

SEBI exonerates independent directors for dividend non-payment, notes board meeting minutes for concerns flagged

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Summary

One of the most discussed issues in Corporate Laws is the liability of directors and more specifically liability of Independent Directors. Pursuant to Section [149\(12\)](#) of Companies Act, 2013, the facts of case, nature of omission or commission, role of directors at that point of time are some of the important factors for concluding whether Independent Director and Non-Executive Director (not being promoter or KMP) are liable or not. This article is an analysis of the SEBI order in respect of liabilities of Independent Directors w.r.t. the non-payment of dividend within prescribed time. SEBI exonerated the Independent Directors of listed company for the company's default in payment of dividend within prescribed time. SEBI relied on minutes of the board of directors and efforts made by the Independent Director to flag the concerns to the board of directors.

One of the most discussed issues in Company Law and Securities Law is the liability of the directors and more specifically liability of the Independent Directors. According to the provisions of Section 149(12) of Companies Act, 2013, an Independent Director and Non-Executive Director (not being promoter or KMP), shall be held liable, only in respect of such acts of omission or commission by a company which had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently. Here, to determine the liabilities of Independent Director and Non-Executive Director, there are two tests which are to be considered: (i) Omission or Commission by the company which had occurred with director's knowledge, attributable through Board processes, (ii) Director's consent or connivance or where he had not acted diligently. The facts of case, nature of omission or commission, role of directors at that point of time are some of the important factors for concluding whether Independent Director and Non-Executive Director (not being promoter or KMP) are liable or not. However, such provisions are not applicable to executive directors of the company.

This article is an analysis of the SEBI order in respect of the liabilities of the Independent Directors listed w.r.t. the non-payment of dividend within prescribed time.

Details of non-compliance by the Company

Zylog Systems Limited ('ZSL') is company listed on BSE and NSE. ZSL had declared dividend to its shareholders at the rate of Rs. 5 per equity share of the face value of Rs.5/- each and the same was approved in the Annual General Meeting held on September 25, 2012. The total amount of dividend declared was Rs.16,44,64,200/-. SEBI received several complaints from investors alleging that ZSL has not paid the dividend declared by it. Accordingly, SEBI issued a letter asking the company to furnish information regarding declaration and payment of dividends under the Companies Act, 1956 and reasons for default. ZSL submitted that they have not been able to pay dividend to the shareholders due to strain on liquidity position of the company.

ZSL further submitted the list of directors as on the date of declaration of dividend i.e. September 25, 2012. Accordingly, SEBI issued Show Cause Notice to all the directors for the said non-compliance and violation of the provisions of Companies Act, 1956. ZSL's two Independent Directors submitted the following:

- (i) Default of non-payment of dividend within the statutory period occurred at the company's administrative level without their knowledge or consent as both of them were not associated with the day to day activities of the company,
- (ii) One of the Independent Director stated that he was unaware of the default till November 12, 2016, when the same was brought to his notice as per the certificate furnished by Company Secretary and Managing Director stating that Dividend for the year 2011-12 has not been paid yet;
- (iii) One of the Independent Director, who was also the Chairman of the Audit Committee, submitted a copy of the minutes of the meeting of the Audit Committee;
- (iv) Other Independent Director submitted that he came to know about the non-payment of dividend when the same was taken up in the board meeting of November 14, 2012. He submitted that he was inducted as an independent director of the company on February 11, 2011 for his technical competence in the IT field;
- (v) Independent Directors relied and referred the copy of the minutes of Board Meeting dated November 14, 2012, wherein they had flagged off the issues relating delay in payment of TDS, payment of dividend and other statutory dues. Independent Directors had also commented on the non-remittance of Dividend Distribution Tax and Provident Fund. All such non-compliances and observations were recorded in the Minutes of the Board Meeting;
- (vi) One of the Independent Director resigned immediately after the board meeting on November 20, 2012, and the other independent Director resigned on January 2, 2013.

SEBI's observation & Conclusion

SEBI stated that the Independent Directors do have an important role to play in guiding the management so that the interest of the Company and the minority shareholders are protected. The Independent Directors will

also have to ensure that the functioning of the Company is in full compliance with the applicable laws. SEBI noted that two Independent Directors after noticing the violation of non-payment of dividend have taken strong stands to convince the Board of Directors of the company about the necessity of ensuring that the statutory dues and the dividends are paid without any delay. As the company failed to comply, the two independent directors resigned from the ZSL's Board. SEBI disposed off the Show Cause Notices against the Independent Directors and observed that *"Since both the noticees did not have any role in the day-to-day management of the company and have discharged their responsibility as Independent Directors putting in their best efforts."*

Conclusion

In my view, this is a very interesting order, wherein SEBI has exonerated the Independent Directors of listed company. The Independent Directors have proved their diligence (as required under Section 149(12) of Companies Act, 2013) by referring and presenting the Minutes of the Board Meeting and Audit Committee Meeting. The SEBI has noted only the Independent Director's role in flagging off the issues relating to delay in payment of TDS, payment of dividend and other statutory dues, non-remittance of Dividend Distribution Tax and Provident Fund. SEBI has not questioned the action taken by the company to make good the default. Based on this ruling, it can be said that bringing the issues relating to non-compliances before the company's management and noting the same in Minutes of meeting are the 'best efforts' by the Independent Directors. It will be interesting to see the stand taken by the other Courts / Tribunals and statutory authorities w.r.t. the liabilities of the independent directors for delay in payment of TDS, non-remittance of Dividend Distribution Tax and Provident Fund.

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