

PRIMA FACIE OPINION OF THE DIRECTOR (DISCIPLINE) UNDER THE COMPANY SECRETARIES ACT, 1980.

The fundamental principles governing the conduct of a professional are integrity; professional independence; professional competence; objectivity; ethical behaviour; conformance to technical standards; and confidentiality of information acquired in the course of professional work. Professional ethics concerns one's conduct of behaviour and practice when carrying out professional work.

“ETHICS CANNOT BE TAUGHT AND BOUGHT, IT COMES FROM WITHIN”

One most common and important issue is the conflict that may arise between the employer's interest and the interest of a member to uphold his professional values and the broader public interest. A member must have courage of conviction to express candidly his considered professional opinion to his employer in order to safeguard his professional values and broader public interest.

Chapter V of the Company Secretaries Act, 1980 deals with the provisions of Misconduct. The procedures to deal with the Misconduct cases are specified under the Company Secretaries (Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007 (as amended) (the Rules).

Professional and Other Misconduct

The expression “*professional and other misconduct*” is defined under Section 22 of the Company Secretaries Act, 1980 (the Act).

Pursuant to Section 22 of the Act, the expression “*professional or other misconduct*” shall be deemed to include any act or omission provided in any of the Schedules, but nothing in this section shall be construed to limit or abridge in any way the power conferred or duty cast on the Director (Discipline) under sub-section (1) of section 21 to inquire into the conduct of any member of the Institute under any other circumstances.

First and Second Schedule

The First and the Second Schedule to the Act contains professional and other misconduct in relation to Company Secretaries. The first Schedule is divided into four parts and the Second Schedule is divided into three parts.

Prima facie opinion of the Director (Discipline)

The Director (Discipline) shall arrive at a *prima facie* opinion on the occurrence of the alleged misconduct. After registration of complaint received under Section 21 of the Act, the Director (Discipline) or an officer authorized by him, shall within sixty days of the receipt of a complaint, send particulars of the acts of commission or omission alleged or a copy of the complaint, as the case may be, to that member (the respondent) at his professional address.

The Respondent shall, within 21 days of the service of a copy of the complaint, or within such additional time, not exceeding thirty days, as may be allowed by the Director (Discipline), forward a written statement in his defence. On receipt of the written statement, if any, the Director (Discipline) may send a copy thereof to the complainant and the complainant shall, within 21 days of the service of a copy of the written statement, or within such additional time, not exceeding thirty days, as may be allowed by the Director (Discipline), forward his rejoinder on the written statement.

On perusal of the complaint, the respondent's written statement, if any, and rejoinder of the complainant, if any, the Director (Discipline) may call for such additional particulars or documents connected therewith either from the complainant or the respondent or any third party or parties, as he may consider appropriate.

If no reply is sent by the respondent within the time allowed or by the complainant within the time allowed, the Director (Discipline) shall presume that the respondent or the complainant have nothing further to state and take further action as per the Rules.

The Director shall examine the complaint, written statement, if any, rejoinder, if any, and other additional particulars or documents, if any, and form his *prima facie* opinion as to whether the member or the firm is guilty or not of any professional or other misconduct or both under the First Schedule or the Second Schedule or both.

Where the Director (Discipline) is of the opinion that a member is guilty of professional or other misconduct mentioned in the First Schedule to the Company Secretaries Act, 1980, he shall place the matter before the Board of Discipline which is constituted by the Council of the Institute under Section 21A of the Company Secretaries Act, 1980; and where the Director (Discipline) is of the opinion that a member is guilty of any professional or other misconduct mentioned in the Second Schedule to the Company Secretaries Act, 1980 or in both the Schedules, he shall place the matter before the Disciplinary Committee which is constituted by the Council of the Institute under Section 21B of the Company Secretaries Act, 1980.

The Director (Discipline) shall submit before the Board of Discipline all information and complaints where he is of the opinion that there is no *prima facie* case and the Board of Discipline may, if it agrees with the opinion of the Director (Discipline), close the matter or in case of disagreement, may advise the Director (Discipline) to further investigate the matter.

Where the Board of Discipline or the Disciplinary Committee, as the case may be, directed the Director (Discipline) to further investigate the matter, the Director (Discipline) shall further investigate the case and shall place his Further Investigation Report for consideration before the Board of Discipline or Disciplinary Committee, as the case may be.

Where the Board of Discipline or the Disciplinary Committee disagreed with the *prima facie* opinion of the Director (Discipline) that the member is guilty of professional or other misconduct, the case will be closed and the Order will be passed.

Where the Board of Discipline agreed with the *prima facie* opinion of the Director (Discipline) that the member is not guilty of professional or other misconduct, the case will be closed, and the Order will be passed.

Where the Board of Discipline or the Disciplinary Committee, as the case may be, agreed with the *prima facie* opinion of the Director (Discipline) that the member is *prima facie* guilty of professional or other misconduct, a copy of *prima facie* opinion of the Director (Discipline) along with the relevant document relied upon will be sent to parties asking them to submit written statement on the same and rejoinder thereon.

Where the Board of Discipline or the Disciplinary Committee, as the case may be, finds that a member is guilty of professional or other misconduct, it shall afford the member an opportunity of being heard before making any order against him.

The Director (Discipline), the Board of Discipline or the Disciplinary Committee, as the case may be, shall follow the Company Secretaries Act, 1980 and such procedures as may be specified under the Company Secretaries (Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007 (as amended).

Appellate Authority, Disciplinary Committee, Board of Discipline and Director (Discipline) are vested with the powers of civil court for the purposes of an inquiry under the provisions of the Company Secretaries Act, 1980, and shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908, in respect of (a) summoning and enforcing the attendance of any person and examining him on oath; (b) the discovery and production of any document; and (c) receiving evidence on affidavit.

CASE STUDY

1. A complaint of professional or other misconduct has been filed against the Respondent who is a Company Secretary in Practice. The Complainant was Director, Shareholder and Chief Executive Officer of a company. Since its inception, the company had seven shareholders including two foreign nationals with 99.9% equity and remaining five Indian nationals with one share each. The position and status of seven shareholders and members was continued in the company for the financial year 2012-13 and 2013-14 and the Annual Returns for respective years were also filed with ROC. Certain non-compliances and filing of documents with the forged signature have come to the notice of the Complainant. The Complainant vide emails and letters pleaded to the Director/s and to the Board of the company to act and resolve the same, but they did not act upon.

2. The Complainant had written an email enumerating and listing out various non-compliances, malpractices frauds in the company and concluded that "*If these sort of mal practices in the company, I will have only option left is to resign from the company...*". However, no formal resignation letter was submitted by the Complainant. The Complainant had received an email from CMD of the company stating that the Complainant is not authorized to call the Board Meeting for the company, as Board have accepted his Resignation. One FIR was also registered. The Complainant had filed another complaint of professional misconduct for certification of form DIR-12. The Complainant has also filed a petition u/s 397/398 of the Companies Act, 1956 before Hon'ble Company Law Board, subsequently transferred to the Hon'ble NCLT.
3. The Complainant has filed complaint against the Respondent who has certified form MGT-7 for the financial year 2015-16 for the company. The Complainant has alleged that the Respondent has certified the form without any due diligence. The Complainant has stated that the contents of the impugned form MGT-7 certified by the Respondent is contrary to the facts, provisions, and laws. The Annual Return for FY 2015-16 is filed by payment of penalty of late fees. However, the Annual Returns for earlier FY 2014-15 is not filed, and likewise for FY 2016-17 and after it is also not uploaded by the company and no mandatory returns e.g., of Income Tax, Sales Tax, VAT etc. were filed/ uploaded for any of the FY during this period that for FY 2015-16.
4. During the Police Investigation, it is found that the said Registered Office of the company is a residential premise and already sold by its owner. The new owner stays with his family and no office of company exists there. CEO of the company entered into a 'Leave & License Agreement' with the company offering his premises at a monthly license fee for residence-cum-office of the company. As per MOA/AOA of the company, all original documents, records are supposed to be available all time at its Registered Office. It implies that the Registered Office as mentioned in the uploaded form MGT-7 is untrue, false, and misleading to the authorities.
5. The Complainant has alleged that the reason for not holding AGM of the company as mentioned in form MGT-7 is 'Dispute and Pending matter at CLB/ NCLT, which cannot be a reason for not holding the AGM which was due. The Complainant has further stated that Hon'ble NCLT has not passed any order restraining the company from mandatory filing or from holding mandatory AGM or Board Meetings. The company had admitted that it has Secured & Unsecured Loan at the end of the Financial Year 2015-16. The Secured Loan admittedly was of Cash Credit facility enjoyed with Indian Overseas Bank.
6. The Complainant has also alleged that as per the impugned form MGT-7, seven Board Meetings were

held during the financial year FY 2015-16. During the currency of the period, the company had three directors on the Board, and all were of Foreign Origin/ Nationality/ Citizens and did not have a mandatory Resident Director (an Indian Citizen). On this basis, the company should have been disqualified for any act of uploading of any Annual Return including form MGT-7. The Complainant has disputed the presence of on director in two Board meetings and contended that dates are false and fake.

7. The Respondent has attached a copy of Order pronounced by Hon'ble NCLT; an unsigned/ unstamped statement on plain paper depicting List of Shareholders for year ended 31st March, 2016 and a note on the letterhead. The Respondent in the note attached with the form MGT-7 has mentioned that he has certified the said form on the basis of the data provided by the Board of Directors of the company. Maintenance of records, registers, preparation of annual reports, holding and conducting the Board meetings and general meetings is the sole responsibility of the management of the company. Annual return for the year ending on 31st March 2016 has yet not been prepared due to pendency of the case before Hon'ble CLB/NCLT. The compliance of the provisions of law, rules regulations standards is the responsibility of the management. Examination of the Respondent is limited to the verification of procedure on test basis.
8. The Complainant has alleged that the Respondent has stated that he has failed to demonstrate as to how non-filing of returns under various acts by the company tantamount to negligence in certifying form MGT-7. The particulars of registered office of the company are pre-filled in form MGT-7 and the same has been mentioned as per details on MCA-21 Portal. The company is not restrained from keeping an email id or telephone number out of India; hence, the contact number and email id is of Tanzania based company. The purpose is that the company can be contacted also as the promoters of the company are based in Tanzania. Further, non-holding of AGM by the company is a matter of fact and has been mentioned in form MGT-7. The Respondent is not restrained from certifying the e-Form if the company has not held AGM. Non-holding of AGM by the company does not amount to professional misconduct by a Practicing Company Secretary in certifying form MGT-7.
9. The Complainant has stated that the Respondent has not carefully verified and vetted and diligently documents and the papers made available by the Promoter Directors. The Complainant was not aware about the appointment of the Respondent as Company Secretary of the company. The Complainant has never been approached and been asked to give his views and submission face to face or otherwise before certification of any documents and required before filing any documents at MCA as the Complainant was the resident director of the company.
10. The Respondent has contended that the Complainant has made a reference of secured and unsecured loan mentioned in form MGT-7 but he has not clarified what is the negligence on the part of the Respondent certifying the form if he has relied upon the management in absence of availability of the Audited Balance Sheet. The Complainant has not stated that the figures provided by the management and mentioned in form MGT-7 are incorrect figures. The particulars of the Board Meeting and Attendance were mentioned in form MGT-7 as per records maintained by the company and verified. If the company has not provided the records to other authorities, it does not mean that the facts relating to the Board Meeting are incorrect or that the Respondent was negligent in certifying the e-Form. The attachment of Hon'ble NCLT Order, a note on letterhead and list of shareholders were not to legitimize the misdeed/ fraud. Certification of form with these attachments do not amount to any professional misconduct. The letter demonstrates the fact about verification/ certification of documents and data.
11. The Respondent has submitted that while certifying form MGT-7, he had disclosed all material facts known to him report mis-statement known to him and invited attention for departure from the generally accepted procedure a observations/ qualifications. He had no intention to harm any person or make undue advantage to any person. He has further stated that he would take more caution and be more vigilant while certifying forms and documents in future and requested to take lenient view in the matter. The Respondent has admitted his mistake for 4 out of 6 allegations as mentioned in the *prima facie* opinion of the Director (Discipline) in certification of form MGT-7 of the company for the year 2015-16.
12. The Disciplinary Committee observed that the Respondent has failed to exercise due diligence in certification of form MGT-7 of the company for the year 2015-16 and mentioned the details and attendance of directors properly. The audited financial statements were not available, and the Respondent had relied only upon the information given by the management. It is also on record that the Respondent has submitted that he would be more cautious and be more vigilant, while certifying forms and documents in future and requested to take a lenient view in the matter.
13. The Disciplinary Committee held the Respondent 'Guilty' of professional misconduct under Clause (7) of Part-I of the Second Schedule to the Company Secretaries Act, 1980 and passed an order of 'Reprimand' and fine of Rs. 10000/- against the Respondent.