

# **ICS** NIRC-ICSI *Insight*

## NEWSLETTER

**Theme of NIRC-2014: Change, Emerge & Lead**

### National Education Day

– 11th November

To commemorate the Birth  
Anniversary of

### Maulana Abul Kalam Azad

A great freedom fighter,  
eminent educationist  
and the first Education  
Minister of India

“Education is basic to  
the creation of an  
atmosphere in which  
human beings can  
meet one another on  
a plane of  
Friendship and  
Equality”



*"All of the great leaders have had one characteristic in common: it was the willingness to confront unequivocally the major anxiety of their people in their time. This, and not much else, is the essence of leadership."*

– **John Kenneth Galbraith**

Education has become one of the most important things in the life of everyone. Every year 11th November is being celebrated as National Education Day throughout the country to celebrate the Birth Anniversary of Maulana Abul Kalam Azad, the great freedom fighter and first Union Education Minister of Independent India. The objective of celebrating National Education Day is to strengthen educational institutions and to raise the quality of education to greater heights. The development and growth of a country totally depends on the citizens of that country. If the people of the country will be literate and educated, the country will definitely progress. On this occasion, if every member of the Institute takes the responsibility to educate the needy and poor people that will surely result in great contribution in the growth & development of the country. In the same direction, if every member of the Institute understands his/her responsibility to support his/her younger professional colleague and students that will also surely result in great contribution in the growth and development of the profession. Let us join hands and work collectively towards the growth of the country and the profession.

India is one of the top emerging economies of the world, thanks to our deep rooted democratic beliefs, entrepreneurial talent, strong and skilled pool of human resources, well defined regulatory mechanism and the robust domestic demand.

This transformation is not without challenges. It has spelled out new challenges in terms of demand of highest standards of quality and ethical business practices. The professionals may be scientists, engineers, architects, Company Secretaries, lawyers, all have a distinct and definite role to play in converting these challenges into beneficial business opportunities.

Looking into the future – ten or twenty years down the line, things will change in pace with the globalization and growth. The profession of Company Secretaries will also have to keep pace with the demands of the corporates and its stakeholders.

Having said that it is evident that the emerging paradigm is certainly demanding and would be more demanding with the passage of time. It will require the professionals to look beyond traditional and conventional opportunities to focus on a larger canvas in a wider perspective. Value addition and stakeholders' wealth maximization will be the key 'mantras' to sustain the growth momentum in the market place. Multi-tasking and versatile knowledge would be the required skill sets to reach the pinnacle.



Corporates are the major drivers of economic growth and professionals having ample knowledge play important role to impetus the growth. There is no better time than the current days for the profession of Company Secretaries, when the Companies Act, 2013 is in place and plethora of opportunities and recognitions have been given to the Company Secretaries. The Company Secretary is involved into various activities which form vital part of the decision making process such as raising of funds from Indian and international market, merger & amalgamations, cross border transactions, overseas operations, besides the routine jobs.

As a Company Secretary, one must ensure that the Company is fully compliant of all laws and being the Compliance Officer, therefore, huge responsibility lies on the shoulders of Company Secretary. Non-compliance of any transaction, will pose the Company to not only regulatory risk but also to reputational risk. There is need to save the Company from such risks. In addition, there is a need to build and maintain cordial relations with various stakeholders including regulators and other government agencies.

Regular updation of the knowledge base keeping in view the faster changes in the

regulatory regime can only take the Company in the right path. Today's Competitive environment requires the professional to be an achiever and that is possible only by continues hammering. It requires intelligent toil and effective work to achieve the results of highest quality to move the profession ahead. This exercise helps the profession and the members to introspect the various concerning issues.

The regional council has always tried to uphold professional integrity and ethics in all its endeavour towards the development of the profession. NIRC-ICSI is committed towards the students and members to serve them with all means possible. Various initiatives for profession, members in practice, members in employment, students, women professionals, seniors were taken to further the cause of the profession and NIRC-ICSI takes pride in the fact that it will continue to serve the students and members in the days to come.

With best regards,

**NIRC-ICSI**

**COMPANIES ACT 2013: DIRECTORS' REMUNERATION FOR PROFESSIONAL SERVICES\***

– Dr K R Chandratre

**Introduction**

Section 197 of the Companies Act 2013 ('the 2013 Act') contains statutory provisions with regard to remuneration of directors. Subsection (1) of this section provides that the total managerial remuneration payable by a public company, to its directors, including managing director and whole-time director, and its manager in respect of any financial year shall not exceed eleven per cent of the net profits of that company for that financial year computed in the manner laid down in section 198 except that the remuneration of the directors shall not be deducted from the gross profits.

According to the second proviso to subsection (1), except with the approval of the company in general meeting,-

(i) the remuneration payable to any one managing director; or whole-time director or manager shall not exceed five per cent of the net profits of the company and if there is more than one such director remuneration shall not exceed ten per cent of the net profits to all such directors and manager taken together;

(ii) the remuneration payable to directors who are neither managing directors nor whole-time directors shall not exceed,-

(A) one per cent of the net profits of the company, if there is a managing or whole-time director or manager;

(B) three per cent of the net profits in any other case.

Then comes subsection (1) which reads as follows:

(4) The remuneration payable to the directors of a company, including any managing or whole-time director or manager, shall be determined, in accordance with and subject to the provisions of this section, either by the articles of the company, or by a resolution or, if the articles so require, by a special resolution, passed by the company in general meeting and the remuneration payable to a director determined aforesaid shall be inclusive of the remuneration payable to him for the services rendered by him in any other capacity:

Provided that any remuneration for services rendered by any such director in other capacity shall not be so included if-

(a) the services rendered are of a professional nature; and

(b) in the opinion of the Nomination and Remuneration Committee, if the company is covered under sub-section (1) of section 178, or the Board of Directors in other cases, the director possesses the requisite qualification for the practice of the profession."

**Remuneration for services of professional nature**

While s. 197(4) brings within its purview the remuneration payable to any director for services rendered by him "in any capacity", its proviso excludes any remuneration paid to directors for professional services rendered by them to the company. This proviso is analogous to the proviso to subsection (1) of section 309 of the Companies Act 1956 ('the 1956 Act'), which reads as follows:

Provided that any remuneration for services rendered by any such director in any other capacity shall not be so included if-

(a) the services rendered are of a professional nature, and

(b) in the opinion of the Central Government, the director possesses the requisite qualifications for the practice of the profession."

It was stated by the Central Government in respect of the proviso in section 309 of the 1956 Act, that "the benefit of this exception will be available only in respect of those directors who possess requisite qualifications for practising the profession in respect of which they render special services."

The above proviso to s. 197(4) makes it clear that the remuneration for services rendered by a director in any other capacity shall not be included in the remuneration payable to the director in that capacity, provided the services so rendered by him are of a professional nature.

From this proviso it is clear that the remuneration payable to a director for the

\*Views expressed by the Author are solely his own view and the Firm, NIRC or ICSI does not accept any responsibility.

professional services that he renders to the company is entirely outside the purview of the regulatory provisions of s. 197 including the percentage limits stipulated in that section, subject to fulfillment of the two conditions mentioned in it, namely:

- (a) the services rendered are of a professional nature; and
- (b) in the opinion of the Nomination and Remuneration Committee, if the company is covered under sub-section (1) of section 178, or the Board of Directors in other cases, the director possesses the requisite qualification for the practice of the profession.

The words 'if the company is covered under sub-section (1) of section 178' indicate that if a company is not covered under sub-section (1) of section 178, the decision as to the formation of opinion can be taken by the board of directors.

#### Case law under the 1956 Act

On the question whether the remuneration for professional services is remuneration for the purposes and within the meaning of ss. 309 and 310 it is pertinent to take note of a Kerala High Court decision in *R. Gac Electrodes Ltd. & Another v Union of India & others*, (1982) 52 Comp Cas 288, wherein the Government had asked the company to submit Form No.26 for remuneration to be paid to its director for legal services rendered by him to the company. One distinct feature of that case is that the Government had advised the company to do that despite the fact that Government had issued earlier to two other companies a certificate expressing a positive opinion in respect of the same person, without asking for Form No.26.

The learned judge in that case quashed the order of the Government asking the company for an application in Form No.26 and directed to reconsider the matter. In support of his finding that no Form No.26 was necessary, the learned Judge observed that:

"If a director renders professional service not in his capacity as a director and the Central Government certified that he is having the requisite qualifications to practise that profession, the remuneration paid to him for that service will not form part of the managerial remuneration to which he is entitled, and the payment of which is to be limited to the ceiling fixed by section 198. The net result is that the

remuneration for professional service rendered by a director will not be a remuneration to be determined under section 309 in accordance with section 198. Then the further question is whether section 310 which provides for increase of remuneration has anything to do with the payment of remuneration for professional services. The increase can only be an increase of remuneration. As per section 309, the remuneration, payable to a director takes in only managerial remuneration and remuneration for service of a non-professional nature rendered by him in any other capacity, and remuneration the increase for which permission is required under section 310 will take in only the above remuneration. As remuneration for services of a professional nature will not be remuneration determined under section 309(1), the payment of the same to a director will not increase the remuneration he is entitled to under section 309(1). So, it goes without saying that for the payment of remuneration for services of a professional nature no previous sanction of the Central Government is required. So, no Form No.26 application need be filed. What is required is a certificate from the Central Government as insisted by the proviso to section 309(1)".

This question arose before the Bombay High Court in the case of *Ruby Mills Ltd., v Union of India*, [1985] 57 Comp Cas 193. In that case the Government had given its opinion affirmatively, that the director concerned has the requisite qualifications for rendering professional services as a legal adviser. However, the opinion was given subject to the condition that if any payment was to be made to the director for this professional services, it should be subject to prior approval of the Government under s. 310 of the Act. His lordship Pratap J. held that there was no legal warrant or justification for imposing the said condition as it in effect sought to include, albeit indirectly, professional fees in 'remuneration' though the same stand directly excluded therefrom by virtue of the Government's affirmative opinion. The condition also runs contrary to the fair and just compliance of s. 309(1) and the proviso thereto and virtually negates the intended consequence of the opinion in question and, in the process, renders the same infructuous and ineffective. The learned judge also observed that the fulfilment of the conditions attracting the legislative exception embodied in the proviso to s. 309 frees the company as also the

qualified professional (who is also a director) from the statutory control over managerial remuneration or remuneration by virtue of ss. 198, 309 and 310 of the Act.

It may be mentioned that in view of the finding of the Kerala High Court in the case cited above, that remuneration for professional services is not a remuneration within the meaning and purview of ss. 198, 309 and 310, neither the guidelines on managerial, remuneration issued by the Government, nor the provisions of s. 637AA could apply to such case. Also, section 637A could not be invoked by the Government while expressing an opinion or issuing a certificate setting out the opinion. Therefore, no conditions, limitations or restrictions could be stipulated by the Government in issuing such certificate of opinion.

There is nothing in s. 309 of the Act, which empowers the Central Government to restrict the remuneration payable to a director for services rendered by him in a professional capacity or to impose a condition that any payment of remuneration for services of professional nature should be subject to a prior approval under s. 310. Once the Central Government is satisfied that the director possessed the requisite qualifications to render professional services, it is not permissible for the Central Government to put any restriction on the remuneration payable to him by the company in respect of the professional services.

It is not material, where a director renders professional services to the company, whether the consultation charges which are paid to him are paid on a monthly basis or on a case to case basis. Whatever may be the mode of payment to a professional consultant, what is paid to such person is his professional consultancy fee.

The proviso enables a company to seek the opinion of the Central Government regarding possession of requisite qualifications. It is necessary and incumbent upon the Central Government, indeed, it is its duty to express an opinion thereon. The Central Government cannot sidetrack the issue by requiring compliance with another provision, or any other aspect of the company law as a pre-condition to the expression of opinion by it.

#### Meaning of 'profession' and 'professional'

**As noted above, the crux of the matter is the meaning of the undefined term 'profession'. In the two clauses of the proviso the expressions 'professional' and 'profession' are used. Neither of these expressions is defined nor is it capable of being defined precisely.**

The ordinary meaning of 'profession' as per various dictionaries is as follows:

- a type of job that needs special training or skill, especially one that needs a high level of education, such as the medical/legal/teaching, etc. profession
- a calling requiring specialized knowledge and often long and intensive academic preparation;
- a vocation requiring advanced education and training;
- a vocation requiring knowledge of some department of learning or science;
- occupation, especially one involving training and a formal qualification;
- An occupation, such as law, medicine, or engineering, that requires considerable training and specialized study;
- a type of job that needs special training or skill, especially one that needs a high level of education.

The ordinary meaning of 'professional' as per various dictionaries is as follows:

- of, relating to, or characteristic of a profession b : engaged in one of the learned professions;
- following an occupation as a means of livelihood or for gain;
- of, pertaining to, or connected with a profession; appropriate to a profession;
- engaged in one of the learned professions;
- connected with a job requiring advanced education and special training;
- very well trained and showing high standards of work;
- doing an activity, sport etc to earn money, rather than for pleasure;
- connected with a job that needs special training or skill, especially one that needs a high level of education;
- someone who belongs to a learned profession or whose occupation requires a high level of training and proficiency;

- someone who does a job requiring advanced education and special training;
- someone who is very experienced, has a lot of knowledge, and does things very skillfully;
- someone who earns money doing a job, sport etc that other people do for pleasure :
- relating to or belonging to a profession; worthy of a professional person; skilful or competent; engaged in an activity as a paid occupation rather than as an amateur;
- (about people) having a job which needs special training and a high level of education.

Professional service is a service requiring specialized knowledge and skill usually of mental or intellectual nature and usually requiring a licence, certification or registration.

According to Kohlar's Dictionary of Accountancy, "profession is a vocation

- (a) generally recognised by universities and colleges as requiring special training leading to a degree distinct from the usual degree in arts and sciences,
- (b) requiring principally mental rather than manual or artistic labour and skill for its successful prosecution,
- (c) recognising the duty of public service, and (d) having a code of ethics generally accepted as binding on its members". A profession in short is an occupation in which a person professes to be skilled or has a professed knowledge of some department of learning or science or the practice of an art founded upon it.

Analytically considered, the attributes which characterise a profession are the application of an intellectual technique to one or other aspects of the affairs of life. Originally, teaching law and medicine were the chief professions, but with the increasing complexity of our social organisation, newer intellectual techniques have been evolving leading to the growth of newer professions such as engineering, journalism, accountancy, banking etc. And in the U.S.A. and other industrially advanced countries intellectual techniques are already being evolved in relation to business management, thus bringing it also to the level of a profession.

In the case of a profession the emphasis is more on service than on profit and in the case of a learned profession the emphasis is solely on service, irrespective of profit, while the dominant motive in

the case of business and finance is the making of pecuniary gain. In the ethical Code of the American Bar Association it is stated "A profession has for its prime object the service it can render to humanity, reward or financial gain being a subordinate consideration".

An activity to be a profession must be one carried on by an individual by his personal skill, intelligence and an individual by his personal skill, intelligence and dependent on individual characteristics.

'Profession' means an occupation carried on by a person by virtue of his personal and specialised qualifications, training or skill.

A profession ordinarily is an occupation requiring intellectual skill, often coupled with manual skill. Thus a teacher uses purely intellectual skill while a painter uses both. In any event, they are not engaged in an occupation in which employers and employees cooperate in the production or sale of commodities or arrangement for their production or sale or distribution and their services cannot be described as material services.

As was said in Carr v Inland Revenue Commissioners, it seems to be dangerous to try to define the word "profession". In the same case it was held that the appellant who was a fully qualified optician (a Member of the National Association of Opticians and the Joint Council of Qualified Opticians) was carrying on a profession.

In P. Stanwill and Co. v Commissioner of Income Tax, the assessee firm was an old firm of auctioneers and the partners thereof had acquired considerable experience in this line; one of them was a qualified engineer which enabled him to do the work of valuing the property and carrying on the business more efficiently than it could be carried on by any person not so qualified. The firm was held to have been engaged in the auctioneer's profession.

Rowlatt, J, in Christopher Barker & Sons v Inland Revenue Commissioners said that, "every business man has to use skill and ability in the conduct of his business and therefore, those qualities are not distinguishing marks of a profession. All professions are businesses, but all businesses are not professions, and it is only some businesses which are taken out of the operation of the section, namely, those are professions, the profits of which are dependent mainly upon personal qualifications and

in which no capital expenditure is required or only capital expenditure of a comparatively small amount."

It is of the essence of a profession that the profits should be dependent mainly upon the personal qualifications of the person by whom it is carried on.

Scrutton, LJ, in *Commissioners of Inland Revenue v Maxse* attempted, though with considerable diffidence, to define what is a "profession" and said:

"I am very reluctant finally to propound a comprehensive definition. A set of facts not present to the mind of the judicial propounder, and not raised in the case before him, may immediately arise to confound his proposition. But it seems to me, as at present advised, that a 'profession' in the present use of language involves the idea of an occupation requiring either purely intellectual skill or if any manual skill, as in painting and sculpture, or surgery, skill controlled by the intellectual skill of the operator, as distinguished from an occupation which is substantially the production, or sale, or arrangements for the production or sale of commodities. The line of demarcation may vary from time to time. The word 'profession' used to be confined to the three learned professions - Ministry, Medicine and Law. It has now, I think, a wider meaning."

In *Currie v Commissioners of Inland Revenue* Lord Sterndale, M.R., pointed out that "whether a man was carrying on a 'profession' or a 'business' depended upon the circumstances of the case and there might be circumstances in which nobody could arrive at any other conclusion than that what the man was doing was carrying on a profession; and therefore, looking at the matter from the point of view of a judge directing a jury, the judge would be bound to direct them that on the facts they could only find that he was carrying on a profession. That reduces it to a question of law. On the other hand, there might be facts on which the direction would have to be given the other way. But between those two extremes there was a very large tract of country in which the matter became a question of degree; and where that was the case the question was undoubtedly, in his opinion, one of fact; and if the Commissioners came to a conclusion of fact without having applied any wrong principle, then their decision was final upon the matter."

A certain amount of skill and knowledge is required in every business; in a profession it is required in a large degree though that may not be the sole criterion for judging whether a particular business is a profession or not.

If we draw a distinction between occupation and profession we can see that an occupation is a principal activity (job, work or calling) that earns money (regular wage or salary) for a person and a profession is an occupation that requires extensive training and the study and mastery of specialized knowledge, and usually has a professional association, ethical code and process of certification or licensing. Classically, there were only three professions: ministry, medicine and law. These three professions each hold to a specific code of ethics, and members are almost universally required to swear some form of oath to uphold those ethics, therefore "profession" to a higher standard of accountability. Each of these professions also provides and requires extensive training in the meaning, value and importance of its particular oath in the practice of that profession. A member of a profession is termed a professional. However, professional is also used for the acceptance of payment for an activity. Also a profession can also refer to any activity from which one earns one's living, so in that sense sport is a profession. In this case, a legal assistant working in a company was held to be a professional. The Supreme Court observed:

"Furthermore if we draw a distinction between occupation and profession we can see that an occupation is a principal activity (job, work or calling) that earns money (regular wage or salary) for a person and a profession is an occupation that requires extensive training and the study and mastery of specialized knowledge, and usually has a professional association, ethical code and process of certification or licensing. Classically, there were only three professions: ministry, medicine, and law. These three professions each hold to a specific code of ethics, and members are almost universally required to swear some form of oath to uphold those ethics, therefore "professing" to a higher standard of accountability. Each of these professions also provides and requires extensive training in the meaning, value, and importance of its particular oath in the practice of that profession. A member of a profession is termed a professional. However,

professional is also used for the acceptance of payment for an activity. Also a profession can also refer to any activity from which one earns one's living, so in that sense sport is a profession."

In *Bhim Sain v Government of NCT of Delhi* 2014 Lab IC 2067, The Delhi High Court that a legal assistant assisting (working in a company or other organization) and advocates in court matters and supervising court cases was a professional.

In *Sonepat Co-operative Sugar Mills Ltd. v. Ajit Singh* (2005) 3 SCC 232, the respondent was appointed to the post of Legal Assistant the qualification for which was degree in law with a practicing licence. The nature of his duties was to prepare written statements and notices, recording enquiry proceedings, giving opinions to the management, drafting, filing the pleadings and representing the appellant in all types of cases. He was also conducting departmental enquiries against workmen in the establishment. He was placed in probation and his post was dispensed with, following which he was terminated. He raised an industrial dispute. The question before the Labour Court was whether the applicant was a workman. The Supreme Court held:

"Thus, a person who performs one or the other jobs mentioned in the aforementioned provisions only would come within the purview of the definition of workman. The job of a clerk ordinarily implies stereotype work without power of control or dignity or initiative or creativeness. The question as to whether the employee has been performing a clerical work or not is required to be determined upon arriving at a finding as regards the dominant nature thereof. With a view to give effect to the expression to do 'any manual, unskilled, skilled, technical, operational, clerical or supervisory work', the job of the employee concerned must fall within one or the other category thereof. It would not be correct to contend that merely because the employee had not been performing any managerial or supervisory duties, ipso facto he would be a workman. ...The Respondent had not been performing any stereotype job. His job involved creativity. He not only used to render legal opinion on a subject but also used to draft pleadings on behalf of the appellant as also represent it before various courts/authorities. He would also discharge quasi-judicial functions as an enquiry officer in departmental enquiries against

workmen. Such a job, in our considered opinion, would not make him a workman."

In *Stup Consultants Ltd. v Union of India & Another* [1987] 61 Comp Cas 784 (Del), the Delhi High Court stated in the context of the proviso to section 309(1) of the Companies Act 1956 that there is no difference between the "professional" services being rendered by a solicitor or a lawyer and the "professional" services rendered by a civil engineer, as consultant of the company.

A doctor is a professional and not a workman under the Industrial Disputes Act 1947.

#### Applicability of section 188 and clause 49

When a company opts for payment of remuneration to a director in terms of the proviso to subsection (4) of section 197, it would attract the provisions of section 188 because, firstly, a director is a related party under the definition in section 2(76), and secondly, clauses (d) [availing or rendering of any services] and (f) [related party's appointment to any office or place of profit in the company, its subsidiary company or associate company] would be attracted.

However the company can take advantage of the exception under the third proviso to subsection (1), namely any transaction entered into by the company in its ordinary course of business other than transactions which are not on an arm's length basis. The fact the services rendered by the director to the company are relevant and useful to the company's business would make the services availed of in the ordinary course of business, and if the remuneration is at arm's length having regard to all relevant factors (including the director's qualifications, experience and expertise). The committee or the board of directors should address this aspect of the matter and take a conscientious decision. Once the committee/board reaches such decision, the case would stand excluded from section 188 and no compliance with the requirements under the section would be necessary.

Under clause 49.VII.D and E, all Related Party Transactions shall require prior approval of the Audit Committee, and all material Related Party Transactions shall require approval of the shareholders through special resolution and the related parties shall abstain from voting on such resolutions.

A transaction is a 'material Related Party Transaction' if the transaction or transactions to be entered into individually or taken together with previous transactions during a financial year exceeds ten percent of the annual consolidated turnover of the company as per the last audited financial statements of the company.

#### **Applicability of section 149 and clause 49**

The relevant provisions of section 149 are as follows:

"(6) An independent director in relation to a Company, means a director other than a managing director or a whole-time director or a nominee director, -

(a).....

(b)(ii) who is not related to promoters or directors in the Company, its holding, subsidiary or associate Company.

(c) who has or had no pecuniary relationship with the Company, its holding, subsidiary or associate Company, or their promoters, or directors, during the two immediately preceding financial years or during the current financial year."

Section 149(6)(c) disqualifies a person who has or had pecuniary relationship with the company, its holding, subsidiary or associate company, or their promoters, or directors, during the two immediately preceding financial years or during the current financial year. The expression 'pecuniary relationship' has not been defined in the Companies Act 2013. It is a well-settled principle of interpretation that a word or expression used but not defined in a statutory provision must be interpreted according to its ordinary, natural meaning.

The term 'pecuniary' means, relating to or connected with money, or monetary; consisting of or given or exacted in money or monetary payments. Thus, a relationship or transaction that does not involve any monetary advantage or profit or that cannot be measured in money terms will not disqualify a person from being treated as an independent director.

Although clause (c) of subsection (6) does not provide for any exception and it is an absolute disqualification, the scope of the expression 'pecuniary relationship' must be interpreted having regard to the object of the provision. In my opinion, what clause (c) contemplates is that there must exist a relationship arising out of some contract or arrangement between the company and the director under which the company pays the director some money or provides some benefit or amenity and which creates a pecuniary relationship between them that results adversely affecting independence of the director or makes him a subservient person doing things and exercising powers as a director according to the wishes of the promoters rather than upholding and safeguarding the company's interests. In other words, pecuniary relationship renders him obedient or submissive to promoters' wishes and subordinate the company's interests to that of the promoters. This adversely affects his ability to take independent view and exercise unbiased judgment.

It appears that remuneration paid to a director would constitute 'pecuniary relationship' and make him ineligible for being treated as an independent director.

According to clause 49.II.B.(c), a director who has or had no pecuniary relationship with the company, its holding, subsidiary or associate company, or their promoters, or directors, during the two immediately preceding financial years or during the current financial year (except by way of director's remuneration), is not qualified to be treated as an independent director. Whether the remuneration paid to a director for professional services in terms of section 197 can be considered to be a director's remuneration is a crucial question. Since such remuneration is payable in terms of section 197 of the 2013 Act only to a director subject to satisfaction certain conditions, it would seem that such remuneration is a director's remuneration and hence stands exempted under clause 49.II.B.(c).

### **CHAPTERS OF NIRC-ICSI**

Agra, Ajmer, Allahabad, Alwar, Amritsar, Bareilly, Bhilwara, Chandigarh, Dehradun, Faridabad, Ghaziabad, Gurgaon, Jaipur, Jalandhar, Jammu, Jodhpur, Kanpur, Karnal-Panipat, Kota, Lucknow, Ludhiana, Meerut, Modinagar, Noida, Shimla, Sonapat, Srinagar, Udaipur, Varanasi & Yamuna Nagar.

## LLP AN EMERGING CONCEPT IN INDIA \*

– Akshi Gandhi

One hugely popular and highly preferred category of entity for doing business in almost all economic sectors in the majority of the countries worldwide, is the limited liability company (LLC), along with the private and public limited corporations. In India and many other countries, these limited liability companies are better known as the Limited Liability Partnerships (LLPs). This long-awaited form of a company was introduced to the Indian corporate world in April 2009, through the innovative LLP Act of 2008. This unique form of legally recognized corporate entity integrates the features of both the limited corporations and the traditional partnership firms. As it is a unique hybrid combination of a limited company and a partnership, this LLP is especially suitable for small to medium-sized business or professional enterprises

### CONCEPT OF LLP

The Limited Liability Partnership (LLP) is viewed as an alternative corporate business vehicle that provides the benefits of limited liability but allows its members the flexibility of organizing their internal structure as a partnership based on a mutually arrived agreement. A LLP combines the advantages of both the Company and Partnership into a single form of organization.

### Salient features of the Limited Liability Partnership form of business organization are listed as follows:

1. LLP is a Body Corporate. It is a Legal entity separate from its partners with perpetual succession.
2. Can own assets in its name, sue and be sued.
3. Name to contain 'Limited Liability Partnership' or 'LLP' as suffix.
4. One partner is not responsible or liable for another partner's misconduct or negligence.
5. Liability of the partners is limited to their agreed contribution in the LLP except in case of fraud.
6. Partner may lend money to and transact other business with LLP.
7. Any individual or body corporate can be a partner.
8. Minimum of 2 partners and no maximum
9. Minimum 2 individuals as Designated Partners, of whom at least one shall be resident in India.

10. Every Designated Partners must obtain Designated Partner Identification Number (DPIN) from the Central Government. In case you already have a DIN (Director Identification Number), the same can be used as a DPIN.

11. The mutual rights and duties of the partners of LLP and the mutual rights and duties of LLP and its partners shall be governed by LLP agreement between the partners or between LLP and its partners. In the absence of such agreement, relationship of Partners and LLP would be governed as per Schedule 1 of LLP Act, 2008.

12. A Statement of Accounts and Solvency (SAS) to be prepared within 6 months from each Financial Year

13. Annual Return of LLP must be filed with Registrar of LLP

14. Audit of the accounts is required only if the contribution exceeds Rs. 40 lakhs or annual turnover exceeds Rs.1crore.

15. Multi Disciplinary Professional LLP can be formed

16. Applicability of Companies Act, 1956 will be directed by Central Government by notification in Official Gazette.

### PARTNERS IN RELATION TO A LIMITED LIABILITY PARTNERSHIP

"Partner", in relation to a limited liability partnership, means any person who has been admitted as a partner in the limited liability partnership in accordance with the limited liability partnership agreement [Section 2(1) (q) of the Limited Liability Partnership Act, 2008]. An individual or a body corporate may become a Partner in a Limited Liability Partnership. [Section 5 of the Limited Liability Partnership Act, 2008] Proviso to Section 5 specifies the disqualifications that will prevent an individual from becoming a Partner.

Accordingly, an individual shall not be capable of becoming a partner of a limited liability partnership, if-

- (a) He has been found to be of unsound mind by a Court of competent jurisdiction and the finding is in force;
- (b) He is an undischarged insolvent; or

\*Views expressed by the Author are solely his own view and the Firm, NIRC or ICSI does not accept any responsibility.

(c) He has applied to be adjudicated as an insolvent and his application is pending.

The LLP Act, 2008 has not specified the qualifications to be a partner but has specified the above three disqualifications in respect of an individual. Minimum number of partners in the Limited Liability Partnership is stipulated as two by Section 6 (1) of Limited Liability Partnership Act 2008. In case the minimum number of partners is reduced below two and the LLP carries on Business for more than 6 months, then such sole partner with whom business is carried on, if he has knowledge of such fact, shall be personally liable for obligations of LLP during that period [Section 6(2)].

### FORMATION OF LIMITED LIABILITY PARTNERSHIP

The process for incorporating a LLP is as follows:

#### STEP 1: APPLY FOR DIN 1

- All the designated partners shall obtain Designated Partner Identification Number (DPIN), DPIN is an eight digit numeric number allotted by the Central Government in order to identify a particular partner.
- The application for allotment of DPIN shall be made online in (E-Form 7)

#### STEP 2: APPLICATION FOR APPROVAL OF NAME TO GOVERNMENT

- The name with which LLP is to be incorporated is to be decided
- The registrar will approve the name applied for provided the name is not either undesirable in the opinion of the Central Government or that is identical with or that which too nearly resembles to the name of any existing partnership firm or a LLP or a body corporate or a trade mark registered or pending registration under the Trade Marks Act, 1999.
- Application shall be made in (E-Form 1) for the availability of the proposed name with the Registrar
- Applicable fees have to be paid by credit card.
- The name approved shall be available for adoption for a period of 3 months.

#### STEP 3: VERIFICATION OF DOCUMENTS AND FORMS BY THE GOVERNMENT

#### STEP 4: FILING OF INCORPORATION DOCUMENT AND SUBSCRIPTION STATEMENT

Incorporation documents must be filed with the Registrar in (E-Form 2) with the following attachments.

1. Copy of authorization, where the partner is a limited liability partnership, or company, or a limited liability partnership incorporated outside India or a company incorporated outside India.
2. Proof of address of registered office of limited liability partnership.
3. Details in respect of names of partners/witnesses and their signatures.
4. Attachments in respect of details of individuals/bodies corporate where the number exceeds five.
5. In-cooperation documents & Subscription statements.
6. Optional attachments as may be required.

#### STEP 4: CERTIFICATE OF INCORPORATION

After the Registrar is satisfied that all the formalities with respect to the incorporation has been complied, he will issue a Certificate of Incorporation as to formation of the LLP within maximum of 14 days from date of filing of documents. The Certificate of Incorporation issued shall be the conclusive evidence of formation of the LLP.

#### STEP 5: DRAFTING OF LLP AGREEMENT

Thereafter Limited Liability Partnership Agreement governing the mutual rights and duties among the partners and among the LLP and its partners is to be prepared which contains:

- Name of the LLP
- Name of Partners & Designated Partners
- Manner of contribution
- Profit/Loss Sharing ratio between partners
- Rights & Duties and obligations of Partners
- Proposed Business of LLP
- Rules for governing the conduct of operations of LLP

In case no agreement is entered into, the rights & duties as prescribed under Schedule I to the LLP Act shall be applicable.

#### STEP 6: FILING OF LLP AGREEMENT

LLP agreement must be filed in (E-Form 3) with the Registrar. This form must be filed within 30 days of incorporation.

### STEP 7: APPROVAL OF FORM 3:

After verification by the government and satisfied by it, it approves LLP agreement. This is the last step of LLP incorporation. The company can start its business now onward.

### LIMITATION OF LIABILITY

A limited liability partnership is not bound by anything done by a partner in dealing with a person if--

- a.) the partner in fact has no authority to act for the limited liability partnership in doing a particular act; and
- b.) the person knows that he has no authority or does not know or believe him to be a partner of the LLP

The LLP is liable if a partner of the LLP is liable to any person as a result of the wrongful act or omission on his part in the course of the business of the LLP or with its authority. The LLP will have unlimited liability when any activity is carried out with intent to defraud creditors of the limited liability partnership or any other person, or for any fraudulent purpose, unless it is proved that such acts were without the knowledge or authority of the LLP. An obligation of the LLP whether arising in contract or otherwise, is solely the obligation of LLP. The liabilities of the limited liability partnership shall be met out of the property of the limited liability partnership. Every partner is an agent of LLP and not of other partners. Partner is not personally liable and the liabilities of LLP will be met out of the property of LLP. Partner is personally liable for his own wrongful act or omission and not that of other partners.

### WINDING UP & DISSOLUTION OF LLP'S

- Winding up is process, where all the assets of the business are disposed off to meet the liabilities of the same and surplus any, is distributed among the owners.
- Winding up of a LLP may be of two kinds - voluntary or by tribunal and limited liability partnership, so wound up may be dissolved
- The LLP (Winding up and Dissolution) Rules shall govern the procedure and proceedings for winding up and dissolution of a LLP
- Under the voluntary winding up, the partners may among themselves decide to be wound up

- A LLP may be compulsorily wound up by the Tribunal on the happening of any of the events specified under clause (a) to (f) of Section 64 of the LLP Act -

- o If the limited liability partnership decides that the limited liability partnership be wound up by the Tribunal
- o If, for a period of more than six months, the number of partners of the limited liability partnership is reduced below two
- o If the limited liability partnership is unable to pay its debts
- o If the limited liability partnership has acted against the interests of the sovereignty and integrity of India, the security of the State or public order
- o If the limited liability partnership has made a default in filing with the Registrar the Statement of Account and Solvency or annual return for any five consecutive financial years
- o If the Tribunal is of the opinion that it is just and equitable that the limited liability partnership be wound up

### FOREIGN DIRECT INVESTMENT (FDI) IN LLP

The Cabinet Committee of Economic Affairs (CCEA) approved Foreign Direct Investment (FDI) in LLP on 11th May, 2011. Foreign Investment is allowed in LLP only with Foreign Investment Promotion Board (FIPB) Approval. Under FDI Policy, Foreign Investment in Limited Liability Partnership is allowed with specific approval of the Government. However, FDI in LLPs is allowed only under those sectors where 100% FDI is otherwise allowed under automatic route and subject to other specified conditions.

### Foreign Director Investment allowed in Limited Liability Partnerships (LLPs), subject to following conditions:

- A. PERSONS ELIGIBLE - A person resident outside India (PROI) or an entity incorporated
- B. PERSONS NOT ELIGIBLE
  - Citizen/entity of Pakistan and Bangladesh or
  - SEBI registered Foreign Institutional Investor (FII) or
  - SEBI registered Foreign Venture Capital Investor (FVCI) or
  - SEBI registered Qualified Foreign Investor (QFI) or

- SEBI registered Foreign Portfolio Investor
- C. CONDITIONS FOR LLP TO ACCEPT FDI
- All LLPs operating in sector/activities where 100% FDI is allowed under Automatic Route are eligible.
  - All the LLPS engaged in the followings sectors are not allowed to accept FDI:
    - a) Sectors eligible to accept 100% FDI under automatic route but are subject to FDI-linked performance related conditions
    - b) Sectors eligible to accept less than 100% FDI under automatic route
    - c) Sectors eligible to accept FDI under Government Approval route
    - d) Agricultural/plantation activity & print media
    - e) Prohibited sectors/activities
- D. ELIGIBLE INVESTMENT - Amount contributed in the capital of LLP would be an eligible investment.

Note: Investment by way of 'profit share' will fall under the category of reinvestment of earnings. Any kind (direct or indirect) of FDI in LLP will require prior Government/FIPB approval.

- E. PRICING OF INVESTMENT/TRANSFER
- FDI in an LLP shall be at a price more than or equal to the fair price as worked out with any valuation norm which is internationally accepted. A valuation certificate has to be issued by a Chartered Accountant or by a practicing Cost Accountant or by an approved valuer from the panel maintained by the Central Government.
  - Transfer of capital contribution/profit share from resident to non-resident- To be at a consideration equal to or more than the fair price of capital contribution/profit share of an LLP
  - Transfer of capital contribution/profit share from non- resident to a resident- To be at a consideration which is less than or equal to the fair price of the capital contribution/profit share of an LLP.

F. MODE OF PAYMENT- Consideration can only be in cash through either:-

- Normal banking channels; or
  - Debit to NRE/FCNR (B) account of the person concerned, maintained with an AD Category - I bank.
- G. REPORTING OF FDI BY LLPS
- LLPs shall submit Form FOREIGN DIRECT INVESTMENT-LLP(I), together with a copy of FIRC, Valuation Certificate and KYC report to concerned Regional Office of RBI through an AD Category - I bank within 30 days from the date of receipt of the inward remittance.
  - AD Bank should get the KYC report of the foreign investor from the overseas bank.
  - Disinvestment / transfer of capital contribution or profit share between a resident and a non-resident (or vice versa) shall be reported within 60 days from the date of receipt of funds in Form FOREIGN DIRECT INVESTMENT-LLP(II).

- H. DOWNSTREAM INVESTMENT IN LLP
- An Indian company, having foreign investment can make downstream investment in LLP only if both are operating in sectors where 100% FDI is allowed under the automatic route, having no FDI-linked performance related conditions.
  - LLP with FDI can't make any downstream investments in any entity in India.

- I. OTHER CONDITIONS TO BE COMPLIED BY LLP
- LLP having body corporate as Designated Partner, can accept FDI only if that body corporate is a Company registered under Companies Act. Also, Nominee of that Company should satisfy the residential status as per FEMA, 1999.
  - Designated partners will be responsible for all the aforementioned compliances and also liable for all penalties imposed on the LLP for their contravention.
  - Company with FDI can convert into LLP only if all the aforementioned conditions (except mode of payment) are met and with the prior approval of FIPB/Government.
  - LLPs are not permitted to avail External Commercial Borrowings (ECBs).

**WHETHER COMPANIES ARE WHITE ELEPHANT, HOW TO SAVE COST?\***

– Divesh Goyal

Many things are easier to get into than out of. Companies are in that list - it is easy to form them, but difficult to demolish. It is quite common for entities to form companies that were formed for a once-conceived business, but that never took off and therefore, the company remains unused. Or it may be that the business ceased quite some time back and the company is lying like a non working company over the years. This is what is known as "defunct company".

After commencement of Companies Act, 2013 from 01st April, 2014 compliance requirement of Companies has been increased. Therefore it's difficult for the Non-working Private Company to continue with Status of Active Company, because maintenance of company is expensive under companies Act, 2013 comparison to Companies Act, 1956.

If the companies are non-working than Companies two options to save cost:

1. Strike off Company (Under Section-560 of Companies Act, 1956 with FTE scheme)
2. Get Dormant Status of Company (Under Section-455 of Companies Act-2013).

**Definitions:**

**Fast Track Exit:** Fast Track Exit mode is introduced by Ministry of Corporate Affairs for giving opportunity to non-operating companies for getting their names struck off from the records of Ministry of Corporate Affairs. Fast Track Exit mode is an easy mode of closing non-operating companies at cheaper cost with lesser formalities under section 560.

**Dormant Company:** Section-455 of Companies Act, 2013 talks about a New Provision Calls "DORMANT COMPANY". This concept was not there in Companies Act, 2013. Another Name of this concept by Professionals is "ASSET SHIELDING CONCEPT UNDER COMPANIES ACT 2013". A Dormant Company offers excellent advantage to the promoters who want to hold an asset or intellectual property under the corporate shield for its usage at a later stage.

**Checks for FTE:** This scheme come into force by circular No. 36/2011 dated: 07th June, 2011. This scheme is effective from 03rd July, 2011.

- A. Company has not commenced any business activity or operation since incorporation; or
- B. Company is not carrying over any business activity or operation for last one year before making the application of FTE.
- C. Assets & Liabilities of company are nil.

D. Documents require for FTE & require to attach in form:

- i. An affidavit (on Stamp Paper as per Stamp Act of State and duly notarized) from the all director (Mentioned company has not carried on any business since incorporation or that the company did some business for a period up to a date and then discontinued its operations, as the case may, be)
- ii. An Indemnity Bond (on Stamp Paper as per Stamp Act of State and duly notarized), duly notarized by every director (Mentioned any losses, claim and liabilities on the company, will be met in full by every director)
- iii. A Statement of Account as on date not prior to more than one month preceding the date of filling of application in Form FTE, duly certified by Statutory Auditor or Chartered Accountant Whole time Practice.
- iv. Copy of Board Resolution authorizing directors to file application

**Procedure for FTE:** After above mention checks and preparation of above mentioned documents company can apply for FTE with ROC.

- A. A Company eligible to apply for striking off its name needs to apply to Registrar of Companies in Form FTE.
- B. The Form FTE, should be filed electronically on the Ministry of Corporate Affairs portal namely [www.mca.gov.in](http://www.mca.gov.in) and by making payment of Rs. 5000/- as the ROC fees;
- C. Form FTE, shall be certified by a Chartered Accountant in whole time practice or Company Secretary in whole time practice or Cost Accountant in whole time practice;
- D. The Registrar of companies shall put the name of applicant(s) and date of making the application(s) under Fast Track Exit mode, on daily basis, on the MCA portal [www.mca.gov.in](http://www.mca.gov.in), giving thirty days time for raising objection, if any, by the stakeholders to the concerned Registrar;
- E. The Registrar of Companies immediately after passing of time given in above Para and on being satisfied that the case is otherwise in order, shall strike its name off the Register and shall send notice under Section 560(5) of the Companies Act, 1956 for publication in the Official Gazette and the applicant company under this Scheme shall stand dissolved from the date of publication of the notice in the Official Gazette.

*\*Views expressed by the Author are solely his own view and the Firm, NIRC or ICSI does not accept any responsibility.*

**Few other Checks for FTE:** Get the complete scheme on [http://www.mca.gov.in/Ministry/pdf/Circular\\_36-2011\\_07jun2011.pdf](http://www.mca.gov.in/Ministry/pdf/Circular_36-2011_07jun2011.pdf)

1. Any defunct company (Described below) which has active status or identified as dormant by the Ministry of Corporate Affairs, may apply for getting its name struck off from the Register of Companies.
2. Any defunct company which is a Government company is to submit a 'No Objection Certificate' issued by concerned administrative Ministry or Department or State Government along with the application.
3. In case of foreign nationals and NRIs, indemnity bond and affidavit may be notarized as per the respective country's law.
4. Litigation: Fast track exit mode does not mention anywhere that a Company against which litigation is pending cannot apply for striking off the name of the Company from the Register maintained by the ROC. Hence, a Company against which litigation is pending can apply under fast track mode. Further, details of pending litigations are required to be filled up in e-form FTE which has a reference in affidavit format too. Any pending litigations involving the company should be disclosed while applying under this Scheme;
5. NOC is not required from Income Tax / Sales Tax / Central Excise / other Govt authorities. But all directors need to confirm that there are no dues pending against Company with any such authorities. And MCA will send letter confirming that Income Tax has no objection for striking off the name of the said Company.

**Defunct Company:** For the purpose of the scheme "defunct company" shall mean a company which has-

- Nil asset and nil liability
- Not commenced any business or activity since incorporation
- Not been carrying any business operation since last one year before making an application under Fast Track Exit Scheme.

**FAQ'S of FTE:**

1. The defaulting companies can apply under FTE.

**Sol:** Defaulting companies are identified as companies which have not filed their statutory documents, i.e. balance sheet and annual return for any of the financial year 2006-07, 2007-08, 2009-10, 2010-2011, 2011-2012, 2012-2013, and 2013-2014. Directors of such defaulting companies are debarred from filing any document until the default is made good. Such defaulting companies can apply under FTE.

2. How to Apply for FTE?

**Sol:** Any defunct company desirous of getting its name strike off the Register under Section 560 of the Companies Act, 1956 shall make an application in the Form FTE, annexed electronically on the Ministry of Corporate

Affairs portal namely [www.mca.gov.in](http://www.mca.gov.in) accompanied by filing fee of C 5,000/-;

3. Which Companies cannot apply under fast track exit mode?

**Sol:** Following Companies cannot apply under fast track exit mode:-

- Listed Companies
- De-listed Companies due to non-compliance of Listing Agreement or any other statutory Laws
- Section 25 Companies
- Vanishing companies
- Companies where investigation / inspection ordered and yet to be taken up or pending
- Companies where order u/s 234 has been issued by ROC and reply is pending
- Companies where prosecution for a non-compoundable offence is pending in court
- Companies accepted deposits which are outstanding or default in repayment
- Company having secured loan
- Company having management dispute
- Company for which filing of docs have been stayed by court or CLB or CG or any other competent authority
- Company having dues of Income tax / sales tax / central excise / banks / financial institutions / CG / SG / other local authorities
- Companies not having active / dormant status on MCA portal

4. Can an inoperative company with assets and liabilities apply under FTE?

**Sol:** The FTE scheme talks about a defunct company to mean a company with nil asset and nil liability. Though proviso (a) to section 560 (5) states that liability, if any of the director shall continue, but the scheme deals with a defunct company with nil asset and nil liability. This reflects that zero asset-liability is a condition precedent to the application under the present scheme.

**Dormant Company:** This Cover under Section-455 of Companies Act, 2013 comes into effect from 01st April, 2014.

Lets emphasis on Definition of Dormant Company:

Dormant Company means a company

1. If a company is formed and registered under the Act for a future project and has no significant accounting transaction or
2. If a company is formed and registered under the Act to hold assets and has no significant accounting transaction or
3. If a company is formed and registered under the Act for Intellectual property and has no significant accounting transaction such a company OR

4. An Inactive company may make an application in such manner as may be prescribed for obtaining the status of dormant company.

**Now Let's Discuss Inactive Company:**

Inactive company means a company which:

- has not been Carrying on Any Business, or
- has not been Carrying on operation or
- has not made any Significant Accounting Transaction During The Last Two Financial Years, or
- Has not filed Financial Statements and Annual Returns during the LAST TWO FINANCIAL YEARS.

**Not Lets Discuss Significant Accounting Transaction**

"Significant Accounting Transaction" means any transaction other than-

- Payment of Fees by a company to the Registrar;
- Payments made by it to fulfill the requirements of this Act or any other law;
- Allotment of shares to fulfill the requirements of this Act; and
- Payments for maintenance of its office and records.

**Checks for Dormant Company:**

1. Company incorporates for a future project or to hold an asset or intellectual property and has no significant accounting transaction. Or;
2. A Company is inactive company (as per Definition given above)
3. Documents require for Dormant & require to attach in form:
  - a. CTC of Board Resolution.
  - b. CTC of Special Resolution.
  - c. Auditor's Certificate.
  - d. Statement of Affairs duly certified by Chartered Accountant or Auditor(s) of the company.
  - e. Latest Financial Statement and Annual Return of the Company is mandatory to attach In Case The Same Is Filed To Registrar.
  - f. Certificate regarding no dispute in the management or ownership
  - g. Consent of lender, if any loan is outstanding.
4. As per Sub- Section 4 Section- 455: Where a company Not Filed or Fails to File Financial Statements or Annual Return for TWO (2) Financial Year consecutively, The Registrar of Company (ROC) shall issue a notice to that company and enter the name of such company in register maintain for Dormant Company.
5. As per CLLS Scheme: The defaulting inactive companies, while filing due documents under CLLS-2014 can, simultaneously apply to get themselves declared as Dormant Company under Section- 455 of the Companies Act 2013 by filling e-form MSC-1 at 25% of the fee payable on form FTE.

**Few other Checks for Dormant Status:** As per Section 455(1) Explanation (ii).

This Section comes into effect from 01st April, 2014.

- A. No inspection, inquiry or investigation has been ordered or taken up or carried out against the company;
- B. The company is neither having any public deposits which are outstanding nor is the company in default in payment thereof or interest thereon;
- C. No prosecution has been initiated or pending against the company under any law;
- D. The company has not defaulted in the payment of workmen's dues;
- E. The company does not have any outstanding statutory taxes, dues, duties etc. payable to the Central Government or any State Government or local authorities etc.;
- F. The application has not been made with an objective to deceive the creditors or to defraud any other person;
- G. The securities of the company are not listed on any stock exchange within or outside India;
- H. The company is not having any outstanding loan, whether Secured and Unsecured- But if company has any Outstanding Unsecured Loan then the company may apply for status of DORMANT only after obtaining NOC from the lender. Such NOC required to be attached in the Form which requires filing with ROC.
- I. There is No Dispute in the Management or Ownership of The Company; A certificate in this regard required to taken from Management. Such Certificate required to be attached in the Form which requires filing with ROC.

**FAQ'S of Dormant Company:**

1. A company which is in existence from the period less than 2 year can go for Status of Dormant?  
View: Yes As per Definition of Inactive Company given above [Section 455(1) explanation (I) Means a company which not carrying any business or operation.
2. What is the procedure to get Status of Active company.  
View: If company wants to get Active status to be file e-form MSC-4 with ROC, then gets active company status.
3. Transaction which a company can do during Dormant Status.  
View:
  - i. Payment of fees by a company to the Registrar;
  - ii. Payments made by it to fulfill the requirements of this Act or any other Law;
  - iii. Allotment of shares to fulfill the requirements of this Act; and
  - iv. Payments for maintenance of its office and records.

## LEGAL UPDATES

### Whether Company Law Board has the authority to relax the provisions of buy-back of shares in section 77A by exercising its rights and powers under section 402???

The above captioned Company Petition has been filed by the Petitioners invoking the provisions contained in Section 397 and 398 read with Section 402 of the Companies Act, 1956 (Shri. Nitin Mukund Sahasrabhojane & Anr..Petitioners V.s

M/s Venus Automation Pvt. Ltd. & Ors.. Respondents C.P No. 107 of 2013 DOJ 26-03-2014)

- The Petitioners, Shri. Nitin Mukund Sahasrabhojane & Anr have filed a Company Application praying therein to pass an order directing M/s Venus Automation Pvt. Ltd. Company to file Form No.32 relating to the removal of the Petitioner (Nitin Mukund)as Director at the earliest possible time to avoid any further damage to the interest of the Company's stake holder
- In the course of trial, the Parties negotiated and they reached at a mutual settlement. They have accordingly filed a Company Application along with the Consent Sheet containing the Consent Terms therein
- In the aforesaid Company Application, the Parties have interalia sought relaxation in the rules and procedure prescribed under Section 77A of the Act to allow buyback of shares held by the Petitioners as contemplated in the Settlement Agreement irrespective of the fact that such buy-back would be:- 1)In excess of 25% of total paid-up capital and frees reserves of the company. 2) Completed in next one year irrespective of the debt equity ratio. 3) Without passing the special resolution. 4) Without depositing immediately after the date of closure of the offer in the special bank A/c, such sum as would make up the entire sum due and payable as consideration for the buy-back in terms of rules. 5) Without complying the rule that within 7 days

of the time specified in sub rule (4) of rule 6 of Private Limited Company and Unlisted Public Limited Company. 6) (buy-back of Securities) Rules 1999 company to make payment of consideration in cash or bank draft/ pay order to those shareholders whose offer has been accepted or return the share certificates to the shareholders forthwith.

A query was raised from the Ld. Counsels appearing for both the sides as to whether the Bench in the exercise of its rights and powers conferred upon it by virtue of the provisions contained in Section 402 of the Act is empowered to pass an order to relax the compliance of the provisions contained in section 77A of the said Act.

Petitioners submitted that the CLB in the exercise of its rights and powers conferred upon it by virtue of the provisions contained in Section 402 of the Act, is empowered to exempt the Company from making any compliance of the conditions laid down in Section 77A relating to buyback of shares as provided therein and the rules made there under.

### JUDGEMENT

Upon a critical examination of all aspects, CLB Mumbai bench directed that if exemption as sought by the Parties is granted, nobody's interest is going to be prejudicially affected. It is pertinent to mention here that, the Company does not have any embargo in reducing the capital as it does not have term loan facility from any Bank. Thus, the reliefs whereby the Petitioners and Respondents have requested exemption to 'open a separate bank account and deposit the whole consideration therein' and 'to file return of buy back' may be allowed. It is, however, directed that the Respondent Company shall deposit all the cheques towards the consideration of buy-back of shares within 7 days of the receipt of this order with the escrow. C.P thus, stands disposed off as per the Consent Terms as contained in the Consent Sheet which shall form part of the order.

## LIGHTER SIDE OF THE PROFESSION

"Paramjeet Singh,for what reasons you left your last job?"

"Due to lack of Job Satisfaction."

"In what respect you were not satisfied with the Job?"

"Sorry Sir,the Job Satisfaction issue concerned my Boss and not me."

"Has your performance been appreciated by the Company?"

"Yes,very much."

"How do you say that?"

"Because this year the Company has not gone in for my Annual Pay Cut."

—CS PARAMJEET SINGH, pslawadvisers@yahoo.com

Members may send their contribution for this column at e-mail niro@icsi.edu for publication in the NIRC Newsletter-Insight. Decision of the Editorial Board of Newsletter in this regard will be final.



**COMPLIANCE CHECKLIST FROM 01<sup>ST</sup> NOVEMBER TO 10<sup>TH</sup> DECEMBER, 2014**

*Compliance Checklist*

<b>Central Excise Related Compliance</b>					
<b>S. No.</b>	<b>Activities</b>	<b>Sections/Rules/Clauses, etc.</b>	<b>Acts/Regulations etc.</b>	<b>Compliance Due Date</b>	<b>To whom to be submitted</b>
1.	Last Date for payment of Excise Duty Non SSI units (October) *(in case of Payment through Internet banking)	Rule 8	Central Excise Rules, 2002	05 <sup>th</sup> November *06 <sup>th</sup> November	Central Excise Authorities
2.	Monthly Return of information relating to Principal Inputs (October, 2014) (Form No. ER-6)	Rule 9A	CENVAT Credit Rules, 2004	10 <sup>th</sup> November	Central Excise Authorities
3.	Filing of Return of Central Excise and Cenvat Credit for the month of October, 2014 (Form No. ER-1) (Non SSI Units)	Rule 12 / Rule 9(7)	Central Excise Rules, 2002/ CENVAT Credit Rules, 2004	10 <sup>th</sup> November	Central Excise Authorities
4.	Monthly Excise return by EOU for the month of October, 2014 (Form No. ER-2)	Rule 17(3)	Central Excise Rules, 2002	10 <sup>th</sup> November	Central Excise Authorities
5.	Annual Financial Information Statement (Form No. ER-4)	Rule 12(2)	Central Excise Rules, 2002	30 <sup>th</sup> November	Central Excise Authorities
6.	Last Date for payment of Excise Duty Non SSI units (November) *(in case of Payment through Internet banking)	Rule 8	Central Excise Rules, 2002	05 <sup>th</sup> December *06 <sup>th</sup> December	Central Excise Authorities
7.	Monthly Return of information relating to Principal Inputs (November, 2014) (Form No. ER-6)	Rule 9A	CENVAT Credit Rules, 2004	10 <sup>th</sup> December	Central Excise Authorities
8.	Filing of Return of Central Excise and Cenvat Credit for the month of November, 2014 (Form No. ER-1) (Non SSI Units)	Rule 12 / Rule 9(7)	Central Excise Rules, 2002/ CENVAT Credit Rules, 2004	10 <sup>th</sup> December	Central Excise Authorities
9.	Monthly Excise return by EOU for the month of November, 2014 (Form No. ER-2)	Rule 17(3)	Central Excise Rules, 2002	10 <sup>th</sup> December	Central Excise Authorities

**Service Tax Related Compliances**

<b>S. No.</b>	<b>Activities</b>	<b>Sections/Rules/Clauses, etc.</b>	<b>Acts/Regulations etc.</b>	<b>Compliance Due Date</b>	<b>To whom to be submitted</b>
10.	Pay Service Tax in Challan GAR – 7, collected for the month of October 2014 by persons other than individuals proprietors and partnership firms. *(in case of Payment through Internet banking)	Section 68 Read with Rule 6	Finance Act, 1994 Service Tax Rules, 1994	05 <sup>th</sup> November *06 <sup>th</sup> November	Service Tax Authorities
11.	Pay Service Tax in Challan GAR – 7, collected for the month of November 2014 by persons other than individuals proprietors and partnership firms. *(in case of Payment through Internet banking)	Section 68 Read with Rule 6	Finance Act, 1994 Service Tax Rules, 1994	05 <sup>th</sup> December *06 <sup>th</sup> December	Service Tax Authorities



Income-tax Related Compliances					
S. No.	Activities	Sections/Rules/Clauses, etc.	Acts/Regulations etc.	Compliance Due Date	To whom to be submitted
12.	Contractor's Bill / Advertising / Professional service Bill - TDS collected for the previous month Section 194J (October, 2014)	Section 194C Section 194J	Income-tax Act, 1961	07 <sup>th</sup> November	Income Tax Authorities
13.	Monthly payment of TCS (October, 2014)	Section 206	Income-tax Act, 1961	07 <sup>th</sup> November	Income Tax Authorities
14.	TDS from Salaries for the previous month (October 2014)	Section 192	Income-tax Act, 1961	07 <sup>th</sup> November	Income Tax Authorities
15.	Deposit TDS from salaries for the previous month in Challan No.281 (October)	Section 192	Income-tax Act, 1961	07 <sup>th</sup> November	Income Tax Authorities
16.	File I. T. Return / Wealth Tax Return for Corporate assesses and all assesses whose have business income including assesses whose accounts are required to be audited under any law and working partners	Section 44AB	Income Tax Act, 1961	30 <sup>th</sup> November	Income-Tax Authorities
17.	Due date of filing return under Section 92E (Transfer Pricing) by Company Assessee	Section 139	Income-tax Act, 1961	30 <sup>th</sup> November	Income Tax Authorities
18.	Contractor's Bill / Advertising / Professional service Bill - TDS collected for the previous month Section 194J (November, 2014)	Section 194C Section 194J	Income-tax Act, 1961	07 <sup>th</sup> December	Income Tax Authorities
19.	Monthly payment of TCS (November, 2014)	Section 206	Income-tax Act, 1961	07 <sup>th</sup> December	Income Tax Authorities
20.	TDS from Salaries for the previous month (November 2014)	Section 192	Income-tax Act, 1961	07 <sup>th</sup> December	Income Tax Authorities
21.	Deposit TDS from salaries for the previous month in Challan No.281 (November)	Section 192	Income-tax Act, 1961	07 <sup>th</sup> December	Income Tax Authorities
Company Law Related Compliances					
22.	Last Date for filing e-form 20B for Companies having Paid up Capital and e-form 21A for Companies not having Paid up Capital	Section 159	Companies Act, 1956	28 <sup>th</sup> November (Within 60 days from the Day on which AGM is held or due to be held)	Registrar of Companies
23.	Annual filing by companies incorporated under the Companies Act, 1956 under the Company Law Settlement Scheme, 2014 regarding	Companies Act, 1956	Companies Act, 1956	15 <sup>th</sup> November	Registrar of Companies
RBI Related Compliances					
S. No.	Activities	Sections/Rules/Clauses, etc.	Acts/Regulations etc.	Compliance Due Date	To whom to be submitted
24.	Monthly return (NBS-6) on exposure to capital market	Para 13B	NBFC Prudential Norms (Reserve Bank) Directions,	07 <sup>th</sup> November	RBI



			1998		
25.	Monthly Return on Important Financial Parameters	DNBS (RID) C.C. No.57/02.05.15/2005-06 dated Sep 6, 2005	Circular	07 <sup>th</sup> November	RBI
26.	Reporting of actual transactions of ECB in form ECB-2 within 7 working days (October)	ECB Rules	FEMA, 1999	08 <sup>th</sup> November	RBI through Authorized Dealer
27.	Monthly statement of short term dynamic liquidity in Form ALM-I	DNBS (PD).CC.No.15/02.01/2000-2001 dated June 27, 2001	Circular	10 <sup>th</sup> November	RBI
28.	Monthly return (NBS-6) on exposure to capital market	Para 13B	NBFC Prudential Norms (Reserve Bank) Directions, 1998	07 <sup>th</sup> December	RBI
29.	Monthly Return on Important Financial Parameters	DNBS (RID) C.C. No.57/02.05.15/2005-06 dated Sep 6, 2005	Circular	07 <sup>th</sup> December	RBI
30.	Reporting of actual transactions of ECB in form ECB-2 within 7 working days (November)	ECB Rules	FEMA, 1999	08 <sup>th</sup> December	RBI through Authorized Dealer
31.	Monthly statement of short term dynamic liquidity in Form ALM-I	DNBS (PD).CC.No.15/02.01/2000-2001 dated June 27, 2001	Circular	10 <sup>th</sup> December	RBI

**Economic, Industrial & Labour Law Related Compliances**

S. No.	Activities	Sections/Rules/Clauses, etc.	Acts/Regulations etc.	Compliance Due Date	To whom to be submitted
32.	Monthly payment of Provident Fund (PF) (Non Corporate)	(a) Paragraph 38 of Employees Provident Funds Scheme, 1952 (b) Section 418 of the Companies Act, 1956	(a) Employees' Provident Funds and Misc. Provisions Act, 1952 (b) Exempted Scheme	15 <sup>th</sup> November	Provident Fund Authorities Trustees of Provident Fund
33.	File monthly return for employees leaving / joining during the month of October (Form No.5)	Paragraph 20(2) read with Paragraph 36(1) & (2)	The Employees Pension Scheme, 1995 (For exempted establishments under Employees Provident Fund and Misc. Provisions Act, 1952)	15 <sup>th</sup> November	Provident Fund Commissioner
34.	i) File monthly Return of employees entitled for membership of Insurance Fund (Form No.2(IF)) ii) File monthly Return for members of Insurance Fund	Paragraph 10	The Employees Deposit Linked Insurance Scheme, 1976 (For exempted establishments)	15 <sup>th</sup> November	Provident Fund Commissioner

	leaving service during the month of October (Form no. 3(IF)) iii) File monthly return of members joining service during the month of October (Form no.F4(PS))		under Employees Provident Fund and Misc. Provisions Act, 1952)		
35.	Payment of ESI contribution for the previous month	Regulation 31	Employees' State Insurance Act, 1948 and Employees State Insurance (Gen.) Regulations, 1950	21 <sup>st</sup> November	ESIC Authorities
36.	Monthly return of Provident Fund for the previous month (October) Provident funds	Paragraph 38 of Employees' Provident Act, 1952	Employees Provident Funds and Misc. Scheme, 1952	25 <sup>th</sup> November	Provident Fund Authorities
37.	Monthly return of Provident Fund for the previous month with respect to International Workers.	Paragraph 36	The Employees' Provident Funds Scheme, 1952	25 <sup>th</sup> November	Provident Fund Authorities

### Stock Exchange / Listing Compli

S. No.	Activities	Sections/Rules/ Clauses, etc.	Acts/Regulations etc.	Compliance Due Date	To whom to be submitted
38.	Submit limited review report for the quarter ended 30th September	Clause 41	Listing Agreement	14th November	Stock Exchanges
39.	Furnish Unaudited quarterly financial results in the prescribed format	Clause 41	Listing Agreement	14th November (Within 45 days from the end of the Quarter)	Stock Exchanges

### Depositories

S. No.	Activities	Sections/Rules/ Clauses, etc.	Acts/Regulations etc.	Compliance Due Date	To whom to be submitted
40.	Submit monthly statement on substitution of names of depositories in the previous quarter.	Regulation 54(5)	SEBI (Depositories & Participants) Regulations, 1996	07th November	Depositories
41.	Submit monthly statement on substitution of names of depositories in the previous quarter.	Regulation 54(5)	SEBI (Depositories & Participants) Regulations, 1996	07th December	Depositories

**Note :** While every care has been taken in the preparation of this Compliance Check List for the Month of November, 2014, to ensure its accuracy at the time of publication, NIRC – ICSI assumes no responsibility for any errors which despite all precautions, may be found therein. Members are requested to check the latest position with the original sources before acting upon on the information published in this newsletter. Neither this Newsletter nor the information contained herein constitutes a contract or will form the basis of a contract. The material contained in this document does not constitute/ substitute professional advice that may be required before acting on any matter.



**THE INSTITUTE OF  
Company Secretaries of India**  
IN PURSUIT OF PROFESSIONAL EXCELLENCE  
Statutory body under an Act of Parliament

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## PMQ COURSES OFFERED BY THE INSTITUTE OF COMPANY SECRETARIES OF INDIA

The Institute, as a part of building capacity of its members, offers Post Membership Qualification (PMQ) courses on new and emerging areas with the aim to provide application oriented knowledge to the members to enable them to render quality services in diversified areas. A brief description of these PMQ Courses offered by the Institute is as under:

### 1. PMQ Course in Corporate Governance

Post Membership Qualification Course in Corporate Governance aims to enable the members to gain acumen, insight and thorough knowledge relating to various aspects of corporate governance.

The brochure of the course is available at:

[http://www.icsi.edu/webmodules/PMQ\\_CG\\_BROCHURE\\_New\\_June\\_%202014.pdf](http://www.icsi.edu/webmodules/PMQ_CG_BROCHURE_New_June_%202014.pdf)

### 2. PMQ Course in Corporate Restructuring and Insolvency

The Post Membership Qualification (PMQ) Course in Corporate Restructuring and Insolvency aims at capacity building of members in practical and application oriented aspects of corporate restructuring, rehabilitation, insolvency and matters related thereto. The Course structure entails participation in workshop for case studies and a written examination.

The brochure of the course is available at:

<https://www.icsi.edu/portals/0/PMQCRIBrochure.pdf>

### 3. PMQ COURSE IN COMPETITION LAW

The PMQ Course in Competition Law aims at capacity building of Company Secretaries in the area of legal, procedural and practical aspects of Competition Law and matters related thereto.

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[http://www.icsi.edu/webmodules/PMQ\\_CL\\_Brochure\\_240618.pdf](http://www.icsi.edu/webmodules/PMQ_CL_Brochure_240618.pdf)

For further details please visit [www.icsi.edu](http://www.icsi.edu) or contact Director (Academics), ICSI, Lodhi Road, New Delhi, 011-45341014, email: [pmq@icsi.edu](mailto:pmq@icsi.edu)

#### Printed & Published by :

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#### Disclaimer:

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## COMPANY SECRETARIES BENEVOLENT FUND

Be a proud member of CSBF-Saathi Haath Badhana

In recent past, some of our members have died leaving behind the spouse and minor children. In some cases providing adequate financial assistance to the bereaved family becomes an impediment. Although the Managing Committee of the CSBF wanted to help the bereaved family members, but it was constrained to do so in view of financial position of the Fund.

The fund can provide the much needed financial assistance in such cases if the corpus of the Fund increases substantially which is possible if more number of members are enrolled to the fund. The members in all earnestness are therefore sincerely requested to become the members of the CSBF by paying one time Life membership fee of ₹ 7,500/-.

**The payments made to the Fund are exempted under Section 80G of the Income Tax Act, 1961.**

**Following benefits are presently provided by the CSBF:**

<p>Financial Assistance in the event of Death of a member of CSBF:</p> <p><b>Upto the age of 60 years</b></p> <ul style="list-style-type: none"><li>Group Life Insurance Policy for a sum of ₹ 5,00,000</li></ul> <p><b>Above the age of 60 years</b></p> <ul style="list-style-type: none"><li>Upto ₹ 2,00,000 in deserving cases on receipt of request subject to the Guidelines approved by the Managing Committee from time to time.</li></ul>	<p>Other benefits subject to the Guidelines approved by the Managing Committee from time to time:</p> <p><b>Reimbursement of Medical Expenses</b></p> <ul style="list-style-type: none"><li>Upto ₹ 60,000/-</li></ul> <p><b>Financial Assistance for Children's Education (one time)</b></p> <ul style="list-style-type: none"><li>Upto ₹ 40,000/- per child (Maximum for two children) in case of the member leaving behind minor children</li></ul>
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The members who have yet not become members of CSBF are requested to fill up Form-A (available on website of the Institute i.e. [www.icsi.edu](http://www.icsi.edu)) and send the same along with a cheque for ₹ 7,500/- favouring 'Company Secretaries Benevolent Fund' payable at New Delhi to the Regional Director, NIRC of ICSI, 4, Prasad Nagar Institutional Area, New Delhi. Members may also apply online at [www.icsi.edu](http://www.icsi.edu)

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