

Presentation

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Impact Analysis of Regulator's Actions & way ahead Striking off & Disqualification



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Views are strictly personal

This presentation is made only to analyze the impact of the action & to create understanding of way ahead

This presentation does not intend to criticize any action of the regulator neither is an attempt to dislodge the noble efforts of the Government to identify black money & the offenders

Bombing on Hiroshima Nagasaki



- 2.07 lakhs companies died
- 2 lakhs human beings injured
- Irreparable loss to business, wealth creation & growth story of India inc
- Professionals on the verge of getting crazy
- Epidemic of non filing for current year



Exact Action

- ROCs struck off 2,09,032 companies from its records in the month of July 2017
- All ROCs on MCA portal in the month of September 2017 published the lists of :
 - Directors disqualified under section 164 (2) – 1,06,578 directors
 - Directors disqualified associated with struck off (defaulting) companies
- Directors listed as disqualified u/s 164 have vacated office u/s 167 – Retrospective effect from November 2016

Exact Action

- List of 16,794 Shell companies published in August 2017:
 - 700 real estate co.
 - 400 stock and commodity broking firms
 - 331 companies flagged off by the MCA to SEBI
- List of Company Secretaries associated with shell companies was published by MCA.

Exact Action

- DIN of all disqualified directors deactivated
- DIN of directors associated with struck off companies deactivated
- Live Companies were debarred from filing returns – since deactivation of DIN of all directors
- Banks have frozen accounts of Struck Off Companies – DOFS directions
- Banks have debarred such directors from operating Company accounts – DOFS instructions to all banks 5.9.2017

MCA press release 6.9.2017 – Stricter Norms for corporate governance

- Directors of Struck Off Companies debarred from operating bank accounts
- Those who will and have already siphoned off the money will be prosecuted under fraud provisions
- Non filing of 3 years – directors disqualified from being appointed or reappointed and thereby compelling them to vacate office
- 2-3 lakhs directors will be debarred
- Identification of persons behind Shell Companies & profile check of directors
- Identification of more shell companies is in process
- CA/CS/CMA associated with shell companies and involved in illegal activities are being identified and actions of institutes on them would be monitored

MCA press release 6.9.2017 – Stricter Norms for corporate governance

Positive results of these actions:

- help the government to check the means of black money,
- promote ecosystem of “ease of doing business”
- enhance investors confidence
- Minimize the possibility of frauds & tax evasions
- Chocking of availability of funds for illegal purpose
- Interest of stakeholders would be protected
- Image of county in global business would improve

MCA press release 12.9.2017 –

Identification of more than 1 lakh directors of shell co. for disqualification

- 1,06,578 directors disqualified U/s 164 (2)
- Disqualification section acts by operation of law
- Disqualified directors have vacated office U/s 167
- Identification of directors of defaulting shell companies is in process
- Money laundering activities performed under these companies are under the scanner

MCA press release 26.10.2017 – Tracking of properties of struck off cos

- Figure of struck off companies increased to 2.25 lacs
- Tracking off properties of such companies & identification of *benami* properties
- Any transaction of such properties post striking off is void *ab initio* and a nullity till company is restored
- The identity of such companies is lost and legal ownership of companies for such was non-existent.
- Permitting such transaction is illegal and may attract disciplinary action on district administrative officials

Reasons Stated – Striking off

- Companies are not carrying out business or operations for 2 financial years
- Parameter of – Non filing of FS & AR for 2 years adopted
- Exclusions – Section 25/8 co, Companies having pending charges, companies under prosecution.

Disqualification



Reasons Stated for Disqualification

- Failure to file FS & AR by the company **for** consecutive 3 FY's starting from FY 1.4.2014.
- Failure to **do filing of** 3 consecutive years since 1.4.2014? – based on due date of filing
- Directors have defaulted in filing

Points worth considerable – Striking off

- Whether company is really doing business
- Available last audit report – whether going concern or not?
- Whether Excise, customs, income tax, sales tax, VAT returns were filed
- Whether other tax compliances being done
- Whether company has any employees, labour law compliances
- Whether company is registered under GST
- Responses submitted by the Company &
- Further actions taken by the companies for completing filing

Legal Provisions- Sec 250

Effect of dissolution u/s 248

Where a company stands **dissolved** under section **248**, it shall on and from the date mentioned in the notice under sub-section (5) of that section **cease to operate** as a company and the Certificate of Incorporation issued to it shall be deemed to have been cancelled from such date **except** for the purpose of **realising the amount due to the company and for the payment or discharge of the liabilities or obligations of the company.**

Points worth considerable – Disqualification

- Commencement of CA 2013 with effect from 1.4.2014
- Vacation affecting directorships in compliant companies

Legal Provisions Sec 274 (1) (g)– 1956

DISQUALIFICATIONS OF DIRECTORS:

(1) A person shall not be capable of being appointed director of a company, if –

(g) such person is already a director of a **public company** which, -

(A) has **not filed** the annual accounts and annual returns **for any continuous three financial years** commencing on and after the first day of April, 1999
; or

Legal Provisions – Sec 164 (2) (a)

Disqualifications for appointment of director:

(2) No person who is or has been a **director of a company** which—

(a) has **not filed** financial statements or annual returns **for any continuous period of three financial years,**

Legal Provisions – Sec 167 (1) (a)

Vacation of office of director:

(1) The office of a director shall become **vacant** in case:

(a) he incurs any of the disqualifications specified in Section 164;

Legal Provisions – Sec 92 (5)

Annual return

(5) If a company **fails to file** its annual return under sub-section (4), **before the expiry of the period specified under section 403 with additional fees**, the company shall be punishable with fine which shall not be less than fifty thousand rupees but which may extend to five lakhs rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees, or with both.

Legal Provisions – Sec 137 (3)

Copy of financial statement to be filed with Registrar:

(3) If a company **fails to file** the copy of the financial statements under sub-section (1) or sub-section (2), as the case may be, **before the expiry** of the period specified **in section 403**, the company shall be punishable with fine of one thousand rupees for every day during which the failure continues but which shall not be more than ten lakh rupees, and the managing director and the Chief Financial Officer of the company, if any, and, in the absence of the managing director and the Chief Financial Officer, any other director who is charged by the Board with the responsibility of complying with the provisions of this section, and, in the absence of any such director, all the directors of the company, shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees, or with both.

Legal Provisions – Sec 403 (1) first proviso

Fee for filing:

Provided that any document, fact or information may be submitted, filed, registered or recorded, **after the time specified in relevant provision** for such submission, filing, registering or recording, **within a period of two hundred and seventy days from the date** by which it should have been submitted, filed, registered or recorded, as the case may be, **on payment of such additional fee** as may be prescribed:

Legal Provisions – Sec 439 (1) & (2)

Offences to be non-cognizable

(1) Notwithstanding anything in the Code of Criminal Procedure, 1973 (2 of 1974), **every offence under this Act except the offences referred to in sub-section (6) of section 212 shall be deemed to be non-cognizable** within the meaning of the said Code.

(2) No court shall take cognizance of any offence under this Act which is alleged to have been committed by any company or any officer thereof, **except on the complaint in writing of the Registrar**, a shareholder of the company, or of a person authorised by the Central Government in that behalf:

Legal Provisions – Sec 441 (1)

Compounding of certain offences

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), any **offence punishable under this Act** (whether committed by a company or any officer thereof) **with fine only**, may, either before or after the institution of any prosecution, be compounded by—

(a) **the Tribunal**; or

(b) where the maximum amount of fine which may be imposed for such offence does not exceed five lakh rupees, **by the Regional Director** or any officer authorised by the Central Government, on payment or credit, by the company or, as the case may be, the officer, to the Central Government of such sum as that Tribunal or the Regional Director or any officer authorised by the Central Government, as the case may be, may specify:

Legal Provisions – Sec 441 (6) (a)

Compounding of certain offences

(6) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—

(a) any offence which is punishable under this Act, with imprisonment or fine, or **with imprisonment or fine or with both**, shall be **compoundable with the permission of the Special Court**, in accordance with the procedure laid down in that Act for compounding of offences;

Legal Provisions – Sec 454

Adjudication of penalties.

- (3) The adjudicating officer may, by an order **impose the penalty** on the **company** and the **officer** who is in default stating any **non-compliance or default** under the **relevant provision of the Act**.

Legal Provisions – Sec 447 (1)

Explanation.—For the purposes of this section—

- (i) “fraud” in relation to affairs of a company or any body corporate, includes any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss;

Legal Provisions- Sec 153 read with rules

- Rule 11 (a) to (e) of Appointment & disqualification rules does not provide “disqualification” as a ground for deactivation of DIN
- Director has a right to hold the DIN and do compliances by using the DIN & DSC

Legal Provisions – Sec 164 (2) read with rules

- Company to report names & address of the disqualified directors of the Company in DIR 9
- Responsibility casted on the Company
- Whether publication of lists on MCA portal is therefore warranted?

Legal Provisions – Sec 167 (3)

Section 167. Vacation of office of director.—

(3) Where **all the directors** of a company **vacate** their offices under any of the **disqualifications** specified in sub-section (1), the **promoter or**, in his absence, the Central Government **shall appoint** the **required number of directors** who shall hold office **till the directors are appointed** by the company in the **general meeting**.

Legal Provisions – LLP Act, 2008

- The provisions of the Companies Act does not extend to LLP
- Disqualification not likely to extend to partners of LLP
- Merging of DPIN in DIN might create a confusion

Constitutional Right

- Fundamental right of Indian Citizen under Article 19(1)(g)-To practice any profession, or to carry on any occupation, trade or business
- 5 year's alleged debarring from business



Judicial judgments – no retrospective effect of Sec 164 (2)(a) read with 167(1)(a)

- Vikram Ahuja V. Greenstone Investments Private Limited
(NCLT Mumbai order dated 22.11.2016)
- Raj Shekhar Agrawal V. Pragati Development Ltd
(CLB Kolkatta Bench order dated 02.11.2015)

Retrospective disqualification

Leading to questioning of:

- Participation in decision making process
- Valid constitution of Board
- Decisions taken in the Board meetings
- Forms and returns filed, signed
- Guarantee bonds or promissory notes signed on behalf of the Company
- Agreements, contracts & arrangements entered
- Borrowings made, Loan documentation executed



Way Ahead – possible solution – Struck off Companies

- Ease out the process of revival at NCLT – further codify processes & fixed revival fees structure based on circumstances
- Consider having region wise dedicated bench to deal such cases
- Explore the possibility of registrar making sue-motto application to NCLT to cancel striking off
- Verify the lists again – excuse the companies not eligible to be struck off or those who have completed filing pre issue of STK 7 notice

Way Ahead – possible solution – Struck off Companies

- Verify the list of defaulting directors (on account of their association with struck off striking companies) and exclude them and reactivate their DIN (if the company is not falling in the criteria of 3 years non filing)
- Request DOFS to undo the action for such companies/ directors
- Give clarity as how many directors to be inducted through 167 (3) provisions

Way ahead – legal recourse

Revival of Company – NCLT powers Sec 252

Appeal under sub section (1) – within 3 years

- Any person aggrieved by striking off order
- Unjustified grounds of striking off
- Opportunity of being heard to be given
- Pass the order of restoration of the Company
- ROC to issue fresh certification of incorporation

Way ahead – legal recourse

Revival of Company – NCLT powers Sec 252

Application under sub section (3)

- Company, member, creditor or workman if feels aggrieved can make application within 20 years
- NCLT to satisfy that at the time of striking of Company was carrying on business operations or it just that the name may be restore
- Will order the restoration of the Company
- It may further order that such restoration of company & all other persons would be in the same position as if the name was never struck off.

Way Ahead – possible solution – Disqualified directors

- Remove retrospective effect of disqualification
- Remove lists from portals & give effect in master data of companies by asking companies to file DIR 9
- Allow directors to file application for compounding off offence of non filing and on compounding, restore their position & DIN – subject to company is genuine & completing all filing
- DIR 10 – not a route to restore disqualified directors

Way ahead – legal recourse - directors

- Filing of writ (Article 226 & 227) – to remove disqualification
- Various pleas taken in petition made before high courts
 - Unconstitutional, violation of fundamental & statutory rights (Delhi)
 - Consequence of arbitrary exercise of powers
 - Fundamental right denied under article 19(1) (g)
 - No reasonable opportunity/ No show cause notice
 - Retrospective applicability imposes numerous liabilities & hardship
 - Rectification required to be made to restrict the scope of disqualification to defaulting companies only

Way ahead – legal recourse - directors

- Lacuna in procedure required to be followed by defaulting Co for completing filing & consequent disqualification of director to rectify defect, hence DIN for defaulting companies be restored to complete e-filing(Hyderabad)
- The issue of non-compliance of 164 (2) (a) could be considered wef 01.04.2014 hence director still has chance to complete the requirements (Gujrat)
- Provisions of section 164 (2) (a) does not provide for immediate disqualification. It is applicable for reappointment in the defaulting company & for appointment of director in other company.(Delhi)
- Consideration required to determine the date of failure pursuant to provisions of 164 (2) (a) & 167

Public Interest litigation – disqualification

- Who has to file
- What is the locus standee
- Impact on Indian economy
- SME sector more affected
- Role of Chambers & directors associations

Proposal to control growth of inactive entities

- Ease out norms for voluntary striking off of company & LLP –2/1 year ‘no operations’ rule
- Improve the scheme of dormant company u/s 455
- Harmonization of actions of registrar

Menace Ahead

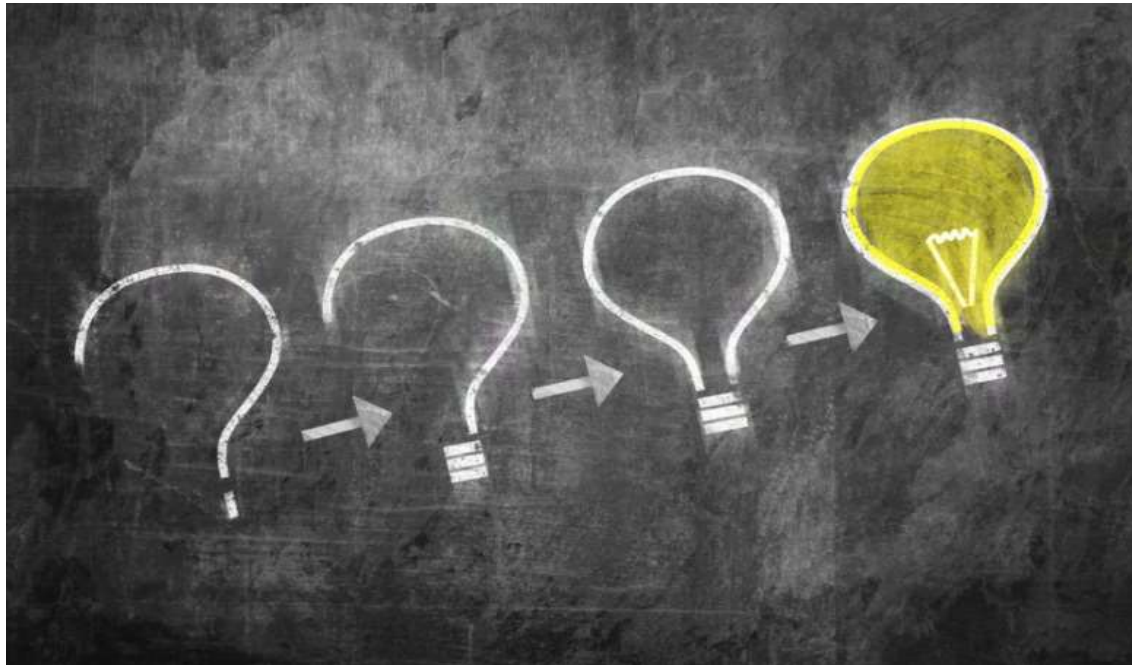
- Proposal to remove protection of section 403 in the Amendment Act 2017
- Proposal to charge Rs 100/- per day fine for non filing



Role of CS – learning from the experience

- Exercise governance
- On time Filing compliances
- Appraise directors about pit falls
- Provide timely alerts & appraise crucial changes to clients/ management
- Undertake profile check of directors – fit to act as such
- Carry out due diligence before certifying the forms

Any Questions please!



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