

Welcome to the March Edition of the Clasis Law Newsletter

This edition brings to our readers a featured article titled "Active Company Tagging Identities and Verification".

The article captures the details of the e-form ACTIVE recently introduced by MCA vide Companies (Incorporation) Amendment Rules, 2019 for the purpose of geo-tagging the registered office of companies.

We continue to highlight certain key judgements passed by the Hon'ble Court as well as changes in Corporate and Commercial laws.

Your inputs and feedback are always welcome and we look forward to our interactions with you.

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"Clasis Law's Managing Partner Vineet Aneja has been included in IBLJ's A-List of the top 100 lawyers for the year 2018 and recognised as amongst India's Most Trusted Corporate Lawyers by ICCA, 2017"

Active Company Tagging Identities and Verification

Ministry of Corporate Affairs ("MCA") vide its notification dated February 21, 2019 issued the Companies (Incorporation) Amendment Rules, 2019 ("Rules") further amending the Companies (Incorporation) Rules, 2014 ("Principal Rules"). A new rule 25A has been inserted in the Principal Rules pertaining to Active Company Tagging Identities and Verification (ACTIVE). Additionally, e-form ACTIVE (INC-22A) has been inserted in the Principal Rules after e-form INC -22.

The Rules came into effect from February 25, 2019. Every company incorporated on or before December 31, 2017 is required to file the particulars of the company and its registered office with the MCA in e-form ACTIVE on or before April 25, 2019.

Consequences of non-filing of e-form ACTIVE

If a company does not intimate the particulars to the MCA within the prescribed time period the following actions will be taken by the MCA:

- the status of the company will be marked as "ACTIVE-non-compliant" by the MCA on or after April 26, 2019.
- the concerned Registrar of Companies within whose jurisdiction the registered office of a company is situated will note take on record the following event based information/changes:
 - SH-07 (Change in Authorized Capital);
 - PAS-03 (Change in Paid-up Capital);
 - DIR-12 (Changes in Director except cessation);
 - INC-22 (Change in Registered Office);
 - INC-28 (Amalgamation, de-merger).
- Registrar of Companies is empowered to cause physical verification of the registered office of such companies and even initiate action for removal of the name of such companies from the register of Registrar of Companies.
- a fee of INR 10,000 to be paid by the company for filing e-form ACTIVE on or after April 26, 2019.

Exempted categories of companies

- companies which have been struck off or are in the process of striking off.
- under liquidation companies.
- amalgamated companies.
- dissolved companies.

Requirements

The e-form ACTIVE is majorly a pre-filled form where the details of a company as available with the MCA gets populated automatically based on the filings made by the company with the Registrar of Companies. Therefore, a company first needs to ensure that all its filings with the MCA are complete and proper only then the e-form ACTIVE can be duly submitted. In fact, any company which has not filed its financial statement or the annual return or both would not be able to file the e-form ACTIVE unless such company is under management dispute and the Registrar of Companies within whose jurisdiction the registered office of a company is situated has recorded the same on the register.

Along with the e-form ACTIVE the following photographs are required to be attached:

- One photograph of the registered office showing external building; and
- One photograph of the inside office showing therein at least one director or key managerial personnel sitting (whose digital signatures will be affixed to the form).

The objective of MCA is to geo-tag the registered office details of companies through the latitude and longitude details which means attaching data to the exact location of the office.

While it has just been a few days since the introduction of e-form ACTIVE, the stakeholders have come across some practical issues in trying to complete and submit the e-form such as:

- the details of the annual filings made for the financial year ending March 31, 2018 are only being recognized by the system and if a company follows a different financial year other than March 31 which had been changed in accordance with the requirements of the Companies Act, 2013, the system does not tag the last filings made with the MCA for such companies.
- The details of statutory auditors gets prefilled from the information in e-form ADT-1 filed by a company for the appointment of its auditors and does not take into account the filings made by the company intimating the appointment of statutory auditor in e-form GNL 2 during the transition period.

Basis the concerns raised by the users, MCA is looking into it and coming up with appropriate solutions to resolve these issues so that the filings can be done smoothly.

Conclusion

Since the financial year 2017-18, there has been a drive to crackdown the shell companies and the companies that are non-compliant. Initially, MCA struck off from the register of Registrar of Companies, those companies which defaulted in annual filing for a continuous period of two or more financial years. This was followed by the disqualification of directors of defaulting companies. Subsequently, the individuals who had been allotted director identification number in India, were required to provide details and complete their KYC with the MCA.

In a similar manner, the registered office of a company is meant to be the premises where its statutory records and registers are maintained as well as its recorded address where the government authorities or any other stakeholders can communicate. Whereas as per the trend noticed in past investigations into shell companies, either the exact address of the registered office of a company does not exist or there are too many companies registered on the same address. There is no doubt that e-form ACTIVE will help the MCA to locate the exact location of a registered office and to a great extent, it will help in depreciating the use of false addresses by shell companies. The expected outcome of these initiatives is to create a transparent and compliant India Inc. and to make it trustworthy for public as well as to the global market.

For any clarification or further information, please contact

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Legal Alerts

The Arbitrator does not have jurisdiction to award interest if it is prohibited as per the expressed terms of the contract between the parties

The Hon'ble Supreme Court of India in its recent judgment dated February 7, 2019 in the matter titled **Jaiprakash Associates Ltd. (JAL) through its Director vs. Tehri Hydro Development Corporation India Ltd. (THDC) through its Director, SLP (Civil) No. 13551 of 2013**, has held that the interest cannot be awarded by the arbitrator if the clauses in the agreement expressly bar/prohibit the payment of interest.

The brief facts of the case are:-

Appellant/ Contractor was awarded with the contract under which it was to execute certain Works. Accordingly an agreement dated December 18, 1998 was entered between the Appellant and the Respondent. Dispute arose between the parties and since the agreement contained an arbitration clause, appellant raised two claims before the Arbitral Tribunal comprising of three (3) arbitrators. Among other claims awarded ("**said award**"), the Arbitral Tribunal also granted interest at the rate of 10% per annum from the date when the arbitration was invoked i.e. October 9, 2007, till sixty (60) days after the award. Future interest at the rate of 18% per annum till the date of payment was also awarded.

Against the said award, objections were filed before the High Court. The Single Judge of the Delhi High Court quashed the award to the extent the interest was awarded by the arbitrators. The Appellant preferred an intra court appeal which was dismissed by the Division Bench of the High Court thereby upholding the order of the Single Judge. The High Court has taken such view in terms of the Clause 50 and 51 of the General Conditions of Contract.

The Relevant Clauses of General Conditions of Contract ("**GCC**")

"Clause 50.0- *Interest on money due to the Contractor No omission on the part of the Engineer in charge to pay the amount due upon measurement or otherwise shall vitiate or make void the contract, nor shall the contractor be entitled to interest upon guarantee or payments in*

arrears nor upon any balance which may on the final settlement of his account, be due to him."

Clause 51.0- *No claim for delayed payment due to dispute etc.*

"No claim for interest or damage will be entertained or payable by the corporation in respect of any amount or balance which may be lying with the corporation owing to any dispute, different or misunderstanding between the parties or in respect of any delay or omission on the part of the Engineer in charge in making intermediate or final payments on in other respect."

The Appellant preferred a Special Leave Petition ("**SLP**") against the order of Division Bench of the Delhi High Court. The Supreme Court had subsequently granted leave to appeal.

The Supreme Court after hearing the submission of both the parties and also considering its earlier judgments including "**State of Uttar Pradesh v. Harish Chandra and Company (2012) 12 SCC 10**" and "**Sayeed Ahmed and Company v. State of Uttar Pradesh & Ors (2009) 12 SCC 26**" held that view taken by both the Single Judge and Division Bench of the High Court were correct to the extent that the legal position with respect to interest in an arbitral award under 1940 Act has taken a paradigm shift. The Supreme Court further held that the position under Section 31 (7) of 1996 Act, is wholly different, as it sanctifies agreements between the parties and states that the moment the agreement says otherwise, no interest becomes payable from the date of the cause of action until award is delivered.

Considering the present legal position and taking into consideration the judgment in *Sayeed Ahmed (supra)*, the Supreme Court found that Clauses 50 and 51 of the GCC put a bar on the Arbitral Tribunal to award interest and therefore, the Arbitral Tribunal did not have any jurisdiction to do so.

Accordingly, the Supreme Court dismissed the Civil Appeal and held that the conclusions of the High Court in the impugned judgment are correct and need no interference.

Employment Law Update

Legal update in the Supreme Court judgment of **Regional Provident Fund Commissioner V. Vivekananda Vidyamandir and Ors.** dated February 28, 2019 regarding inclusion of special allowances in the category of "basic wages" for computation of deduction towards provident fund.

Issue: In a batch of appeals clubbed together in the aforesaid matter, the Supreme Court opined on the question of law, that whether special allowances paid by an establishment to its employees would fall within the expression "basic wages" under Section 2(b)(ii) read with Section 6 of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 ("**Act**"), for computation of deduction towards provident fund.

The common submission on behalf of the appellants was that basic wages defined under section 2(b) of the Act contains exceptions and will not include what would ordinarily not be earned in accordance with the terms of the contract of employment.

Held: The Supreme Court has held that basic wage, under the Act, has been defined as all emoluments paid in cash to an employee in accordance with the terms of his contract of employment. But it carves out certain exceptions which would not fall within the definition of basic wage and which includes dearness allowance apart from other allowances mentioned therein. But this exclusion of dearness allowance finds inclusion in Section 6 of the Act. The test adopted to determine if any payment was to be excluded from basic wage is that the payment under the scheme must have a direct access and linkage to the payment of such special allowance as not being common to all. The crucial test is one of universality. The employer, under the Act, has a statutory obligation to deduct the specified percentage of the contribution from the employee's salary and make matching contribution. The entire amount is then required to be deposited in the fund within 15 days from the date of such collection.

The Supreme Court upheld the principles laid out in the earlier case of *Bridge and Roof Co. (India) Ltd. vs. Union of India* and held that any variable earning which may vary from individual to individual according to their efficacy and diligence will stand excluded from the term "basic wages". Thus "basic wage" will not include the additional emoluments which some workmen may earn, on the basis of a system of bonuses related to the production; the quantum of earning in such bonuses varies from individual to individual according to their efficiency and diligence; it will vary sometimes from season to season with the variations of working conditions in the factory or other place where the work is done.

Further, the Supreme Court held that the respondents have not placed any evidence to establish that the allowances in question are either variable or incentive linked. In order that the amount goes beyond the basic wages, it has to be shown that the workman concerned had become eligible to get this extra amount beyond the normal work which he was otherwise required to put in. It is therefore not possible to ascertain whether extra amounts paid to the workmen were in fact paid for the extra work which had exceeded the normal output prescribed for the workmen. The wage structure and the components of salary have been examined on facts, both by the authority and the appellate authority under the Act, who have arrived at a factual conclusion that the allowances in question were essentially a part of the basic wage camouflaged as part of an allowance so as to avoid deduction and contribution accordingly to the provident fund account of the employees. Thus, the appeal preferred by the Regional Provident Fund Commissioner has been allowed.

Impact: In light of this judgment, companies should take a re-look at their pay structure and PF contribution practices. It is the need of the hour to align the pay structures on the lines of this landmark Supreme Court ruling in order to avoid hefty fines and further scrutiny.

Corporate and Commercial

Establishment of Branch Office (BO) / Liaison Office (LO) / Project Office (PO) or any other place of business in India by foreign entities

On February 27, 2019, the RBI issued a circular in relation to the Foreign Exchange Management (Establishment in India of a branch office or a liaison office or a project office or any other place of business) Regulations, 2016. In terms of these regulations, applications received from a Non-Government Organisation, Non-Profit Organization, Body/Agency/Department of a foreign Government for opening of a branch office or a liaison office or a project office or any other place of business in India are to be forwarded to the RBI for prior approval and be considered in consultation with the Government of India. This has since been reviewed and it is advised that if such an entity is engaged, partly or wholly, in any of the activities covered under Foreign Contribution (Regulation) Act, 2010 (FCRA), it shall obtain a certificate of registration under the FCRA and shall not seek permission under the Foreign Exchange Management (Establishment in India of a branch office or a liaison office or a project office or any other place of business) Regulations, 2016.

Accordingly, the Form FNC has also been suitably modified and the following phrase added under the heading 'Declaration' in Part II clause (ii), at the end of the existing sentence.

"We will not undertake either partly or fully, any activity that is covered under Foreign Contribution Regulation Act, 2010 (FCRA) and we understand that any misrepresentation made or false information furnished by us in this behalf would render the approval granted under the Foreign Exchange Management (Establishment in India of a branch office or liaison office or a project office or any other place of business) Regulations, 2016, automatically as void ab initio and such approval by the Reserve Bank shall stand withdrawn without any further notice".

All other provisions of the LO/BO/PO policy shall remain unchanged.

Draft National E-commerce Policy

On February 23, 2019, the Department for Promotion of Industry and Internal Trade (erstwhile DIPP) issued the Draft National E-commerce Policy. The National e-Commerce Policy addresses 6 broad issues of the e-commerce ecosystem (i) data; (ii) infrastructure development; (iii) e-commerce marketplaces; (iv) regulatory issues; (v) stimulating domestic digital economy; and (vi) export promotion through e-commerce. It identifies critical aspects of each issue and lays out strategies to achieve the Government's vision. The identification of aspects and strategies takes into account needs and expectations of all stakeholders and accords the interests of startups, small manufacturing, trading and service enterprises a high consideration. The Government has sought comments from stakeholders by or before 9 March 2019 in order to draft and formulate the final policy.

Banning of Unregulated Deposit Schemes Ordinance, 2019

On February 21, 2019, the President of India promulgated the Banning of Unregulated Deposit Schemes Ordinance, 2019. This Ordinance has been promulgated to have a central legislation to tackle the menace of illicit deposits taking activities in the country. Presently, non-banking entities are allowed to raise deposits from the public under the provisions of various statutes enacted by the Central Government and State Governments. However, the regulatory frame work for deposit taking activity in the country is not seamless. Despite such diverse regulatory frame work, schemes and arrangements leading to unauthorised collection of money and deposits fraudulently by inducing public to invest in uncertain schemes promising high returns or other benefits are still operating in the society. This Ordinance, therefore, ensures a comprehensive ban on unregulated deposit taking activity and for its effective enforcement. It aims to prevent such unregulated deposit schemes or arrangements at their inception and at the same time makes soliciting, inviting or accepting deposits pursuant to an unregulated deposited scheme as a punishable offence. The said Ordinance also seeks to put in place a mechanism by which the depositors can be repaid without delay by attaching the assets of the defaulting establishments.

Indian Medical Council (Amendment) Second Ordinance, 2019

On February 21, 2019, the President of India promulgated the Indian Medical Council (Amendment) Second Ordinance, 2019 to bring in necessary official amendments in the Indian Medical Council (Amendment) Bill, 2018 pending in Parliament for replacing the earlier Ordinance. This Ordinance, *inter alia*, enables the Board of Governors appointed in supersession of the Medical Council of India (MCI) to continue to exercise the powers of MCI and that of Central Government under Section 10A of the Indian Medical Council (IMC) Act, 1956, for a period of two (2) years or till the Council is reconstituted, whichever is earlier so as to ensure transparency, accountability and quality in the governance of medical education in the country.

Companies (Second Amendment) Ordinance 2019

On February 21, 2019, the President of India promulgated the Companies (Second Amendment) Ordinance 2019 for replacement of the said Ordinance in Parliament by a replacement Bill. It is based on the recommendations of the Committee to review offences under the Companies Act, 2013, so as to fill critical gaps in the corporate governance and compliance framework as enshrined in the Companies Act 2013, while simultaneously extending greater Ease of Doing Business to law abiding corporates. This will incentivize compliance of law while simultaneously meting out exemplary punishment for serious violations. This Ordinance, *inter alia*, addresses the need to impose civil liability for technical and procedural defaults of a minor nature and to plug the corporate governance and enforcement framework, through the following: (i) re-categorisation of 16 minor offences as civil defaults which will de-clog special courts; (ii) transfer of certain routine functions such as permitting conversion of a public company into a private company from National Company Law Tribunal (NCLT) to the Central Government; (iii) making non-maintenance of registered office and non-reporting of commencement of business as grounds for striking of from register of companies; and (iv) breach of ceiling on Directorships being made a ground for disqualification; (v) Enhancing the pecuniary jurisdiction of Regional Director's for compounding offences under the Companies Act with a view to unburdening the NCLT of routine functions etc.

Companies (Incorporation) Amendment Rules, 2019

On February 21, 2019, the MCA issued the Companies (Incorporation) Amendment Rules, 2019 thereby adding a new rule 25A to the Companies (Incorporation) Rules, 2014 regarding Active Company Tagging Identities and Verification (ACTIVE). In terms of this new rule every company incorporated on or before December 31, 2017 shall file the particulars of the company and its registered office, in e-Form ACTIVE on or before April 25, 2019. In case a company does not intimate the said particulars, the Company shall be marked as "ACTIVE-non-compliant" on or after April 26, 2019 and no further filings with the MCA (i.e. changes in capital, director, registered office, or similar) would be possible.

Accordingly, in the Companies (Incorporation) Rules, 2014, after e-form INC-22, the e-form ACTIVE (INC-22A) has been inserted.

Investment by Foreign Portfolio Investors (FPI) in Debt

On February 15, 2019, the Reserve Bank of India ("RBI") amended Schedule 5 to the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017. The amendment is for withdrawing, with immediate effect, the provision (in paragraph 4(f) (ii) of Schedule 5) whereby no FPI shall have an exposure of more than 20% of its corporate bond portfolio to a single corporate (including exposure to entities related to the corporate).

Companies (Significant Beneficial Owners) Amendment Rules, 2019

On February 8, 2019, the Ministry of Corporate Affairs ("MCA") issued the Companies (Significant Beneficial Owners) Amendment Rules, 2019 thereby amending the Companies (Significant Beneficial Owners) Rules, 2018. Certain definitions like 'majority stake', 'partnership entity', 'reporting company' have been introduced. Additionally, the definition of significant beneficial owner and Form BEN-1 relating to declaration by the significant beneficial owner has also been substituted.

These rules shall come into force on the date of their publication in the Official Gazette

Recent Events

International Women's Day Celebration March 8, 2019

The ladies at Clasis Law celebrated the International Women's Day enjoying an hour of enriching conversation over lunch.





Offbeat

Green Holi

Holi, the festival of colours, is just around the corner. It is the festival with a beautiful blend of vibrant colours and the great indulgence of celebrations that add life to the day of fiesta. But while we're already excited for the long weekend, and have our drinking, colours and dancing plans in place, we also need to realize the importance of environment around us. So whether the concern is about our skin or the environment, let's plan holi in an ecofriendly way by using organic and homemade colours.

Say 'No' to Synthetic colours and play holi with natural colours

The dry colours, commonly known as gulals, have two components a colourant that is toxic and a base which could be either asbestos or silica, both of which cause health problems. Heavy metals contained in the colourants can cause asthma, skin diseases and adversely affect the eyes. The best way to counteract this practice is to replace the use of artificial colors with eco-friendly colors.

Make your own natural colours by simply using turmeric, chandan & henna and making their different combinations with your imaginations. Such colours are harmless and can easily be washed off. Dry hibiscus flowers in the shade and grind them. Blood-red flowers will give you a beautiful colour. Beetroot is an excellent ingredient to make organic pink or magenta colours. For green colour, mix equal quantities of henna powder and flour. Tesu (Palash) gives you a lovely yellow-orange color.



Play Tilak Holi

The Holi festival is more about spreading love, joy and happiness rather than colouring every single person you meet. Play a different holi this year and put a simple tilak on your loved ones. Imagine how much effort and water it will save once you are done playing with colours

Avoid use of balloons and plastic bags

A common practice seen in the celebration of Holi is throwing balloons filled with water, which directly hit the face and body of people. Use of plastic bags and balloons can cause injury or can damage some external organs as well as the environment. So, from this year let us all avoid the use of plastic bags & balloons and stop others to do so for playing a safe & joyous holi.

Do not waste water, Celebrate Dry Holi

We all know that water is a precious resource and soon there will be a shortage of fresh water. Throwing water on strangers makes no sense. It is just wastage of something which is already limited. No water in pichkaris, no hurling water balloons, paints and bags on each other. Enjoy the beautiful colours of Holi by applying it dry and let the colours make everyone's face colourful for a delightful experience. In short, a dry Holi is one with only colours and no water. It will not just encourage eco-friendly Holi, but it will also save your time to remove harsh colours post-Holi celebrations.



Flower Power

If you think that Holi is incomplete without lots of vibrant colours, then nature has provided you with them in abundance. Playing holi with flowers is the most adorable way to celebrate this festival. It is the best alternative for those harmful chemical colours. Once you are done with celebration collect it and dump it around trees, which after a specific duration decompose in the soil as a fertiliser.



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