Forensic Audit : Laws and Regulations

Lesson 12

KEY CONCEPTS

■ FCPA ■ OECD ■ UNCAC ■ IPC ■ PCA

Learning Objectives

To understand:

- Various penalised provisions of Companies Act, 2013 relating to fraud
- The provisions of Companies Act, 2013 relating to reporting of fraud.
- Reporting of fraud under various laws such as:
  1. SEBI Act, 1992
  2. Information Technology Act, 2000
  3. Insurance Act, 1938
  4. Prevention of Corruption (Amendment) Act, 2018
  5. Income Tax Act, 1961
- International laws such as :
  1. United Nations Convention against Corruption (UNCAC)
  2. Integrity Pact (IP)
  3. Foreign Corrupt Practices Act, 1977
  4. UK Bribery Act, 2010
- ICSI Anti-Bribery Code

Lesson Outline

- Introduction
- Indian Laws: Information Technology and Business Laws
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- SEBI Act, 1992
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- The Companies (Auditor's Report) Order, 2020
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- International Laws
- United Nations Convention Against Corruption
- OECD Guidelines for Multinational Enterprises relating to Combating Bribery
- The Integrity Pact (IP)
- Foreign Corrupt Practices Act, 1977
- The United Kingdom Bribery Act, 2010
- ICSI Anti-Bribery Code
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- Test Yourself
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INTRODUCTION

A forensic audit is an examination and evaluation of a firm's or individual's financial information for use as evidence in the court of law. A forensic audit can be conducted in order to prosecute a party for fraud, embezzlement or other financial claims.

In order to understand the legal consequences that a person attracts on being caught in a forensic audit, it is necessary to know about the various statutes that talk about the implementation of forensic audits in India.

Let us discuss the statutes dealing with corporate laws and empowering forensic auditors in performing their duties in its true letter and spirit. The detailed position of Laws and Regulations dealing with Corporate Fraud and also aids in achieving forensic audit would be discussed under the following heads:

1. **Indian Laws**
   - Information Technology and Business Laws
2. **International Laws**
   - UK Bribery Act
   - US Foreign Corrupt Practices Act
3. **ICSI Anti Bribery Code.**

1. INDIAN LAWS : INFORMATION TECHNOLOGY AND BUSINESS LAWS

Companies Act, 2013

Considering the consequence of corporate frauds on the growth of Corporates and Economy, the Companies Act, 2013 lists down frauds and prescribes penalties and punishments for violations.

Section 447 of the Companies Act, 2013 often now referred to as one of the draconian provision of the new Act deals with provision relating to punishment for fraud.

Section 447: *"Without prejudice to any liability including repayment of any debt under this Act or any other law for the time being in force, any person who is found to be guilty of fraud, shall be punishable with imprisonment for a term which shall not be less than 6 months but which may extend to 10 years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to 3 times the amount involved in the fraud:*

Where the fraud in question involves public interest, the term of imprisonment shall not be less than 3 years".

The Companies Act, 2013 has provided punishment for fraud as provided under Section 447 in around 20 sections of the Act *e.g.* u/s 7(5), 7(6), 8(11), 34, 36, 38(1), 46(5), 56(7), 66(10), 75, 140(5), 206(4), 213, 229,

251(1), 266(1), 339(3), 448 *etc.* for directors, key managerial personnel, auditors and/or officers of company. Thus, the new Act goes beyond professional liability for fraud and extends to personal liability if a company contravenes such provisions.

The following table includes some sections that attract liability u/s 447. These are cognizable offences and a person accused of any such offence under these sections shall not be released on bail or bond, unless subject to the exceptions provided u/s 212(6) of the Act:

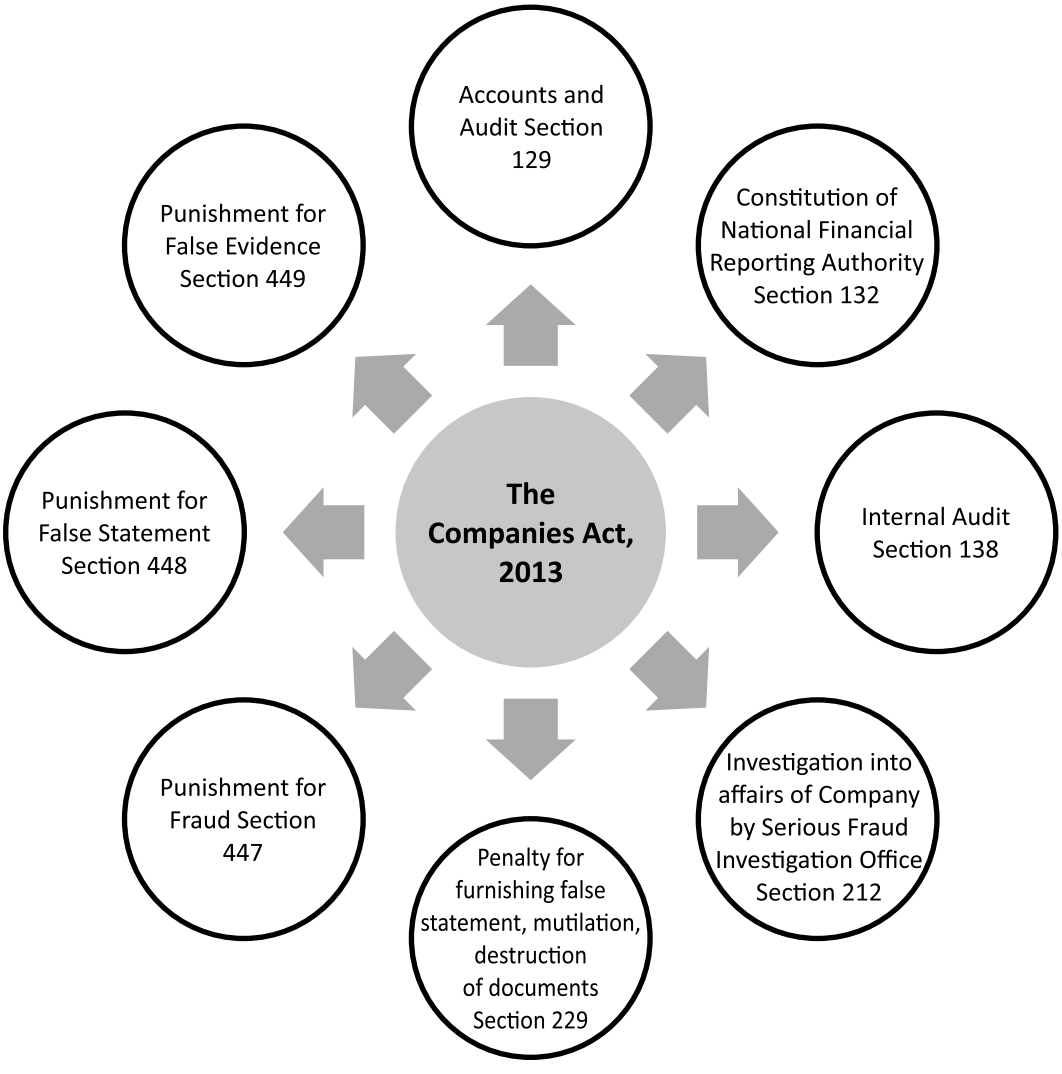
Section	***Fraud With Respect To***	***Who will be penalised***
7(5)	Registration of a company	A person furnishing false information or suppressing any material information of which he or she is aware.

Section	*Fraud With Respect To*	*Who will be penalised*
36	Inducing persons to invest money	The person doing so.
75(1)	Acceptance of deposit with intent to defraud depositors or for any fraudulent purpose	Every officer of the company who accepted the deposit.
206(4)	Conducting business of a company for a fraudulent or unlawful purpose	Every officer of the company who is in default.
213	Other cases: • Business of a company being conducted with intent to defraud its creditors • Fraud, misfeasance or other misconduct of the company or any of its members • Company withholding information from members with respect to its affairs, which they may reasonably expect	Every officer of the company who is in default and the person(s) concerned in the formation of the company or management of its affairs.
229	Furnishing false statement or mutilation or destruction of documents	Person required to provide an explanation or make a statement during the course of inspection, inquiry or investigation, or the officer or other employees, as required.
251(1)	Application for removal of name from register with the object of evading liabilities/intent to deceive	Persons in charge of management of the company.
339(3)	Conducting business of company with intent to defraud its creditors, any other persons or for any fraudulent purpose	Every person who was knowingly a party to the business in the aforesaid manner.
448	Making a false statement in any return, report, certificate, financial statement, prospectus, statement or other document required by or for the purpose of any of the provisions of this Act or the rules made thereunder.	Person making such a statement etc.

Fraud Reporting under Companies Act, 2013

The new act casts onerous responsibility on the part of statutory auditor/cost auditor/secretarial auditor to report fraud to Board and Central Government. It would mean that even for a small fraud involving say Rs. 1000 in a large multi-locational enterprise would cast reporting fraud responsibility on the part of auditing professionals including CS/CA/CMA. This provision has mandated that the professionals like CS/CA/CMA appointed by the company under Section 139/148/204 to do direct reporting of frauds (to the Central Government) in addition to their existing responsibilities of reporting requirement to the shareholder/Board of company.

Section 143(12) to 143(15) of the Act contains provisions relating to reporting of fraud.



Fraud Reporting

Section 143(12) Notwithstanding anything contained in this section, if an auditor of a company, in the course of the performance of his duties as auditor, has reason to believe that an offence involving fraud is being or has been committed against the company by officers or employees of the company, he shall immediately report the matter to the Central Government within such time and in such manner as may be prescribed.

Action of Fraud Reporting in good faith

Section 143 (13) No duty to which an auditor of a company may be subject to shall be regarded as having been contravened by reason of his reporting the matter referred to in sub-section (12) if it is done in good faith.

Similar Provisions applicable to Cost Auditor and Secretarial Auditor:

Section 143(14) the provisions of this section shall *mutatis mutandis* apply to –

- The Cost Accountant in practice conducting cost audit under section 148; or
- The Company Secretary in practice conducting secretarial audit under section 204.

Punishment for default

Section 143 (15) If any auditor, cost accountant or company secretary in practice do not comply with the provisions of sub-section (12), he shall be punishable with fine which shall not be less than 1 lakh rupees but which may extend to 25 lakh rupees.

Rule 13 of The Companies (Audit and Auditors) Rules, 2014 contains the operational procedure of Reporting of Fraud prescribed in Section 143(12) of the Act.

Reporting of fraud by Auditor

Rule 13(1) For the purpose of sub-section 12 of Section 143, in case the auditor has sufficient reason to believe that an offence involving fraud, is being or has been committed against the company by officers or employees of the company, he shall report the matter to the Central Government immediately but not later than 60 days of his knowledge and after following the procedure indicated herein below:

First Fraud Report to Board/Audit Committee

a. Auditor shall forward his report to the Board or the Audit Committee, as the case may be, immediately after he comes to knowledge of the fraud, seeking their reply or observations within 45 days;

Final Fraud Report to Central Government on receipt of First Fraud Report

b. on receipt of such reply or observations the auditor shall forward his report and the reply or observations of the Board or the Audit Committee along with his comments (on such reply or observations of the Board or the Audit Committee) to the Central Government within 15 days of receipt of such reply or observations;

Final Fraud Report to Central Government on failure of receipt of First Fraud Report

c. in case the auditor fails to get any reply or observations from the Board or the Audit Committee within the stipulated period of 45 days, he shall forward his report to the Central Government along with a note containing the details of his report that was earlier forwarded to the Board or the Audit Committee for which he failed to receive any reply or observations within the stipulated time.

Authority and Mode/Format of dispatching Final Fraud Report to Central Government

- Rule 13(2): The report shall be sent to the Secretary, Ministry of Corporate Affairs in a sealed cover by Registered Post with Acknowledgement Due or by Speed post followed by an e-mail in confirmation of the same.
- Rule 13(3): The report shall be on the letter-head of the auditor containing postal address, e-mail address and contact number and be signed by the auditor with his seal and shall indicate his Membership Number.
- Rule 13(4): The report shall be in the form of a statement as specified in Form ADT-4. This Form of Report is available as an annexure to The Companies (Audit and Auditors) Rules, 2014.

Similar Provisions of Fraud Reporting applicable to Cost Auditor and Secretarial Auditor

Rule 13(5): The provision of this rule shall also apply, mutatis mutandis, to a cost auditor and a secretarial auditor during the performance of his duties under Section 148 and section 204 respectively.

The new law has also bestowed legal status on the Serious Fraud Investigation Office, a probe agency under the Ministry of Corporate Affairs. Serious Fraud Investigation Office (SFIO) is established by Central Government to investigate frauds relating to a company.

SEBI Act, 1992

Regulation 11 C of the SEBI Act, 1992 empowers the SEBI to direct any person to investigate the affairs of intermediaries or brokers associated with the securities market whose transactions in securities are being dealt with in a manner detrimental to the investors or the securities market.

Information and Technology Act, 2000

Section 43 and 44 of the IT Act, 2000- lays down penalty for the following

- Unauthorized copying of an extract from any data.
- Unauthorized access and downloading files.
- Introduction of viruses or malicious programmes.
- Damage to a computer system or computer network.
- Denial of access to an authorized person to a computer system.
- Providing assistance to any person to facilitate unauthorized access to a computer.

Insurance Act, 1938

Section 33 of the Act empowers the IRDA to direct any person (Investigating Authority) to investigate the affairs of any insurer.

The Companies (Auditor's Report) Order, 2020

The Act requires the auditor to report to the effect that if a substantial part of fixed assets have been disposed of during the year, whether it has affected the going concern status. In light of these statutory authorities, the following penalties may be faced by a person, if he/she is caught in a forensic audit, by way of white-collar penalties.

Penalty under the Prevention of Corruption Act, 1988 (PC Act)

Prevention of Money-Laundering Act, 2002– Section 3 of the Act defines the offence of money laundering as the involvement of a person in any process or activity connected with the proceeds of crime and projecting it as untainted property, where the scope of integrating forensic audits can be clearly seen.

The Prevention of Corruption (Amendment) Act, 2018: An Abridged

The Prevention of Corruption Act, 1988 (the "Act") was amended by the Prevention of Corruption (Amendment) Act, 2018 (the "Amendment Act"). Most of the amendments are aimed at tightening up the existing provisions in the Act and expanding the coverage of the offences. Prevention of Corruption (Amendment) Act 2018 as passed by Parliament in July 2018, which amended and brought about significant changes to the extant Prevention of Corruption Act 1988. Among other changes, the Amendment Act has made bribe giving a specific offence and has introduced the concept of corporate criminal liability for acts of bribery. Corporates may claim a defence if it can be proven that adequate procedures were in place to prevent persons associated with it from undertaking anything which may be an offence under the Prevention of Corruption Act. Such procedures must comply with guidelines, which are yet to be prescribed by the government.

Backdrop of the Amendment Act

In the wake of numerous scams being unearthed in India over the past decade, enforcement agencies have also been proactive in terms of monitoring compliance under relevant anti-corruption and bribery laws and taking action against violations.

In 2016 the government announced demonetisation of Rs 500 and Rs 1000 bank notes in its attempt to combat unethical practices such as hoarding black money outside the formal economic system, tax evasion and using illicit or counterfeit cash to fund illegal activities. Consequently, on basis of information received from banks, the tax authorities and other anti-corruption bodies have identified suspicious persons and entities and initiated action against them.
In 2017 the Ministry of Corporate Affairs voluntarily struck off 224,000 shell companies and imposed restrictions on the usage of their bank accounts and transference of company property.
Action was taken to disqualify directors who failed to comply with specific requirements under the Companies Act 2013.
The ministry also announced that if any director or other authorized signatory of a struck-off company tried to siphon off money from the company's bank account, he or she will be punished with a prison term of between six months and 10 years, and where the fraud involved public interest, the minimum prison term will be at least three years and may also involve a fine of up to three times the amount involved.
The prime minister's office has created a special task force to oversee the drive against such defaulting companies with the help of various enforcement agencies.
Further, in 2018 an ordinance to the Companies Act 2013 was promulgated reintroducing the requirement to declare the commencement of business for newly incorporated companies, which may restrict the opening of shell companies.
The Central Vigilance Commission (CVC) has also taken certain proactive actions recently, such as advising all central government departments on quicker disposal of pending corruption cases. The CVC has an online complaint management system where individuals can register complaints in this regard.
The Serious Fraud Investigation Office (the investigative arm of the Ministry of Corporate Affairs) has increased the pace of its investigations over the past couple of years. Moreover, the Supreme Court has expanded the ambit of the definition of 'public servant' (under the Prevention of Corruption Act 1988) to include all officials of private banks, as their duties are public in nature (Central Bureau of Investigation, Bank Securities and Fraud Cell v. Ramesh Gelli, February23, 2016) thereby bringing them under the purview of anti-corruption laws.

Highlights of the Prevention of Corruption (Amendment) Act, 2018

Definition of 'Undue Advantage': The Amendment Act provides that any public servant who accepts or attempts to accept from any person, any 'undue advantage', either for himself or for any other person, in lieu of performance of a public duty, shall be punishable with imprisonment for a minimum term of 3 (three) years and maximum of 7 (seven) years. The Amendment Act has defined 'undue advantage' to mean any gratification other than legal remuneration that a public servant is permitted to receive. Further, 'gratification' is not limited to pecuniary gratifications or to gratifications estimable in money. By virtue of such an expansive definition, even non-monetary considerations such as a better posting, post-retirement benefits, gifts and favours not estimable in money can also be covered under the ambit of undue advantage.

Persons liable for offering a bribe to public servants: Previously, the PC Act did not contain a separate provision for a person who gives or promises to give an undue advantage, but the Amendment Act makes giving an undue advantage by a person to a public servant, a specific offence punishable by 7 (seven) years imprisonment or fine, or both. However, if a person is forced / coerced to give an undue advantage but reports the same to the

concerned authority within 7 (seven) days of doing so, he shall not be liable for the same. Further, as per the PC Act, during a corruption trial, if a person made a statement that he gave an undue advantage to a public servant, it would not be used to prosecute him for the offence of abetment. The Amendment Act omits this provision. Effectively, it may become a potential risk for bribe givers to testify against the corrupt, and they may be discouraged from appearing as witnesses in a trial against public servants.

Offering of bribes by commercial organisations: The Amendment Act has defined 'commercial organisation' to mean not just a company or partnership incorporated in India and carrying on business in India or outside India, but also a body or partnership incorporated or formed outside India but carrying on business in India. Section 9 of the PC Act has been substituted by the Amendment Act to provide for a specific provision for offences committed by commercial organisations and persons associated with it. It provides that if a commercial organisation commits any of the offences listed out in the PC Act with the intention to obtain or retain business or obtain or retain an advantage in the conduct of its business, then such commercial organisation shall be punishable with fine, quantum of which is not prescribed in the Amendment Act.

The Amendment Act mandates the Central Government to formulate and prescribe guidelines to prevent persons associated with commercial organisations from bribing any public servant. A commercial organisation can defend itself when accused of any offence under the PC Act, if it proves that it had adequate procedures in place to ensure compliance with such guidelines issued by the Central Government to prevent persons associated with the commercial organisation from undertaking such conduct. The corporate sector in India will have to be swift in enacting its internal guidelines and ensure that its employees are well informed and abide by these guidelines to protect itself from any kind of prosecution under the PC Act, in the event of any associated person charged with the act of giving a bribe.

Further, if such an offence is proved to have been committed with the consent or connivance of any director, manager, secretary or other officer of the organisation, then such person shall also be prosecuted under the PC Act.

Redefining criminal misconduct: Under the PC Act, criminal misconduct by a public servant inter alia included: (i) using illegal means to obtain any valuable thing or monetary reward for himself or any other person; (ii) abusing his position as a public servant to obtain a valuable thing or monetary reward for himself or any other person; and (iii) obtaining a valuable thing or monetary reward without public interest, for any person. The Amendment Act replaces this section with a truncated definition of criminal misconduct to include only the following two acts: (i) misappropriation or conversion for his own use, any property entrusted to or under the control of a public servant: and (ii) amassing assets disproportionate to known sources of income. To prove the latter, the intention to acquire assets disproportionate to income must also be proved, in addition to possession of such assets. Thus, the scope of criminal misconduct has been narrowed and the threshold to establish the offence of possession of disproportionate assets has been increased by the Amendment Act.

Prior sanction of appropriate government for investigation and prosecution: The PC Act required prior sanction of the appropriate government for prosecution of serving public officials. The Amendment Act extends this protection of requirement of prior approval to investigation prior to prosecution. Further, such protection is extended to former officials as well, for offences done while in office. The third proviso to Section 19(1) provides for a directory (not mandatory) time period of 3 (three) months within which the appropriate government must convey the decision on such sanction. Additionally, the Central Government may prescribe guidelines for grant of sanction for prosecution.

Attachment of property: The Amendment Act has provided for application of the Prevention of Money Laundering Act 2002 and Criminal Law Amendment Ordinance 1944 for attachment and administration of property procured by means of an offence under the PC Act.

Time frame for trial: The PC Act did not provide a time frame within which the trial was to be completed. However, the Amendment Act now prescribes that the Special Judge shall endeavour to complete the trial within 2 (two) years. This period can be extended by 6 (six) months at a time and up to a maximum of 4 (four) years in aggregate subject to proper reasons for the same being recorded. The wording of the section is directory in nature and not mandatory, making it less likely that the courts will abide by such timelines.

Enhancement of Punishment: Punishment has been increased from a minimum imprisonment term of 6 (six) months to 3 (three) years, and from a maximum of 5 (five) years to 7 (seven) years, with or without fine. Punishment for abetment of offences has also been increased by the same quantum.

Income Tax Act, 1961

Though Income Tax Act does not deal with corruption directly but contains number of provisions which deal with ill-gotten money by an assesse.

Cash Credits [Section 68]: As per the provision of Section 68 of the Act, any sum found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year.

Unexplained Investments [Section 69] : As per the provision of Section 69 of the Act, where in the financial year immediately preceding the assessment year the assessee has made investments which are not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and source of the investments, or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the value of the investments may be deemed to be the income of the assessee of such financial year.

Unexplained Money [Section 69A] : As per the provision of Section 69A of the Act, where in any financial year the assessee is found to be the owner of any money, bullion, jewellery or other valuable article and such money, bullion, jewellery or the valuable article is not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and source of acquisition of the money, bullion, jewellery or other valuable article, or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the money and the value of the bullion, jewellery or other valuable article may be deemed to be the income of the assessee for such financial year.

Amount of investments, etc., not fully disclosed in books of account [Section 69B]: As per the provision of Section 69B of the Act, where in any financial year the assessee has made investments or is found to be the owner of any bullion, jewellery or other valuable article, and the Assessing Officer finds that the amount expended on making such investments or in acquiring such bullion, jewellery or other valuable article exceeds the amount recorded in this behalf in the books of account maintained by the assessee for any source of income, and the assessee offers no explanation about such excess amount, or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the excess amount may be deemed to be the income of the assessee for such financial year.

Unexplained Expenditure [Section 69C]: As per the provision of Section 69C of the Act, where in any financial year an assessee has incurred any expenditure and offers no explanation about the source of such expenditure or part thereof, or the explanation, if any, offered by him is not, in the opinion of the Assessing Officer, satisfactory, the amount covered by such expenditure or part thereof, as the case may be, may be deemed to be the income of the assessee for such financial year.

Tax on income referred to in Section 68 or Section 69 or Section 69A or section 69B or Section 69C or section 69D is chargeable to tax under Section 115BBE which provides that on any such income the income-tax payable shall be the amount of income-tax calculated at the rate of 60%.

As per the provision of Section 271AAC of the Act, where the income determined includes any income referred to in Section 68, Section 69, Section 69A, Section 69B, Section 69C or Section 69D for any previous year, the assessee shall pay by way of penalty, in addition to tax payable under Section 115BBE, a sum computed at the rate of 10% of the tax payable under Section 115BBE.

Bharatiya Nyaya Sanhita, 2023 (Indian Penal Code, 1860)

- Section 200 of BNS – Public servant unlawfully engaging in trade: "Whoever, being a public servant, and being legally bound as such public servant not to engage in trade, engages in trade, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both."
- Section 168 – Bribery, read with Section 7 of the PC Act "Whoever commits the offence of bribery shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both. Provided that bribery by treating shall be punished with fine only" as per Section 171E.
- Section 312 – Dishonest Misappropriation of property.
- Section 314 – Criminal Breach of Trust: "Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both" according to Section 406.
- Section 316 – Cheating. (Corresponding to infamous Section 420 of IPC)
- Section 334(2) – Forgery "Whoever commits forgery shall be punished with imprisonment of either description for a term which may extend to two years, or with fine or with both"
- Section 334(3) Whoever commits forgery, intending that the document or electronic record forged shall be used for the purpose of cheating, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.
- Section 333 – Making false document or false electronic record
- Section 337 – Having possession of document described in section 335 or 336, knowing it to be forged and intending to use it as genuine.
- Section 338 – Forged document or electronic record and using it as genuine.

Penalties under Prevention of Money Laundering Act, 2002.

- Section 4 – Punishment for money-laundering - Whoever commits the offence of money-laundering shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine which may extend to five lakh rupees:

  Provided that where the proceeds of crime involved in money-laundering relates to any offence specified under paragraph 2 of Part A of the Schedule, the provisions of this section shall have effect as if for the words "which may extend to seven years", the words "which may extend to ten years" had been substituted.

2. INTERNATIONAL LAWS

Corruption is a political, social and economic issue at the global level. The issue of corruption cuts to the heart of modern ideas about politics, culture and democracy. Despite continuing concern and a multi-million dollar international industry committed to fighting it, corrupt practices often seem impervious to change. Today it is a major cause of global crises of poverty, human rights violation, injustice and insecurity.

Many governments have been launched anticorruption policies and programmes in order to combat corruption. Although, over a period of time, the number of proposals and ideas on different ways and means to combat corruption has grown, the progress is less than satisfactory.

A less corrupt country likely to have more growth, improved foreign investments, higher per capita income, lower infant mortality, increased literacy, stronger property rights, increased business growth and many other additional benefits. The challenges are how to get from here to there. In this direction, let us take a brief look on the International Laws, Regulations and Treating holding strong in preventing corruption from their system.

United Nations Convention against Corruption (UNCAC)

The United Nations Convention against Corruption "UNCAC" is a multilateral treaty or agreement that has been negotiated by member states of the United Nations, "UN", and promoted by the UN Office on Drugs and Crime, "UNODC". It is one of the several legally binding international anti-corruption agreements that require state parties to abide by the treaty to implement several anti-corruption measures and mainly focus on five main areas as follows:

The UNCAC's comprehensive approach and the mandatory character of many of its provisions act as evidences of this development. Most importantly, the UNCAC tackles the forms of corruption that had not been covered by many of the earlier international instruments, such as trading under influence, abuse of function, and various other types of corruption in the private sector. A further important significant development is the specific inclusion of a provision dealing with the recovery of stolen assets, which is a major concern for countries.[6]

OECD Guidelines for Multinational Enterprises relating to Combating Bribery

The Guidelines for Multi-National Enterprises (MNEs) prescribed by the OECD are the most wide-ranging set of government-supported recommendations on responsible business conduct in existence today. The Governments adhering to the guidelines aim to encourage and maximize the positive impact of the MNEs for sustainable development and enduring social progress. It provides guidance for responsible business conduct in areas, such as, labour rights, human rights, environment, information disclosure, combating bribery, consumer interests, competition, taxation, and intellectual property rights.

The Integrity Pact (IP)

The Integrity Pact is a tool developed and launched by the Transparency International to help different businesses, governments and civil societies in order to equip them to fight corruption in the field of public procurements and public contracting. The Transparency International had established mutual contractual rights and obligations to reduce the high cost and corruption involved in the public contracts. The main objective of the Integrity pact is to make the public procurement process transparent by binding both the parties to the contract. It also envisages a monitoring role for civil society who is the ultimate beneficiary of government action. IP should cover all activities related to the contract from pre-selection of bidders, bidding and contracting, implementation, completion and operation.

Foreign Corrupt Practices Act, 1977 (U.S.A.)

The Foreign Corrupt Practices Act, 1977 "FCPA" is a United States' federal law that contains two main provisions, *i.e.*, addresses accounting transparency requirements under the Securities Exchange Act of 1934 and concerning bribery of foreign officials. The Act was amended in 1988 and further in 1998. It includes both bribery and accounting provisions.

Applicability of the Act

- Any person who has a certain degree of connection with the United States and engages in foreign corrupt practices.
- Any act by U.S. businesses, foreign corporations trading securities in the U.S., American nationals, citizens, and residents acting in furtherance of a foreign corrupt practice whether or not they are physically present in the U.S.
- In the case of foreign natural and legal persons, the Act covers their deeds if they are in the U.S. at the time of the corrupt conduct.

The ideology of the FCPA is to make it illegal for companies and their supervisors to influence foreign officials with any personal payments or rewards. This Act was passed to make it unlawful for certain classes of people and entities to make payments to foreign government officials in order to assist in obtaining or retaining business. Further, the Act governs not only payments to foreign officials, candidates, and parties, but any other recipient if part of the bribe is ultimately attributable to a foreign official, candidate, or party. These payments are not restricted to monetary forms and may include anything of value. This is considered the territoriality principle of the Act.

Under the FCPA it must be proved that the person offering the bribe did so with a "corrupt" intent. Further, the FCPA only covers active bribery, that is to say the giving of a bribe. The taking of the bribe is not covered under the FCPA. The Act concerns the intent of the bribery rather than the amount, and therefore there is no requirement of materiality. Offering anything of value as a bribe, whether in the form of cash or non-cash items, is prohibited.

***Accounting Provision**:* The FCPA also requires the companies whose securities are listed in the U.S. to meet its accounting provisions. These accounting provisions operate in tandem with the anti-bribery provisions of the FCPA, and requires respective corporations to prepare and keep books and records that accurately and fairly reflect the transactions of the corporation, and to devise and maintain an adequate system of internal accounting controls. An increasing number of corporations are taking additional steps to protect their reputation and reduce their exposure by employing the services of due diligence companies tasked with vetting third party intermediaries and identifying easily overlooked government officials embedded in otherwise privately held foreign firms.

***Bribery and facilitation payment**:* With reference to payments to foreign officials, the act draws a distinction between bribery and facilitation or "grease payments", which may be permissible under the FCPA, but may still violate local laws. The primary distinction is that grease payments or facilitation payments are made to officials to expedite their performance of the routine duties which they are already bound to perform. The exception focuses on the purpose of the payment rather than on its value.

***Successor's liability for the FCPA violation**:* The Act provides that U.S. Company acquiring a foreign firm could face successor liability for the FCPA violations committed by the foreign firm prior to being acquired. Generally, acquiring companies may be liable as a successor for pre-existing the FCPA violations committed by an acquired company where those violations were subject to the FCPA's jurisdiction when committed.

Further, businesses increasingly focus on their core competencies, and as a result engage more third parties to provide critical business functions; businesses do not have direct control over their third parties and as such, are exposed to the regulatory and reputational risk of the third party FCPA violations. As per the FCPA, businesses bear accountability for activities involving both their internal and external relationships. Companies who operate internationally, or who engage third parties in countries with a high Corruption Perceptions Index are especially at risk. Many companies have now adopted "Anti-Bribery/Anti-Corruption" (ABAC) solutions to combat this risk and help protect themselves from fines and reputational damage.

Penalty

For offences committed under the FCPA an individual can be fined up to US $ 250,000 per violation, and may also be given upto five years of imprisonment. A company guilty under the FCPA is liable for a fine of up to US $ 2,000,000 per violation.

The United Kingdom Bribery Act, 2010

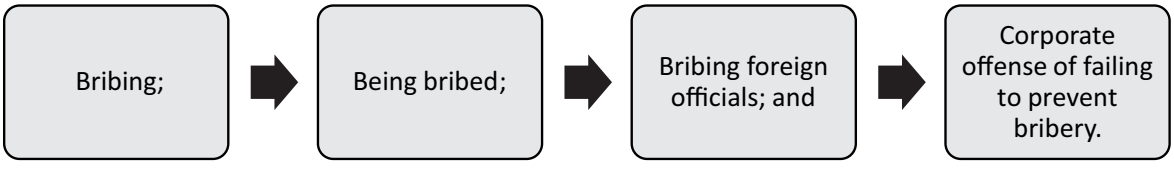
The Bribery Act, 2010 is an Act of the Parliament of the United Kingdom that covers the criminal law relating to bribery. The Act defines all the previous statutory and common law provisions in relation to bribery, the bribery of foreign public officials and the failure of a commercial organisation to prevent bribery on its behalf.

The objective of the Act is to provide a modern legislation that effectively deals with the increasingly sophisticated, cross-border use of bribery, and carry out the prosecution of bribery by individuals and organizations both within the UK and overseas easier. It applies to the United Kingdom of Great Britain and Northern Ireland.

Salient features of the Act

- It will criminalise both active and passive bribery, i.e., both bribing and being bribed.
- It will criminalise not just bribery of public officials, but also bribery entirely in the private sphere.
- It does not require proof of dishonesty or corruption.
- It will criminalise the failure to prevent bribery.
- It will, effectively, require those carrying on business in the UK to have in place "adequate procedures" to prevent bribery taking place, even if the bribery is unconnected with the UK.
- The offences will have extensive extra-territorial reach, criminalising activities which may take place entirely outside the UK.
- Committing offences could lead to imprisonment for up to 10 years (for individuals) and/or unlimited fines (for individuals and corporate bodies).
- There is no exception for "facilitation payments".
- "Local customs and practices" will not necessarily provide a defence.

- The Act creates four offences of bribery such as:



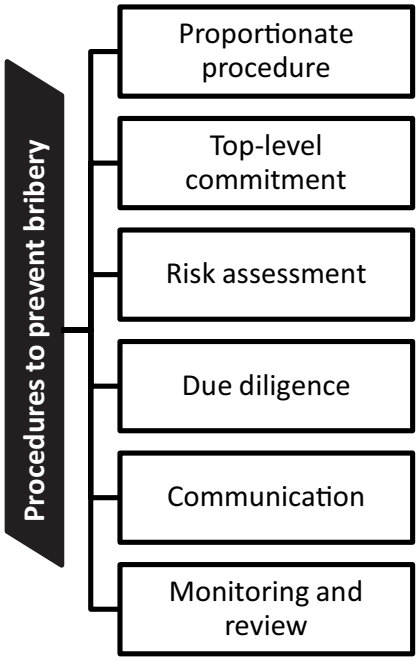
Bribing: Section 1 of the Act provides that it is an offence for a person to offer, promise or give a financial or other advantage for the purpose of bringing about an improper performance of a function or activity.

Being bribed: Section 2 of the Act provides that it is an offence to request, agree to or receive a financial or other advantage for the purpose of bringing about an improper performance of a function or activity or to request, agree to or receive a reward for having done so.

Bribery of Foreign Public Official: Section 6 of the Act provides that it is an offence to offer, promise or give a financial or other advantage to a foreign public official where such advantage is not permitted under the written law applicable to that foreign official. Further, the bribery giver must intend that the advantage given or offered would influence the foreign official in the performance of his/her duties as a public official and must intend to secure business, or to obtain a business advantage. However, the defence is available if the local laws of the country of the foreign official permit or require them to be influenced in that way.

Corporate offence of failing to prevent bribery: Section 7 of the Act provides that a commercial organisation commits an offence under the Act if a person associated with it bribes another person with an intention of obtaining or retaining either business or a business advantage for that organization. However, the commercial organisations will have an absolute defence to liability if they can show that they have put in place "adequate procedures" to prevent bribery. The personal liability can be put in place on senior company officers who turn a blind eye to such board-level bribery.

Adequate procedures to prevent bribery: The UK Bribery Act also specifies what could be considered as adequate procedure put in place to prevent bribery. This will include:



- *Proportionate procedures* – the procedures adopted should be proportionate to the risk faced.
- *Top-level commitment* – the company should adopt a culture of zero tolerance through a commitment by senior management.
- *Risk assessment* – the company should identify its bribery risks and priorities its actions in high risk areas.
- *Due diligence* – the company should take appropriate care when entering into relationships or markets where there is a risk of bribery.
- *Communication* – the company's policy should be clearly communicated to all relevant parties, supported by appropriate training and "speak up" procedures.
- *Monitoring and review* – the procedures put in place should be reviewed and updated as the company's risks change over time.

Penalties

An individual found to have committed an offence under the Bribery Act is liable to be awarded imprisonment for up to ten years and/or to an unlimited fine. A company found guilty is subject to an unlimited fine.

3. ICSI ANTI BRIBERY CODE

Indeed, we have plethora of legislations to fight against the menace of corruption and bribery, yet, if we hold a comparative analysis of legal measures India hold in effectively combating corruptions and bribery with the international practices of the related area, we find that though India has various anti-corruption legislations and anti-corruption institutions, yet the main legislation 'Prevention of Corruption Act, 1988' does not contain any provision directly dealing with the offence of giving bribe. In the Companies Act, 2013, also the offence of corruption or bribery is not specified. It is only a matter of time that India will have a specific legislation (Act) to deal with bribery in the private sector. In international legislations like the Foreign Corrupt Practices Act, 1977.

(FCPA) of USA and the United Kingdom Bribery Act, 2010 both, mandate corporate and other business entities to formulate and adopt anti-bribery policies in accordance with its requirements and provide protection to senior management if they have Anti-Bribery policy in place.

In a survey of the corporate sector by the ICSI, it was observed that due to absence of clear-cut guidelines, the private sector lacks a well-formulated policy to check corruption and the supply side of bribery emanating in their organisations.

Continuing with our deep-rooted perseverance in going hand in hand with the government's initiative towards the practices of good governance and inclusive growth of nation, the Institute is dedicating all its efforts in making India to quit corruption and bribery in its entirety. As a step forward in this dedication towards corruption free India, the Institute is recommending 'Corporate Anti-Bribery Code' (The Code) to apprise the stakeholders about the deep effect, impact of corruption on the growth of corporates and the laws to check and regulate the practices of bribery and corruption in the corporates.

Need for the Code

The main legislation 'Prevention of Corruption Act, 1988' dealing with corruption at present does not provide a definition of 'Corruption' itself. Also, in any corrupt transaction, there are two parties: the bribe-giver and the bribe- taker, but as per Section 24 of the Act, a statement made by a bribe-giver in any proceeding against a public servant for an offence, shall not subject him to prosecution under Section 12. This Act, also does not contain any provision directly dealing with active domestic bribery, *i.e.*, the offence of giving bribe. The Code

seeks to curb the supply side of corruption prevalent in the private sector and also covers surrogate corrupt practices.

Objective

The objective of the Code is to ensure that neither the company nor any of its employees, directors or authorised representatives indulge in bribery in any of their actions taken for and on behalf of the company in the course of economic, financial or commercial activities of any kind.

Scope

'Corporate Anti-Bribery Code' (The Code), may be adopted voluntarily by the Corporates. The Code, once adopted by the Company, shall be applicable to the company and its:

- Board of Directors,
- Employees (full time or part-time or employed through any third party contract),
- Agents, Associates, Consultants, Advisors, Representatives and Intermediaries, and
- Contractors, Sub-contractors and Suppliers of goods and/or services.

ICSI Anti-Bribery Code: A Way Ahead

In the present scenario, when with a view to eradicate corruption from its core, people of the nation are called upon to leave the attitude of *"Chalta hai"* and to adopt the attitude of *"Badal Sakta hai"* for the inclusive growth of nation, a step forward would surely be a great association in the governments' fight against black money and corruption while establishing transparent governance at an upper end. It is beautifully said that everyone with their core strength hold the sky, then a sky of malicious act would never fall on the good of the people. In this line this Code would be a step forward in acquainting the stakeholders about the deep effect and impact of corruption on the growth of corporates along with the laws to check and regulate the practices of bribery and corruption in the corporates. This would surely advance their proficiencies in assisting the government's initiative towards building a corruption free New India.

"There is no compromise, when it comes to corruption, you have to fight it"

LESSON ROUND-UP

- The detailed position of Laws and Regulations dealing with Corporate Fraud and also aids in achieving forensic audit would be discussed under the following heads:
    1. Indian Laws
    2. Information Technology and Business Laws
    3. International Laws
    4. UK Bribery Act
    5. US Foreign Corrupt Practices Act
    6. ICSI Anti Bribery Code.
- Considering the consequence of corporate frauds on the growth of Corporates and Economy, the Companies Act, 2013 lists down frauds and prescribes penalties and punishments for violations.

- Section 447 of the Companies Act, 2013 often now referred to as one of the draconian provision of the new Act deals with provision relating to punishment for fraud.
- The Companies Act, 2013 has provided punishment for fraud as provided under Section 447 in around 20 sections of the Act e.g. u/s 7(5), 7(6), 8(11), 34, 36, 38(1), 46(5), 56(7), 66(10), 75, 140(5), 206(4), 213, 229, 251(1), 266(1), 339(3), 448 etc. for directors, key managerial personnel, auditors and/or officers of company.
- The new act casts onerous responsibility on the part of statutory auditor/cost auditor/secretarial auditor to report fraud to Board and Central Government.
- Section 143 (15) If any auditor, cost accountant or company secretary in practice do not comply with the provisions of sub-section (12), he shall be punishable with fine which shall not be less than 1 lakh rupees but which may extend to 25 lakh rupees.
- Rule 13 of The Companies (Audit and Auditors) Rules, 2014 contains the operational procedure of Reporting of Fraud prescribed in Section 143(12) of the Act.
- Rule 13(5): The provision of this rule shall also apply, mutatis mutandis, to a cost auditor and a secretarial auditor during the performance of his duties under Section 148 and section 204 respectively.
- Regulation 11 C of the SEBI Act, 1992 empowers the SEBI to direct any person to investigate the affairs of intermediaries or brokers associated with the securities market whose transactions in securities are being dealt with in a manner detrimental to the investors or the securities market.
- Section 33 of the Act empowers the IRDA to direct any person (Investigating Authority) to investigate the affairs of any insurer.
- Section 3 of the Act defines the offence of money laundering as the involvement of a person in any process or activity connected with the proceeds of crime and projecting it as untainted property, where the scope of integrating forensic audits can be clearly seen.
- Major International Laws covering this domain are:
    1. United Nations Convention Against Corruption (UNCAC)
    2. OECD Guidelines for Multinational Enterprises relating to Combating Bribery
    3. The Integrity Pact (IP)
    4. Foreign Corrupt Practices Act, 1977
    5. The United Kingdom Bribery Act, 2010
- Continuing with our deep-rooted perseverance in going hand in hand with the government's initiative towards the practices of good governance and inclusive growth of nation, the Institute is dedicating all its efforts in making India to quit corruption and bribery in its entirety.
- As a step forward in this dedication towards corruption free India, the Institute is recommending 'Corporate Anti-Bribery Code' (The Code) to apprise the stakeholders about the deep effect, impact of corruption on the growth of corporates and the laws to check and regulate the practices of bribery and corruption in the corporates.

TEST YOURSELF

(These are meant for recapitulation only. Answers to these questions are not to be submitted for evaluation)

1. Discuss the Civil Remedies available against Fraud in India
2. Write a brief note on ICSI Anti – Bribery Code.
3. What are provisions in Information Technology to prevent and regulate Corporate Frauds in India?

LIST OF FURTHER READINGS

- **Forensic Audit Decoded**

  Author: G.C. Pipara

  Publishers: Taxmann

- **Forensic Audit**

  Author: CA Kamal Garg

  Publishers: Bharat's