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CONTENTS

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MESSAGE FROM THE PRESIDENT

My Dear Students,

With immense pleasure and honour, I take this opportunity to hold my first communication with you as a President of our Alma Mater for the Golden Jubilee Year. John Milton once quoted that *time would surely run fast, but if channelized with hard work and dedication, it would fetch the age of gold*. In the similar perspective, the Institute, with its dedication, hard work and professional excellence in establishing, promoting and preserving the principles of governance, has fetched the age of gold in enduring good governance throughout the globe.

Friends, last 50 years of our golden journey have been a delightful canvas of our professional commitment to serve the premier practices of good governance towards roping the seeds for the holistic development and welfare of the society. In addition, our out and out support to the government in its initiative to establish an inclusive society with growth and development, have always been contemporary. For instance, when government is performing zealously under Collective Efforts for Inclusive Growth (*Sabka Sath, Sabka Vikas*), the Institute is also heading forward in serving Professional Excellence through Good Governance with the inclusion of all its stakeholders.

Inter-Alia, you the shinning students of the Institute are one of the major stakeholders in driving our dreams to reality with the big bang of success in the future too. Being 'the torch bearer of the Institute for this year, I am fully aware of the opportunities and prospects under which our students would develop as the Governance Professionals of New India, 2022.

In this context, I ensure you that my foremost objective for the year would be to facilitate and to strengthen the abilities of our students while building them as promising governance professionals under the Pro-People, Pro-Active Good Governance regime of New India, 2022.

I am sure of receiving your absolute co-operation and support in contributing our best prospects of good governance towards building New India, 2022 under the vigil of *Sabka Sath, Sabka Vikas*.

With Best Wishes

CS Makarand Lele

President, ICSI

Date : 6th February, 2018

Key Provisions of the Companies (Amendment) Act, 2017

This article is a compilation and analysis of the important provisions of the Companies (Amendment) Act, 2017.

Gaurav N Pingle, Practising Company Secretary, Pune

E-mail : gp@csgauravpingle.com

Introduction

As compared to Companies Act, 1956, the Companies Act, 2013 ('the Act') introduced some significant changes relating to disclosures to stakeholders, accountability of directors and auditors. The Act introduced corporate governance, corporate social responsibility, concept of 'fraud', liability of auditors, etc. The Act was first amended by the Companies (Amendment) Act, 2015 to address the immediate difficulties arising out of initial experience of the working of the Act. The objective was also to facilitate 'ease of doing business'. However, the amendments by Companies (Amendment) Act, 2015 were not inadequate. Accordingly, Government constituted Companies Law Committee to examine the need for further amendments.

Based on public consultation, the Companies Law Committee received numerous suggestions. Based on Committee's recommendations, the Companies (Amendment) Bill, 2016 was drafted and introduced in Lok Sabha on March 16, 2016. The Bill was then referred to the Standing Committee on Finance on April 12, 2016. Based on the various representations, the Standing Committee on Finance submitted its Report November 30, 2016. The Companies (Amendment) Bill, 2017 was passed by Lok Sabha on July 27, 2017. The Bill received the assent of Rajya Sabha on December 19, 2017. The Bill got assent from the President of India on January 3, 2018.

Main Objectives of Amendments

The amendments under the Companies (Amendment) Act, 2017 (Amendment Act), are broadly aimed at:

- Addressing difficulties in implementation owing to stringent compliance requirements
- Facilitating ease of doing business in order to promote growth with employment
- Harmonisation with Accounting Standards, Securities and Exchange Board of India Act, 1992 and the regulations made thereunder, and the Reserve Bank of India Act, 1934 and the regulations made thereunder
- Rectifying omissions and inconsistencies in the Act
- Carrying out amendments in provisions relating to qualification and selection of members of NCLT and NCLAT in accordance with Supreme Court directions.

Amendments to Definitions of 'Holding Company', 'Subsidiary Company', 'Associate Company'

The definitions of 'holding company', 'subsidiary company', 'associate company' have been amended by the Amendment Act. Holding company now includes 'body corporate', *i.e.*, a company incorporated outside India. One of condition for determining a relationship with company as subsidiary company or associate company has been amended. The scope of related parties has

also been increased, whereby even a company (i.e. holding company, subsidiary company, associate company) incorporated outside India will be a 'related party' under the Act. The amendment to the said definitions will have an impact on the compliance procedures and approval mechanism of related party transactions. It will also have an impact on the group company structure and compliance procedures.

Amendments to other Definitions in the Act

Other than the amendments to definition of 'holding company', 'subsidiary company', 'associate company' and 'related parties', the Amendment Act, in total, amends 14 definitions in the Act. It amends definition relating to 'cost accountant', 'debentures', 'financial year', 'interested director' (this definition is deleted), 'key managerial personnel', 'free reserves', 'public company', 'public financial institutions', 'related party', 'small company', 'turnover'.

Disclosures in Prospectus

The Amendment Act has amended the provisions relating to disclosures in prospectus under the Act. Considering the fact that the company is required to make requisite disclosures in the prospectus under the SEBI (Issue of Capital and Disclosure Requirement) Regulations, 2009, the corresponding provisions relating to disclosure under the Act are deleted. In this way, the Amendment Act has synced the Act with the provisions of securities laws.

Streamlining Company Incorporation Procedure

The procedure for incorporation of companies has been smoothened with reference to the name approval and documentation for company incorporation under the Amendment Act. In case of company incorporation, the name is reserved for a period of 20 days from the date of approval by the Registrar of Companies. However, in case of an application for reservation of name or for change of its name by an existing company, the Registrar of Companies may reserve the name for a period of 60 days from the date of approval.

Private Placement of Shares

Section 42 of the Act (relating to 'issue of shares on private placement basis') has been entirely substituted under the Amendment Act. The amendment will have an impact on both – private companies and public companies;

Issue of Share at Discount

Section 53 of the Act prohibited issuance of shares at a discount. The Amendment Act now allows companies to issue shares at a discount to its creditors when its debt is converted into shares in pursuance of any statutory resolution plan such as resolution plan under the Code or debt restructuring scheme.

Disclosure of Significant Beneficial Owners in a Company

The Amendment Act introduces a completely new provision with reference to the maintenance of the 'register of significant beneficial owners in a company'. Pursuant to the said provisions, every individual (whether acting alone or together, or through one or more persons or trust, including a trust and persons resident outside India) holding beneficial interests, of not less than 25 per cent in shares of a company or the right to exercise, or the actual exercising of significant influence or control over the company shall make a declaration to the company. The declaration shall specify the nature of his interest and other particulars, in such manner and within such period of acquisition of the beneficial interest or rights and any change thereof, as may be prescribed. Every company shall maintain a register of the interest declared by individuals and changes therein which shall include the name of individual, his date of birth, address and details of ownership in the company. Such register shall be open to inspection by any member of the company on payment of such prescribed fees. Every company shall file a return of significant beneficial owners of the company and changes therein with the Registrar of Companies containing prescribed particulars and within prescribed time. The Rules (yet to be prescribed) will introduce more clarity in the provisions and compliance procedures.

General Meetings and Board Meetings

Based on the operational and compliance issues faced by the corporates, the Amendment Act has amended the provisions relating to Board meetings and shareholders' meetings. Pursuant to the amendment, the annual general meeting of an unlisted company may be held at any place in India if consent is given in writing or by electronic mode by all the members in advance. An extraordinary general meeting of the company, other than of the wholly owned subsidiary of a company incorporated outside India, shall be held at a place within India. The provisions relating to shorter notice consent for general meeting have also been amended. Pursuant to the Amendment Act, any item of business, required to be transacted by means of postal ballot, may be transacted at a general meeting by a company which is required to provide the facility to members to vote by electronic means under section 108 of the Act. In case of Board meeting, the participation of directors may be either in person or through video conferencing or other audio visual means, as may be prescribed, which are capable of recording and recognising the participation of the directors and of recording and storing the proceedings of such meetings (along with date and time). Pursuant to the Companies (Meetings of Board and its Powers) Rules, 2014, there are certain transactions or matters which shall not be dealt with in a meeting through video conferencing or other audio visual means. Pursuant to the Amendment Act, it has now been clarified that where there is quorum in a meeting through physical presence of directors, any other director may participate through video conferencing or other audio visual means in such meeting on any specified matter.

Corporate Social Responsibility

The Amendment Act has amended provisions relating to corporate social responsibility ('CSR'). The amendment particularly relates to its applicability and constitution of CSR Committee.

Resident Director

The Amendment Act has amended the definition of 'resident director'. Pursuant to the amendment, every company shall have at least one director who stays in India for a total period of not less than one hundred and eighty-two days during the financial year. However, in the case of a newly incorporated company, the requirement shall apply proportionately at the end of the financial year in which it is incorporated.

Independent Director

The Amendment Act has amended the provisions relating to the pecuniary interest of the independent director with reference to holding any security of or interest in the company, its holding, subsidiary or associate company during the two immediately preceding financial years or during the current financial year, indebtedness of independent director's relatives to the company, its holding, subsidiary or associate company.

Loans to Directors

The entire section 185 of the Act, relating to 'loans to directors', has been substituted by the Amendment Act. Pursuant to the amendment, the Government has introduced adequate checks and balances by way of approval process and for enabling 'loans to directors' in certain cases.

Managerial Remuneration

Section 197 of the Act required approval of the company in a general meeting for payment of managerial remuneration in excess of 11 per cent of the net profits. The Amendment Act now requires that where a company has defaulted in payment of dues to any bank or public financial institution or non-convertible debenture holders or any other secured creditor, the prior approval of the bank or public financial institution concerned or the non-convertible debenture holders or other secured creditor, as the case may be, for such payment of managerial remuneration shall be obtained by the company before obtaining the approval in the general meeting. The requirement of Central Government approval is being replaced by such requirement of the approval of the shareholders, secured creditors and non-convertible debenture holders, as the case maybe. The Amendment Act also mandates the requirement that the statutory

auditor of the company to report in its auditors report on compliance of the provisions of managerial remuneration and whether remuneration paid to any director is in excess of the prescribed limits.

Registered Valuer

Section 247 of the Act prohibited a registered valuer from undertaking valuation of any assets in which he has a direct or indirect interest or becomes so interested at any time during or after the valuation of assets. The Amendment Act now prohibits a registered valuer from undertaking valuation of any asset in which he has direct or indirect interest or becomes so interested at any time during three years prior to his appointment as valuer or three years after valuation of assets was conducted by him.

Fee for Filing

Section 403 of the Act (relating to 'fee for filing') has also been amended by the Amendment Act. Pursuant to the amendment, where any annual return and financial statements is not submitted or filed within the prescribed period then the same can be submitted or filed after the expiry of the period, on payment of prescribed additional fee, which shall not be less than Rs. 100 per day and different amounts may be prescribed for different classes of companies. In due course, the Government may prescribe different fees for one person company small companies, private companies – which are not small companies, public companies, etc.

Fraud

The Amendment Act has amended the penal provisions relating to fraud. Pursuant to the Amendment Act, any person who is found to be guilty of fraud involving an amount of at least Rs. 10 lakh or 1 per cent of the turnover of the company, whichever is lower, shall be punishable with imprisonment for a term which shall not be less than 6 months but which may extend to 10 years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud. Where the fraud in question involves public interest, the term of imprisonment shall not be less than three years.

Conclusion

The suggested amendments aims at strengthening the corporate governance standards in India, initiate strict action against defaulting companies and at the same time improve ease of doing business in India. Based on the provisions of the Amendment Act, the Ministry of Corporate Affairs will amend the corresponding Rules framed under the Act.

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KNOWLEDGE UPDATE

FOREIGN EXCHANGE MANAGEMENT LAW

FDI Policy further Liberalized in Key Sectors

In order to liberalize and simplify the FDI policy so as to facilitate ease of doing business in India, the Union Cabinet approved a number of amendments in the FDI Policy. Key highlights of the changes are as follows:

- 100 per cent FDI under automatic route for single brand retail trading – There is no longer requirement for FDI in single brand Retail trading (SBRT).
- 100 per cent FDI under automatic route in construction development – Clarifying that real-estate broking service does not amount to real estate business and is therefore eligible for 100 per cent FDI under automatic route.
- Foreign airlines to invest up to 49 per cent under approval route – In order to do away with the restriction to invest in Air India, it has now been allowed to invest under Government approval route up to 49 per cent.
- FIIs/FPIs allowed to invest in power exchanges through primary market – Earlier FII/FPI purchases were restricted to secondary market. With the change in FDI policy, it has now been allowed through primary market as well.
- Definition of 'medical devices' has been amended.

An Analysis on Managerial Remuneration With Respect to Companies (Amendment) Act, 2017

The article aims to provide an overview of the important amendments brought by the Companies (Amendment) Act, 2017 with respect to managerial remuneration.

Jaya Sharma, Proprietor, Jaya Sharma & Associates, Practising Company Secretary Firm, Mumbai, E-mail : jaya@jsa-cs.com

Kruti Shah, Student of ICSI

Background

The Companies (Amendment) Bill, 2017, introduced by Lok Sabha on March 16, 2016 as The Companies (Amendment) Bill, 2016, was referred to the Standing Committee on Finance on April 12, 2016. The Companies (Amendment) Bill, 2017 passed by Lok Sabha on July 27, 2017 and Rajya Sabha on December 19, 2017, received the assent of the president on 3rd January 2018.

The major amendments proposed include simplification of the private placement process, rationalization of provisions related to loan to directors, omission of provisions relating to forward dealing and insider trading, doing away with the requirement of approval of the Central Government for managerial remuneration above prescribed limits, aligning disclosure requirements in the prospectus with the regulations to be made by SEBI, providing for maintenance of register of significant beneficial owners and filing of returns in this regard to the ROC and removal of requirement for annual ratification of appointment or continuance of auditor.

Companies (Amendment) Act, 2017 at a Glance

Section	Particulars	Impact Analysis
196(3)	Appointment of managing director, whole-time director or manager	It is proposed that a person beyond the age of 70 years can be appointed as managing director or whole time director or manager even when such appointment has not been approved by special resolution provided that the resolution for such appointment is passed with votes cast in favor of the motion exceed the votes, if any, cast against the motion and the Central Government is satisfied, on an application made by the Board, that such appointment is most beneficial to the company, the appointment of the person who has attained the age of seventy years may be made.

196(4)	Appointment of managing director, whole-time director or manager – CG Approval	This amendment clarifies that in respect of appointment of managing director, whole time director or manager, the approval of Central Government shall only be required in case the appointment is not in accordance with the matters specified in Part I of Schedule V.
197(1)	Overall maximum managerial remuneration	The amendment does away with requirement of obtaining approval of Central Government in case the total managerial remuneration exceeds 11 per cent of the net profits of that company. Further, post the amendment, the Company needs to pass a special resolution for payment of managerial remuneration in excess of prescribed individual limits. It also seeks to provide that, before approval of shareholders prior approval of bank or public financial institution or non-convertible debenture holder or secured creditor shall be obtained where any term loan is subsisting.
197(3)	Managerial remuneration in cases of inadequate profits	The requirement of obtaining prior approval of the Central Government in case of absence or inadequate profits has been done away with.
197(9)	Refund of excess remuneration taken by directors	It specifies a time limit of 2 years within which the excess remuneration needs to refund by the director to the company.
197(10)	Waiver of the recovery of any sum refundable to company by the director	A big relief to companies since Central Government approval of waiver of the recovery of any sum refundable to company by the director has been done away it and now only a special resolution passed within 2 years from the date the sum becomes refundable, is required for such waiver. Further, prior approval of bank or public financial institution or non-convertible debenture holder or secured creditor shall be obtained where any term loan is subsisting.
197(11)	Schedule V	CG approval done away with in cases where Schedule V is applicable on grounds of no profits or inadequate profits.
197(15)	Declaration by auditors on managerial remuneration	It requires auditors of the company in their report under section 143 to make a statement as to whether the remuneration paid by the company is accordance with the provisions of section 197. All existing applications to the CG shall abate and the company shall have to get the members' approval within a year of the Amendment Act coming into force.
200	Central Government of company to fix the limits with regard to remuneration	It is proposed to omit the power of the Central Government to fix the remuneration within the limits specified in the Act, at such amount or percentage of profits as it may deem fit.

Reasoning for the Amendment

- To provide flexibility to the companies in deciding or fixing the managerial remuneration.
- To avoid potential misuse and address potential concerns related to payment of excessive remuneration, the Amendment Act has incorporated adequate safeguards in the form of special resolution at the shareholder's meeting and prior approval of lenders whose dues have not been paid on time.
- To evaluate the financial position/performance of the company and approve managerial remuneration justified in the scenario.

Applicability of Amendment

- The changes made in the Amendment Act shall be effective from such date as may be notified by the Government in the Official Gazette.
- The Government may notify different dates for different provisions of the Amendment Act. The various amendments to the Act will provide much needed relief to stakeholders in terms of clarity, reduction in compliance burden and simplification of procedural requirements.
- Above measures are aimed to enhance ease of doing business and promoting healthy corporate environment in India.

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KNOWLEDGE UPDATE

COMPANY LAW

Section 1 and Section 4 of the Companies (Amendment) Act, 2017 came into force with effect from 26th January, 2018

Ministry of Corporate Affairs has appointed 26th January, 2018 as the date on which provisions of section 1 and section 4 of the Companies (Amendment) Act, 2017 shall come into force.

Companies (Appointment and Qualification of Directors) (Amendment) Rules, 2018

GSR 51(E) dated 22nd January, 2018 notifies the Companies (Appointment and Qualification of Directors) (Amendment) Rules, 2018 ('Amendment Rules') to amend the Companies (Appointment and Qualification of Directors) Rules, 2014 ('Rules'). The key highlights of the Amendment Rules are as follows:

- Substitution of sub-rule (1) of rule 9 which now provides that every applicant who intends to be appointed as director of an existing company shall make an application electronically in Form DIR-3 to the Central Government for allotment of a Director Identification Number (DIN) along with such fees as provided under the Companies (Registration Offices and Fees) Rules, 2014. In case the proposed director not having DIN, the particulars of maximum three directors shall be mentioned in Form No. INC-32 (SPICe) and DIN may be allotted to maximum three proposed directors through Form INC-32 (SPICe).
- Insertion of sub-clause (iiia) after sub-clause (iii) of clause (a) of sub-rule (3) of rule 9 which provides for "Board resolution proposing his appointment as director in an existing company"
- Substitution of clause (b) of sub-rule (3) of rule 9 which now provides that Form DIR-3 shall be signed and submitted electronically by the applicant using his or her own Digital Signature Certificate and shall be verified digitally by a company secretary in full time employment of the company or by the managing director or director or CEO or CFO of the Company in which the applicant is intended to be appointed as director in an existing company.
- Substitution of Form DIR-3 of the Annexure to the Rules.

Register of Significant Beneficial Owners in a Company

In this article, the author analyses key provisions of section 90 of the Companies Act, 2013, as substituted by the Companies (Amendment) Act, 2017, which introduces the concept of significant beneficial owners in a company.

Surendra U Kanstiya, Practising Company Secretary, Mumbai
E-mail : kanstiyask@rediffmail.com

Introduction

Section 90 of the Companies Act, 2013 has been substituted by a new section through the Companies (Amendment) Act, 2017. Whereas the erstwhile section empowered the Central Government to appoint one or more competent persons to investigate and report as to the beneficial ownership with regard to any share or class of shares, the said section in its new avtar introduces the concept of significant beneficial ownership and provides for maintenance of a register to be known as the register of significant beneficial owners.

Substantial Beneficial Interest

Section 90 is applicable to every individual, who acting alone or together, or through one or more persons or trust, including a trust and persons resident outside India, holds beneficial interests -

(*a*) of not less than 25 per cent or such other percentage as may be prescribed, in shares of a company; or

(*b*) the right to exercise, or the actual exercising of significant influence or control as defined in clause (27) of section 2, over the company (known as 'significant beneficial owner').

Beneficial Interest in Shares

Sub-section (10) of section 89 provides that beneficial interest in a share includes, directly or indirectly, through any contract, arrangement or otherwise, the right or entitlement of a person alone or together with any other person to -

(*a*) exercise or cause to be exercised any or all of the rights attached to such share; or

(*b*) receive or participate in any dividend or other distribution in respect of such share.

Control

According to clause (27) of section 2, control includes the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner.

Making of Declaration

Every individual holding significant beneficial interest is duty bound to make a declaration to the company, specifying the nature of his interest and other particulars, in such manner and within such period of acquisition of the beneficial interest or rights and any change thereof, as may be prescribed.

Exemption

The Central Government may prescribe a class or classes of persons who shall not be required to make such declaration.

Maintenance of Register

The company shall maintain a register of the interest declared by individuals and changes therein. The register shall include the name of individual,his date of birth, address, details of ownership in the company and such other details as may be prescribed. The register shall be open to inspection

by any member of the company on payment of such fees as may be prescribed.

Filing of the Return

The company shall also file a return of significant beneficial owners of the company and changes therein with the Registrar of Companies containing names, addresses and other details as may be prescribed within such time, in such form and manner as may be prescribed.

Calling of Information

With a view to collect the necessary information, a company is empowered to give notice, in the prescribed manner, to any person, whether or not a member of the company, whom the company knows or has reasonable cause to believe-

(*a*) to be a significant beneficial owner of the company;

(*b*) to be having knowledge of the identity of a significant beneficial owner or another person likely to have such knowledge; or

(*c*) to have been a significant beneficial owner of the company at any time during the 3 years immediately preceding the date on which the notice is issued,and who is not registered as a significant beneficial owner with the company as required under section 90.

Submission of Information

The person called upon to furnish the relating to the significant beneficial ownership shall submit the same within a period not exceeding 30 days.

Application to the Tribunal

In case a person fails to give the company the information required by the notice within the time specified therein; or(b) where the information given is not satisfactory, the company may apply to the national Company Law Tribunal (NCLT) within a period of 15 days of the expiry of the period specified in the notice. In this manner the company can seek an order from the Tribunal, directing that the shares in question be subject to restrictions with regard to transfer of interest, suspension of all rights attached to the shares and such other matters as may be prescribed.

Order by the Tribunal

Tribunal may, after giving an opportunity of being heard to the parties concerned, make such order restricting the rights attached with the shares within a period of 60 days of receipt of application or such other period as may be prescribed. The company or the person aggrieved by the order of the Tribunal may make an application to the Tribunal for relaxation or lifting of the restrictions placed by the Tribunal.

Fines for Contravention

If any person fails to make a declaration,he shall be punishable with fine which shall not be less than Rs.1 lakh but which may extend to Rs.10 lakh. In case the failure is a continuing one, a further fine which may extend to Rs.1,000 for every day after the first during which the failure continues.

If a company fails to maintain register, file the prescribed return, or denies inspection of the register, the company and every officer of the company who is in default shall be punishable with fine which shall not be less than Rs.10 lakh but which may extend to Rs.50 lakh and where the failure is a continuing one, with a further fine which may extend to Rs.1000 for every day after the first during which the failure continues.

If any person wilfully furnishes any false or incorrect information or suppresses any material information of which he is aware in the declaration made under this section, he shall be liable to action under section 447 which provides penalty for the person who is found to be guilty of fraud.

Conclusion

The fact that huge fines have been proposed for numerous contraventions should be sufficient caution to the concerned companies and the individuals and they should commence the compilation of the relevant information without further delay. As soon as the relevant Rules and the Forms are notified, the compliance of the relevant provisions should be given the top priority so as to ensure that the prescribed time lines are not missed out.

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Testing the Efficacy of the Condonation of Delay Scheme, 2018

This article is intended to familiarise the Condonation of Delay Scheme, 2018 which has been introduced to provide relief to the disqualified directors of companies which have not filed financial statements and annual returns.

Namrata Pandit, Student, Govt. Law College, Mumbai

E-mail : namrata9511@gmail.com

Introduction

Under the Companies Act, 2013 ("Act"), every company registered under the Act is required to file their annual financial statements and annual returns with the Registrar of Companies ("RoC") and failure to file such documents constitutes an offence. Sub-section (2) of section 164 read with section 167 of the Act provides that a default in filing the above documents for a continuous period of three years disqualifies a director from being re-appointed as a director in the defaulting company or in any other company. Further, such directors of defaulting companies are required to inform the concerned company regarding their disqualification, if any, in Form DIR-8 before their appointment or re-appointment[1].

The Ministry of Corporate Affairs ("MCA") noticed that a large number of companies had defaulted in filing the requisite documents with the RoC. The MCA then launched a Company Law Settlement Scheme, 2014 providing an opportunity to the defaulting companies to clear their defaults within a three-month window.

Recently, MCA, identified 3,09,614 directors associated with defaulting companies, *i.e.*, companies that had failed to file financial statements or annual returns for a continuous period of three financial years from 2013-14 to 2015-16. These directors were barred from accessing MCA's online registry and their names were published on the MCA website. Following this, a number of writ petitions were filed and the MCA received a large number of representations from the industry, defaulting companies and their directors seeking an opportunity for the defaulting companies to become compliant and normalize their operations.

Key Provisions of Condonation of Delay Scheme, 2018

The MCA introduced the Condonation of Delay Scheme, 2018 ("Scheme") vide General Circular No. 16/2017 dated 29th December, 2017 ("Circular") for providing relief to the disqualified directors of the defaulting companies (the term "defaulting company" has been defined in the Circular to mean "a company which has not filed its financial statements or annual returns as required under the Companies Act, 1956 or Companies Act, 2013, as the case may be, and the Rules made thereunder for a continuous period of three years.") Key provisions of the Scheme are follows :

Applicability – The Scheme is applicable to all defaulting companies. However, it does not apply to the companies which have been struck off or whose names have been removed from the register of companies in accordance with sub-section (5) of section 248 of the Act.

Applicability in terms of documents – The Scheme shall apply only to the filing of the following overdue documents:

- Form 20B/MGT-7 – Form for filing annual return by company having share capital
- Form 21A/MGT-7 - Particulars of annual return for company not having share capital
- Forms 23AC, 23ACA, 23AC-XBRL, 23ACA-XBRL, AOC-4, AOC-4(CFS), AOC (XBRL) and AOC-4 (non-XBRL) - Forms for filing balance sheet/financial statement and profit and loss account

1. Rule 14 of the Companies (Appointment and Qualification of Directors) Rules, 2014

- Form 66 - Form for submission of compliance certificate with the RoC
- Form 23B/ADT-1- Form for intimation for appointment of auditors

Further, only those overdue documents mentioned above which were due for filing till 30th June, 2017 can be filed by a defaulting company in accordance with the Scheme.

Procedural aspects of the Scheme – Procedure to be followed for condonation of delay provided in the scheme can be summarised as follows :

- The DINs of the disqualified directors shall be temporarily activated to enable them to file the overdue documents.

The overdue documents shall be filed by the defaulting company in the respective e-Forms on payment of the requisite fees and additional fees, if any, as payable under Section 403 of the Act[2]. The Companies (Amendment) Act, 2017 has substantially amended the provisions of section 403[3] and the extension of 270 days that was earlier allowed under the first proviso to section 403 has been omitted. The amended first proviso to section 403 states that in case of delay in filing financial statements or annual returns, an additional fee of minimum Rs. 100 per day shall be payable and the amount of additional fees may be varied depending upon the class of companies. When the company has failed to file the said documents on two or more occasions, without prejudice to any other legal action or liability under the Act, a higher additional fee shall be levied which shall not be lower than twice the additional fee prescribed. Thus, keeping the Scheme in view, the modified section 403 purports to levy different additional fees for default in filing of financial statements and annual returns, which are covered by the Scheme, and default in filing of other documents.

Form e-CODS attached to the Circular shall be filed along with the overdue documents and a filing fee of Rs. 30,000 is required to be paid.

In the case of defaulting companies whose names have been removed from the register of companies under section 248 of the Act and which have applied for revival under section 252 of the Act, up to the date of the Scheme, i.e., 31st December, 2017, the DIN of the directors associated with such companies shall be re-activated only on the National Company Law Tribunal ("NCLT") passing an order for revival in favour of the company, subject to condition that the defaulting company shall file all overdue documents.

Effect of granting condonation - In the case of companies that have availed themselves of the scheme, the RoC shall withdraw all prosecutions pending with respect to the documents which have been filed under the Scheme. However, notwithstanding the Scheme, if a director associated with a defaulting company functions as a director even when he knows that his office has been vacated on account of the disqualification, he shall be liable to be punished with imprisonment for a term which may extend to one year or with fine which shall not be less than Rs. one lakh but which may extend to Rs. five lakh, or with both[4]. The Scheme shall also not affect any civil or criminal liabilities incurred by such disqualified directors during the period in which they remained disqualified. The DINs of the directors of the disqualified companies, at the first instance, shall be re-activated only temporarily. However, on verification and after finding that the overdue documents filed by the defaulting company are in order, the DIN of the concerned director shall be re-activated on a permanent basis since by virtue of condoning the default in filing the documents and allowing the defaulting company to file its overdue documents, the basis of the disqualification itself is extinguished.

In the case of companies that have not availed themselves of the scheme, the DINs of the directors associated with the defaulting companies that fail to avail of the Scheme, and are still found to be disqualified, shall be liable to be deactivated at the end of the Scheme period, *i.e.,* on 31st March, 2018. At conclusion of the Scheme, *i.e.,* on 31st March, 2018, the RoC may also take any other necessary actions under the Act against such companies.

Disclosures under Form e-CODS 2018 - Along with the basic details of the defaulting companies such as CIN (Corporate Identification Number), GLN (Global Location Number), name, address of the registered office or principal place of business,

2. Section 403 of the Act read with the Companies (Registration Offices and Fees) Rules, 2014.

3. Section 403 as amended by Companies Amendment Act, 2017 has not been notified yet.

4. Section 167 (2) of the Act.

date of incorporation, etc., and details with respect to the overdue documents, the e-CODS 2018 requires defaulting companies to make the following disclosures:

- *Whether any appeal(s) was filed against any notice issued or complaint filed before the competent court for violation of the provisions under the Act in respect of the overdue document/s*. If yes, attach proof of withdrawal of such appeal. This disclosure is mandated with the aim of reducing litigation in respect of such defaults. Under the Scheme, the default is condoned and all pending prosecutions against the defaulting company and its directors are withdrawn by the RoC, therefore, no reason exists for continuing any litigation with respect to the same matter.

- *Whether any prosecution(s) is pending in court against the company and its officers in respect of belated documents filed under the Scheme*. If yes, provide details thereof as an attachment. Since the Scheme provides an exemption from prosecution to the defaulting companies, the RoC must possess the details of all such pending prosecutions in competent courts against the company and its officers in respect of the overdue documents so that it may terminate or withdraw these cases.

- *Whether any director(s) of the company is declared as proclaimed offender or facing criminal case(s) for economic offences*. If yes, provide details of such director(s) as an attachment. It appears that the MCA intends to take a strict view in case of directors that are proclaimed offenders or have been charged with economic offences. Owing to the gravity of the offences involved, the MCA may not consider the defaulting companies' application for condonation of delay and refuse to accept the belated documents.

Court's Views on the Scheme

In the case of *Shikha Pahuja* v. *MCA*[5] the petitioner contended before the Delhi High Court that her name was included in the list of disqualified directors published by the government without issuing any show cause notice to her. It was argued on her behalf that there is no automatic disqualification under sub-section (2) of section 167 of the Act. The High Court stayed the impugned list of directors insofar as it included the names of the petitioner. In a subsequent order, the High Court permitted the petitioner to withdraw the petition in order to avail of the Scheme. Observing the MCA should give wide publicity to the Scheme, the Registrar of the Delhi High Court was directed to publish the Scheme on its own website.

In another important decision of the Delhi High Court in *Lalit Tanwar* v. *Union of India*[6], the petitioners were disqualified directors of a company whose name had been struck off the register of companies and such company was not in a position to apply for revival under section 252.The petitioners admitted that the company had not carried out any business and that they were willing to voluntarily strike it off the register of companies. In view of this, the Court held that the petitioners should be provided the benefit of the Scheme. The Court stated that, if on a scrutiny by the RoC, the documents are found to be in order, the removal of the name of the company under sub-section (1) of section 248 of the Act would be deemed as voluntary striking off under sub-section (2) of that section and the RoC shall sympathetically consider the application of the company under the Scheme.

Conclusion

The Scheme comes as a much-needed relief to the disqualified directors of the defaulting companies. Distressed directors that had filed writ petitions in various courts withdrew these petitions in order to avail of the Scheme. The Scheme excludes companies whose names have been removed off the register of companies. Such companies are required to approach the NCLT for revival and obtain a favorable order within the three-month window, in order to be covered under the Scheme. Courts have stepped in to the rescue of such companies which are unable to comply with this requirement and the Delhi High Court, in *Lalit Tanwar's* case (*supra*), has liberally construed the provisions of the Scheme and extended its benefits to such companies when a genuine case is made out.

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5. W.P. (C) 9501/2017 & CM No. 38623/2017

6. W.P.(C) 110/2018 and CM Nos. 487-88/2018

Dormant Company under the Companies Act, 2013

In this article the author delves into dormant company as contemplated under section 455 of the Companies Act, 2013 and the Companies (Miscellaneous) Rules, 2014.

Swapna Somayaji, Student of ICSI

Email: swapna.ridhi1515@gmail.com

Introduction

Concept of dormant companies is a new concept under the Companies Act, 2013 ('the Act'). A company is dormant if it has no significant accounting transaction during the accounting period. A significant accounting transaction is one which the company should enter in its accounting records. When a company is formed for a future project or to hold an asset or intellectual property and has no significant accounting transaction that kind of company may be incorporated as the dormant company under the Act. Section 455 of the Act and Companies (Miscellaneous) Rules, 2014 specify the law and procedure regarding the dormant company. Dormant company status is a new phenomenon and is an excellent tool for keeping assets in the company for its future usage. A dormant company may be either a public company or a private company or a one person company. Construction companies/real estates companies incorporate new companies to hold land/ properties for future projects. It is beneficial for them, as they can incorporate company and purchase property/land in that company and get status of dormant company. There is less compliance in dormant company in comparison of active company. It will help to save cost of compliances for inactive companies.

An Overview of Dormant Company

There are around 1.5 lakh dormant companies present in Indian corporate sector according to recent government data which are either incorporated for future project or to hold only IPRs or assets. Some are yet to carry out the operations or is not operational for a long period of time. However, a dormant company does not necessarily mean that they are defunct; it includes companies which does not have significant operation or transactions because of the nature of business they perform. A dormant company provides an excellent advantage to promoters who want to hold an intellectual property or an asset under the corporate shield for its usage at a later stage. For instance, if a promoter wants to buy a property now for the purpose of some future project at a comparatively affordable price, he can purchase the property through a dormant company so that he can use the property for the project later on. A dormant company formation can also prove useful when an individual wishes to stop trading for a specific period of time. For example, if an individual has been running a successful company but wishes to move abroad for a short time, he can choose to preserve his company by acquiring status of dormant, so that he can restart it at a later date. Since a dormant company remains in the books of registrar for a considerable time it provides the company with a sense of maturity and might help to boost its credit worthiness. Dormant companies or asset holding companies also helps in limiting the liabilities of the holding company and protect the assets of the group company from the operation of other subsidiary company. In case one of the subsidiaries goes bankrupt, unless

the holding company has co-signed the debt, the holding company will not be liable for the loss.

Meaning of Dormant Company

In terms of section 455 of the Act, 'inactive company' means a company which has not been carrying on any business or 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. 'Significant accounting transaction' means any transaction other than, (*a*) payment of fees by a company to the Registrar, (*b*) payments made by it to fulfil the requirements of this Act or any other law, (*c*) allotment of shares to fulfil the requirements of this Act and, (*d*) payments for maintenance of its office and records. A dormant company shall have such minimum number of directors, file such documents and pay such annual fee to the Registrar to retain its dormant status in the register and may become an active company on an application made in this behalf.

Conditions subject to which company can obtain the status of a dormant company

The section 455 deals with companies which are dormant in nature and provides certain conditions to be fulfilled before getting a tag of dormant company. Company may apply for a dormant status if it is formed and registered under the Act for a future project, or to hold an asset or intellectual property and besides it has no significant accounting transaction. An application has to be made to the Registrar of Companies to get a dormant company certificate.

Obtaining status of dormant company

The Companies (Miscellaneous) Rules, 2014 lays down the procedure for obtaining status of dormant company. The relevant Rules are as follows :

Application for obtaining - In terms of rule 3, a company may make an application in Form MSC-1 to the Registrar of Companies ('RoC') within 30 days of passing a special resolution in the general meeting of the company or after issuing a notice to all the shareholders of the company for this purpose and obtaining consent of at least 3/4th shareholders (in value). The ROC shall maintain a register of dormant companies on www.mca.gov.in website maintained by Ministry of Corporate affairs or any other website notified by Central Government. A company shall be eligible to apply only, if

(i) it is neither having any public deposits which are outstanding nor is the company in default in payment thereof or interest thereon;

(ii) no inspection, inquiry or investigation has been ordered or taken up or carried out against the company;

(iii) no prosecution has been initiated or pending against the company under any law;

(iv) it is not having any outstanding loan or if there is any, the concurrence of the lender has been obtained and is enclosed with the application;

(v) it has not defaulted in the payment of workmen's dues;

(vi) it does not have any outstanding statutory taxes, dues, duties etc, payable to the Central Government or any State Government or local authorities etc.;

(vii) there is no dispute in the management or ownership of the company;

(viii) application has not been made with an objective to deceive the creditors or to defraud any other person;

(ix) securities of the company are not listed on any stock exchange within or outside India.

Minimum number of directors – Rule 6 prescribes minimum number of directors and states that a dormant company shall have a minimum number of three directors in the case of a public company, two directors in the case of a private company and one director in case of a one person company. The provisions of rotation of directors do not apply on dormant companies.

Return of dormant company – Rule 7 provides for filing returns. It states that a dormant company shall file a return of dormant company annually, inter-alia, indicating financial position duly audited by a chartered accountant in practice in Form MSC- 3 within a period of thirty days from the end of each financial year. However, the company shall continue to file the return or returns of allotment and change in directors in the manner and within the time specified in the Act, whenever the company allots any security to any person or there is any change in the directors of the company.

Exemptions or privileges for dormant companies – A dormant company is exempted from enclosing cash flow statements in its annual accounts. A Dormant Company shall be deemed to have complied with all the provisions of section 455 if at least one meeting of Board of directors has been conducted in each half of a calendar year and the gap between the two meetings should not be less than ninety days [section 173(5)]. However, a dormant company shall file a return of dormant company annually, indicating financial position duly audited by a chartered accountant in practice in Form MSC-3 within a period of thirty days from the end of each financial year.

Once Dormant, Can It Become Active Again?

Yes, in terms of sub-section (5) of Section 455, a dormant company may become an active company on an application made in this behalf. rule 8 provides procedure for seeking status of an active company. It states that the application shall be made in Form MSC-4 together with the prescribed fees and also with a return in Form MSC-3 with respect to the financial year in which the application seeking active status is being filed. As per rule 8 of the Rules, the Registrar shall issue a certificate recognising the active status of the company under Form MSC-5. The Registrar shall initiate the process of striking off the name of the company if the company remains as a dormant company for a period of consecutive five years. Where a dormant company does or omits to do any act mentioned in the grounds of application in Form MSC-1 submitted to the Registrar for obtaining the status of dormant company, affecting its status of dormant company, the directors shall within seven days from such event, file an application, under sub-rule (1) of rule 8, for obtaining the status of an active company. Where the Registrar has reasonable cause to believe that any company registered as 'dormant company' under his jurisdiction has been functioning in any manner, directly or indirectly, he may initiate the proceedings for enquiry under section 206 of the Act. If after giving a reasonable opportunity of being heard to the company in this regard, it is found that the company has actually been functioning, the Registrar may remove the name of such company from register of dormant companies and treat it as an active company. In case the dormant company does or omits to do an act under the Grounds of application in Form MSC-1 (submitted while seeking dormant status), the directors have a duty under the Act to file an application for obtaining active-company status, within 7 days of such an act or omission. Besides this, the Registrar is empowered to take *suo moto* action in case he is satisfied that the dormant company has been functioning directly or indirectly. In such a case, he can initiate proceedings for enquiry under section 206 of the Act, and provide the company with reasonable opportunity of being heard. If after such hearing, he finds that the company has been functioning, he has the power to remove the name of the company from the register of dormant companies and treat it as an active one.

Form to be Filed

MSC 1:- Application for obtaining status of dormant company, certificate that there is no dispute in the management or ownership of the company, there is any outstanding unsecured loan obtaining concurrence of the lender.

MSC 2 :- Certificate allowing the status of a Dormant Company.

MSC 3 :- Return of dormant companies

MSC 4 :- Application for seeking status of an active company

MSC 5 :- Certificate allowing the status of an active company to the applicant

e-Form MGT-14 must have been filed before passing special resolution for obtaining dormant status and the company must not be a listed company.

If there is any outstanding unsecured loan, the company may apply under this rule after obtaining consent / No objection/ concurrence of lender and enclosing the same with Form MSC -1.

As date of passing special resolution and SRN of MGT-14 is mandatorily required in form MSC-1, the company shall has to mandatorily required to hold General meeting for passing special resolution. So, there is no relevance of obtaining consent of at least 3/4th shareholders in value. Fees range from 2,000 to 20,000 on the basis of authorized share capital.

Attachments with Forms MSC-1

- Certified true Copy of Board resolution authorizing making of this application
- Certified true Copy of Special resolution authorizing for obtaining dormant status.
- Auditor's certificate
- Statement of affairs duly certified Chartered Accountant or Auditors of the Company
- Copy of approval or no objection certificate from the regulatory authority in case company is regulated by such authority.

Latest financial statements and annual return of the company is mandatory to attach in case the same is filed to Registrar.

What is the procedure for suo moto action by the Registrar?

Step 1 - The Registrar must issue notice to the company that has not filed its financial statements for two consecutive years.

Step 2 - The Registrar must record /enter the name of the company in the register of dormant companies.

Step 3 - The Registrar shall strike off the name of a dormant company from the register of dormant companies maintained by him if the company fails to comply with the requirements of Section 455.

It is to be noted, nevertheless, that a dormant company is not exempt from conducting audit of its books of accounts, holding meetings or other compliances under the Companies Act, 2013.

Conclusion

The intellectual property that the dormant company holds includes trademark of the company name. The name of the company is protected so that others are prevented from trading under the name of the dormant company. A company may have been formed in preparation of a future project. This signifies the intention of the promoters to trade and therefore retain the domain name. A good example of this as stated in Ramaiya is a company that has obtained a lease of land but waiting further approvals before commencing the business. Although this is not a very significant benefit, by establishing a company that is initially dormant and later begins business, can claim to be have been well-established since its incorporation though it may have started its business much later. It helps a company to project a better image to prospective clients and/or creditors.

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KNOWLEDGE UPDATE

INSOLVENCY LAW

Amendment to the Insolvency and Bankruptcy Board of India (insolvency Resolution Process for Corporate Persons) Regulations, 2016 and the Insolvency Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017

Insolvency and Bankruptcy Board of India has amended the insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and the Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017. Key highlights of the amendments are as follows:

- 'Dissenting financial creditor' means a financial creditor who voted against the resolution plan or abstained from voting for the resolution plan approved by committee of creditors.
- It is not necessary to disclose 'liquidation value' in the information memorandum.
- A resolution applicant shall submit the resolution plan (s) to the resolution professional within the time given in the invitation for the resolution plans in accordance with the provisions of the Code which will enable the committee of creditors to close a resolution process as early as possible subject to provisions in the Code and the regulations.

Insolvency professional to use registration number and registered address in all his communication

Insolvency and Bankruptcy Board of India, vide Circular No. IP/001/2018 dated 3rd January, 2018 has directed that the Insolvency Professionals, in all his communications whether by way of public announcement or otherwise to a stakeholder or authority, shall prominently state the following:

- His name, address and email as registered with IBBI
- His registration Number as an insolvency professional granted by the IBBI
- Capacity in which he is communicating

Relaxation in the provisions relating to levy of minimum alternate Tax (MAT) in case of companies against which application for corporate insolvency resolution professional has been admitted under the Insolvency and Bankruptcy Code, 2016

With a view to minimise the genuine hardship in relation to restriction in allowance of brought forward loss for computation of book profit under section 115JB, faced by companies against whom an application for corporate insolvency resolution process has been admitted by the Adjudicating Authority under section 7 or section 9 or section 10 of the Code the Ministry of Finance, has decided that with effect from assessment year 2018-19 (i.e. financial year 2017-18) the amount of total loss brought forward (including unabsorbed depreciation) shall be allowed to be reduced from the book profit for the purposes of levy of MAT under section 115JB of the Act.

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If undelivered, please return to:
Krishna Law House,
128, Municipal Market, Super Bazar Compound,
Connaught Place, New Delhi-110001.