in;

(e) A special resolution has been passed by SHS of the issuer before the preferential issue;

(f) The issuer shall, in addition to the disclosures required under Companies Act, 2013 or any other applicable law, disclose the following information pertaining to proposed allottee(s) in the explanatory statement to the notice for the general meeting proposed for passing the Special Resolution:

a. The identity including that of the natural persons who are the ultimate beneficial owners of the shares proposed to be allotted and/or who ultimately control the proposed allottee(s);
b. The business model;
c. A statement on growth of business over the period of time;
d. Summary of audited financials of previous 3FY;
e. Track record in turning around cos; if any;
f. The proposed roadmap for effecting turnaround of the issuer.

(g) The applicable provisions of Companies Act, 2013 are complied with.

2. THE COMPETITION ACT, 2002

(i) EXEMPTION FROM GIVING NOTICE IN SECTION 6(2) UNDER THIS ACT (NOTIFICATION DT. 29/06/2017):

In exercise of powers of Sec. 54, the CG, in public interest, exempts every person or enterprise who is a party to a combination as referred to in Sec. 5 of this Act from giving notice within 30days mentioned in Sub-section (2) of Section 6 of this Act, for a period of 5years from the date of publication of this notification in the Official Gazette.

(ii) EXEMPTION TO REGIONAL RURAL BANKS FROM APPLICATION OF PROVISIONS OF SECTION 5 & 6 OF COMPETITION ACT, 2002 (NOTIFICATION DT. 10/08/2017):

In exercise of powers of Sec. 54, the CG, in public interest, exempts the RRB from the application of provisions of Sec. 5 & 6 of this Act for a period of 5 years from the date of publication of this Notification in the Official Gazette.

(iii) EXEMPTION TO THE VESSELS SHARING AGREEMENTS OF LINER SHIPPING INDUSTRY FROM THE PROVISIONS OF SECTION 3 OF THIS ACT. (NOTIFICATION DT. 16/06/2017):

In exercise of the powers of Sec. 54, the CG, in public interest, exempts the Vessel Sharing Agreements of Liner Shipping Industry from the provisions of Sec. 3 of this Act, for a period of 1 year w.e.f. 20/06/2017, in respect of carriers of all nationalities operating ships of any nationality from any Indian Port provided such agreements do not include concerted practices involving fixing of prices, limitation of capacity or sales & the allocation of markets or customers.

During the said period of 1 year, the Director General, Shipping, Ministry of Shipping, Govt. of India shall monitor such agreements & for which, the persons responsible for operations of such ships in India shall file copies of existing Vessel Sharing Agreements (VSA) or VSA to be entered into with applicability during the said period along with other relevant documents within 30 days of the publication of this Notification in the Official Gazette or within 10 days of signing of such agreements, whichever is later, with the Director General, Shipping.

(iii) EXEMPTIONS TO ALL CASES OF RECONSTITUTION, TRANSFER OF THE WHOLE OR ANY PART THEREOF & AMALGAMATION OF NATIONALIZED BANKS, FROM THE APPLICATION OF PROVISIONS OF SECTION 5 & 6 OF THIS ACT (NOTIFICATION DT. 30/08/2017):

In exercise of the powers conferred by Sec. 54, the CG, in public interest exempts, all cases of reconstitution, transfer of the whole or any part thereof & amalgamation of nationalised Banks, under the Banking Companies (Acquisition & Transfer of Undertakings) Act from the application of provisions of Sec. 5 & 6 of this Act for a period of 10 years from the date of publication of this Notification in Official Gazette.

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3. THE BANKING REGULATION ACT, 1949 :

THE BANKING REGULATION (AMENDMENT) ACT, 2017 (NOTIFICATION DT. 25/08/2017 w.e.f. 04/05/2017) :

NEW SETION 35AA :

POWER OF CG TO AUTHORISE RBI FOR ISSUING DIRECTIONS TO BANKING COMPANIES TO INITIATE INSOLVENCY RESOLUTION PROCESS :

The CG may, by order, authorise RBI to issue directions to any banking company/companies to initiate insolvency resolution process in respect of a default, under the provisions of IBC, 2016.

NEW SECTION 35AB :

POWER OF RBI TO ISSUE DIRECTIONS IN RESPECT OF STRESSED ASSETS :

(1) RBI may, from time to time, issue Directions to any Banking company or Banking companies for resolution of Stressed Assets.

(2) RBI may specify one or more authorities or committees to advise any banking co. or banking companies on resolution of stressed assets.