

Directors' Disqualification,  
CODS 2018,  
Company Strike off &  
Restoration

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**Full Day Seminar ICSI – EIRC.**

2

# Director's Disqualification

# Sec. 164(1) of Cos. Act, 2013

3

*A person shall not be eligible for appointment as a director of a Co.:*

- (a) He is of unsound mind and stands so declared by a competent court;*
- (b) He is an undischarged insolvent;*
- (c) He has applied to be adjudicated as an insolvent and his application is pending;*
- (d) He has been convicted by a court of any offence, whether involving moral turpitude or otherwise, and sentenced in respect thereof to imprisonment for not less than 6 months and a period of five years has not elapsed from the date of expiry of the sentence.*

# ... Sec. 164(1) of Cos. Act, 2013

4

- (e) *On order disqualifying him for appointment as a director has been passed by a court or Tribunal and the order is in force;*
- (f) *He has not paid any calls in respect of any shares of the company held by him, whether alone or jointly with others, and six months have elapsed from the last day fixed for the payment of the call;*
- (g) *He has been convicted of the offence dealing with related party transactions under section 188 at any time during the last preceding five years; or*
- (h) *He has not complied with sub-section (3) of section 152.*

# Sec. 164(2) of Cos. Act, 2013

5

(2) No person who is or has been a director of a Co. which:

- a) *Has not filed Financial Statements or Annual Returns for any continuous period of 3 Financial Years; or*
- b) *Has failed to repay the **Deposits** accepted by it or pay interest thereon or to redeem any **Debentures** on the due date or pay interest due thereon or pay any **Dividend** declared and such failure to pay or redeem continues for one year or more, shall be eligible to be re-appointed as a director of that company or appointed in other company for a period of 5 years from the date on which the Co. fails to do so.*

# Companies (Amendment) Act, 2017

6

***Provided that*** where a person is appointed as a director of a Co. which is in default of clause (a) or clause (b), he shall not incur the disqualification for a period of 6 months from the date of his appointment.

# Vacation of Office of director [sec. 167]

7

*Office of a director shall become vacant in case—*

*a) he incurs any of the disqualifications specified in Sec. 164;*

*Provided that where he incurs disqualification under sub-section (2) of section 164, the office of the director shall become vacant in all the Cos., other than the Co. which is in default under that sub-section.*

**[Companies (Amendment) Act, 2017].**

# Vacation of office of Director [sec. 167]

8

- b) *He absents himself from all the meetings of the Board of Directors held during a period of 12 months with or without seeking leave of absence of the Board;*
- c) *He acts in contravention of the provisions of Sec. 184 relating to entering into contracts or arrangements in which he is directly or indirectly interested;*
- d) *He fails to disclose his interest in any contract or arrangement in which he is directly or indirectly interested, in contravention of the provisions of Sec. 184;*
- e) *He becomes disqualified by an order of a court or the Tribunal ;*
- f) *He is convicted by Court of any offence, whether involving moral turpitude or otherwise and sentenced in respect thereof to imprisonment for not less than 6 months:*
- g) *He is removed in pursuance of the provisions of this Act;*
- h) *He, having been appointed a director by virtue of his holding any office or other employment in the holding, subsidiary or associate company , ceases to hold such office or other employment in that Co.*



9

**Whether shareholders of Co. have locus standi to seek declaration as to director's declaration?**

# Whether shareholders of Co. have locus standi to seek declaration as to director's declaration?

10

- *Shareholders are vitally interested in proper & lawful management of Co., inasmuch as they are represented by Directors, and obviously they must see that Co. is managed and controlled by competent and untainted person to protect their interest;*
- *If a Co. mans the office of director with disqualified persons, it certainly brings disrepute to the Co. itself and it may have adverse effect in the business of Co.;*
- *Amended portion of Sec. 274 [of 1956] is punitive measure for the benefit and protection of the deposit holders against failure, either wilful or otherwise in repayment of deposit on due date;*

**Nabendu Dutta Vs Arindam Mukherjee  
[2004] 55 SCL 146 (CAL.).....**

..... **Whether shareholders have locus standi to seek declaration as to director's declaration?**

II

- *Not only the shareholder of a particular Co. in which tainted directors are sought to be appointed from a defaulting Co., any person in the member of the public who is interested to transact with that Limited Co. can also come in and question the appointment of the tainted directors;*
- *Section intends to identify those directors under whose management the default has occurred. Shareholder has a locus standi.*

**Nabendu Dutta Vs Arindam Mukherjee**  
**[2004] 55 SCL 146 (CAL.)**

12

## Can disqualification of director – take effect by issue of Govt. Notification

13

## Question is:

Whether Sec. 164 of Cos. Act 2013 has prospective or retrospective application?

# Kolkatta CLB: Prospective application of Sec. 164 & 167

14

**Kolkatta  
CLB**

## **Raj Shekhar Agrawal Vs Pragati 47 Development Ltd.**

# Facts of the case

15

- ❑ Petitioners filed 397/398 petition alleging acts of oppression/mismanagement in affairs of Resp. Co.
- ❑ Petition was pending for adjudication;
- ❑ Respondents filed an application praying for an order of injunction restraining / declaring as non-est appointment of any Advocate-on-record / Counsels under claimed authorization of erstwhile directors of Respondent Co., as they had vacated their offices in terms of Sec. 167(I)

# ... Facts of the case

16

- Respondent Co. submitted that all erstwhile directors vacated their offices in terms of Sec. 167(1) read with Sec. 164(2), due to default committed by erstwhile directors in filing, the financial statements of Respondent Co. & and its subsidiary cos. for 3 consecutive years.



# CLB: Prospective application of Sec. 164 & 167

17

- *Provisions of Sec. 164 & 167 have been notified w.e.f. April 1, 2014 and, hence, consequential action u/s 167(3) accrues on non-filing of financial statements for 3 years commencing from April 1, 2014.*
- *Erstwhile Directors continue to be validly and legally appointed directors and hence, the said Board of Directors is competent to appoint the Advocate by following the provisions of law.*

## 18 Another perspective – different provision

Can interpretation of Sec. 196(3)(a) of Cos.Act, 1956 be applied to the provisions of Sec. 164 of Cos.Act, 2013?

# Sec. 196(3)(a) of Cos. Act, 2013

19

Extract of  
Relevant  
provision:

*No co. shall appoint or continue the employment of any person as MD, WTD or Manager who:*

*(a) Is below the age of 21 years or has attained age of 70 years:*

***Provided that appointment of a person who has attained the age of 70 years may be made by passing a special resolution in which case the Explanatory Statement annexed to the notice for such motion shall indicate the justification for appointing such person.***

# HC: Director turning 70 years not to attract automatic 'mid-stream' disqualification

20

**Bombay HC**

**Justice GS  
Patel**

## **Sridhar Sundararajan ('SS')** **Vs** **Ultramarine & Pigments Ltd. &** **Rangaswamy Sampath ('RS')**

# Broad Facts

21

- RS was appointed as CMD of listed co. on August 13, 1990. On May 21, 1998, SS was appointed as director.
- On August 1, 2012, RS was re-appointed as CMD for term of 5 years till 2017. On same day, SS was also appointed as Joint-MD.
- Cos. Act, 2013 was enforced w.e.f. April 1, 2014
- RS attained the age of 70 years on November 11, 2014.
- SS contended that *“On the 70<sup>th</sup> birthday of RS, he earned himself statutory disqualification”*

# Interpretation of Single Judge

22

- *Sec. 196(3) does not operate to interrupt appointment of any Director made prior to coming into force of 2013 Act.*
- *It also does not interrupt the appointment of MD appointed after April 1, 2014 where at the date of MD's appointment / re-appointment was below the age of 70 years but crossed that age during his tenure.*

# Contextual reading of the words in Sec. 196(3)

23

- Interprets Sec. 196(3), use of words “*No company shall appoint or continue the employment of....*”, states that words should be read contextually.
- Draws parallel reference from Sec. 269 of 1956 Act, holds “*there was no ‘discontinuance’ of MD at the age of 70 years and the section applied only to his appointment (including re-appointment)*”.

# ***'70 years' was never an automatic mid-stream disqualification***

24

- ❑ *70 years was never an automatic mid-stream disqualification even under 1956 Act.*
- ❑ *Single Judge relied on SC ruling in P. Suseela & Ors. Vs University Grants Commission (2015) wherein it was held that “it is relevant to distinguish between an existing right and vested right. Where a statute operates in future it cannot be said to be retrospective merely because within the sweep of its operation all existing rights are included”*



# HC: Automatic disqualification trigger for directors turning 70, though appointment made pre-Cos Act, 2013

25

**Bombay HC**

**Justice VM  
Kanade**

**&**

**Justice Dr.  
Shalini  
Phansalkar-  
Joshi**

**Sridhar Sundararajan ('SS')**  
**Vs**  
**Ultramarine & Pigments Ltd. &  
Rangaswamy Sampath ('RS')**

# “MD attaining 70 years would immediately be disqualified”

26

- Bombay HC’s Single Judge Order was quashed.
- Division Bench held that disqualification for MD appointment on ground of age limit would act ‘automatically’
- Thus, MD attaining 70 years would immediately be disqualified.
- *RS was disqualified from continuing as MD, unless he fulfilled the requirements of the proviso i.e. company has to continue his appointment by a special resolution and, secondly, that resolution must state the reason why the continuation is necessary.*
- *Intention was to change earlier position by providing that person who has been appointed as MD before he was 70 years old is prohibited from continuing as MD once he has attained the age of 70.*

# “Language of Sec. 196(3)(a) is plain, simple & unambiguous”

27

- HC rejected RS’s contention that Sec. 196(3)(a) is not applicable to MD’s appointment before April 1, 2014, held *“it would otherwise retrospectively affect vested right of such MD and, secondly, that there is presumption against legislation operating retrospectively”*.
- *Language of Sec. 196(3)(a) is plain, simple and unambiguous and it applies to all MDs who have attained the age of 70 years and there is no distinction between MD who have been appointed before April 1, 2014 and those after April 1, 2014.*
- Div. Bench rejected reliance on MCA Circular that clarified conditions specified in Schedule XIII Part – I of Cos. Act, 1956 (requiring satisfaction only at the time of appointment).

28

# Can AoA provide for 'qualifications'

# Can AoA provide for ‘qualifications’?

29

- *There is nothing in any provisions of Cos. Act which precludes a Co. from having other qualification of directorship, if the AoA provides so;*
- *There can be nothing found in the Policy of Indian Cos. Act or in its language which prohibits additional or different disqualifications for directorship;*
- *There is nothing unreasonable in having minimum age limit with a view to justify confidence in mature judgment.*

***[Saraswathi Vilasam Shanmughanandha Nidhi Ltd. Vs Daivasigamani Mudliar  
(1951) 21 Comp Cas 85 (Mad)]***

30

# Recent trends – Disqualification of directors

# Madras HC granted interim stay against disqualification from directorship

31

- Madras HC granted interim stay in Writ Petitions filed challenging MCA order disqualifying petitioner from directorship, u/s 164(2) of Cos.Act.
- Petitions also seeks directions to MCA & ROC to permit Petitioner to get appointed or reappointed as Director of any Co. without any hindrance;
- High granted time to Respondents to file counters

**Bhagvan Das Dhananjaya Das Vs UoI**  
**Justice M. Duraiswamy**  
**[WP Nos. 25455 & 25456 of 2017]**

# HC directed DIN restoration of defaulting directors for annual-filing completion

32

- Telangana & Andhra Pradesh HC directed MCA to restore DIN of petitioners who are Directors in Dr. Reddy's Research Foundation;
- HC enabled directors to submit Annual Returns for FYs 2011-2012 to 2015-2016 and Financial Statements for 2012-13 to 2015-16;
- HC noted that MCA had disabled DINs of petitioner-directors for non-filing of financial statements/annual returns;



## ... HC directed DIN restoration of defaulting directors for annual-filing completion

33

- *“It appears that there is a lacuna in the procedure that is required to be followed by the companies, which are defaulted in filing their annual returns and the consequent disqualification of the Directors to rectify the defect”*
- HC noted that Rule 14 of Cos. (Appointment and Qualification of Directors) Rules, 2014 prima facie provides for rectifying the defect by enabling defaulting cos. to file returns;
- *“The said Rule does not provide what is required to be done by the respective authorities”*;

## ... HC directed DIN restoration of defaulting directors for annual-filing completion

34


- *“In the light of the fact that a Defaulting Co. is allowed to rectify the defect by filing the returns which have not been filed earlier, the natural corollary of the same would be that the Competent Authority is required to take the same into consideration. As the filing has to be done through e-platform, the same cannot be done unless access is provided to”;*
- HC referred to the Report of Companies Law Committee that disclosed the anomaly in respect of disqualification earned by an individual not only w.r.t. defaulting co. but also w.r.t. other cos.
- HC opined that rectification ought to be made restricting the scope of disqualification to Defaulting Co.

35

# Condonation of Delay Scheme 2018

# Basic Concepts – CODS, 2018

36



**Overdue Documents** means Financial Statements or Annual Returns or other associated documents, as applicable, in the case of Defaulting Co. and refer to documents mentioned in Para. 5 of the Scheme.

**Defaulting Co.** means a Co. which has not filed its Financial Statements or Annual Returns as required under Cos.Act, 1956 or 2013, as the case may be , and the Rules made thereunder for a continuous period of 3 years.

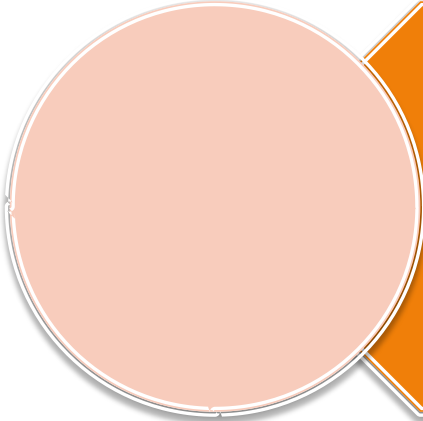
**Designated Authority** means RoC having jurisdiction over the Registered Office of Co.

# Which Cos. can file documents under CODS, 2018?

37



Only defaulting Cos. which have not been deregistered i.e. removed from Register of Companies by the Registrar of Cos,



Such defaulting Co. can file Annual Accounts or Annual Return which are overdue for filing till June 30, 2017.

# Which Cos. cannot file under CODS, 2018?

38

Cos. which have been de-registered / removed from Register of Companies by Registrar of Cos.

# What is the procedure for filing under CODS, 2018?

39

Deactivated DINs of defaulting directors will be activated for a temporary purpose only,

Defaulting Cos. shall complete pending filing by payment of additional fees, as prescribed,

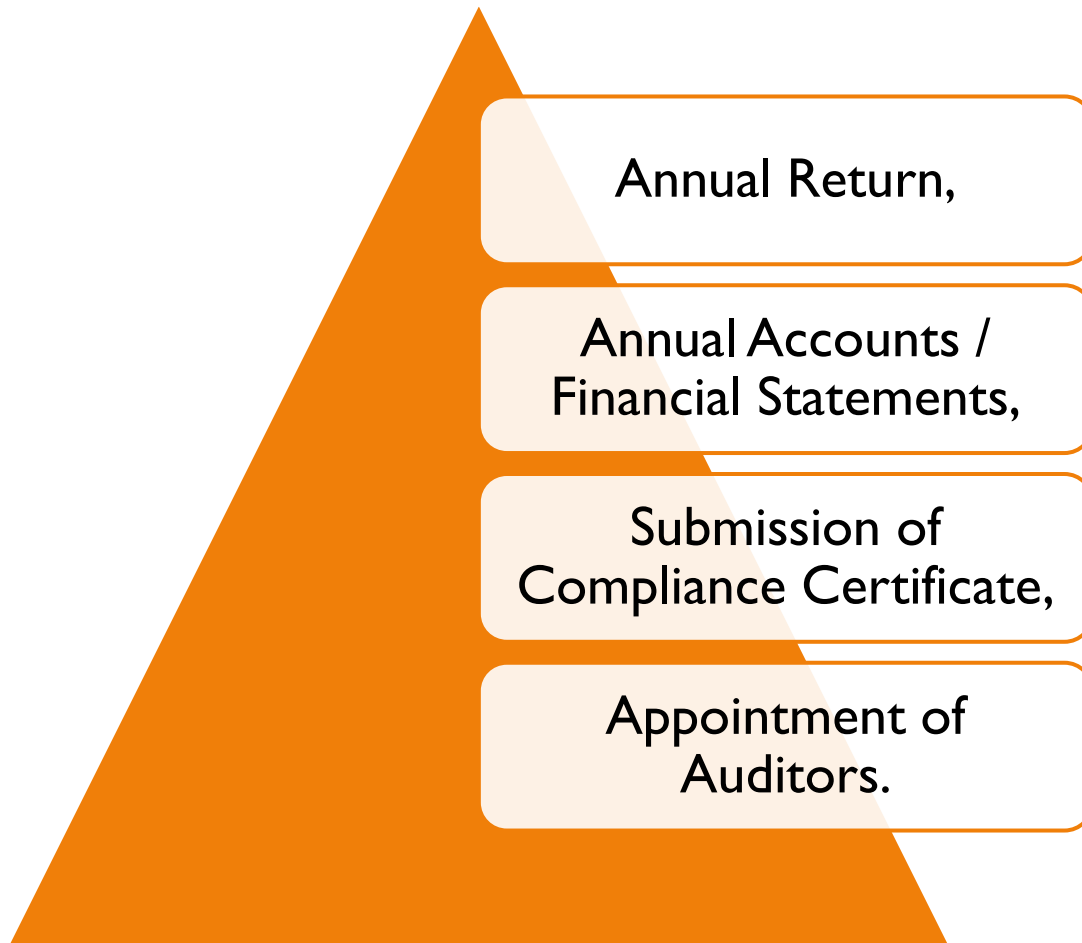
Defaulting Co. shall file an eForm 'e-CODS' along with a fees of Rs. 30,000/-,

If Defaulting Co. does not file the requisite documents / e-Forms, the DIN of the directors will be deactivated,

Where a Co. has been restored after an application to NCLT, the DIN of such directors would be re-activated, subject to company filing all overdue documents.

# Which e-Forms can be filed with activated DIN?

40





# Liability & Prosecution:

41

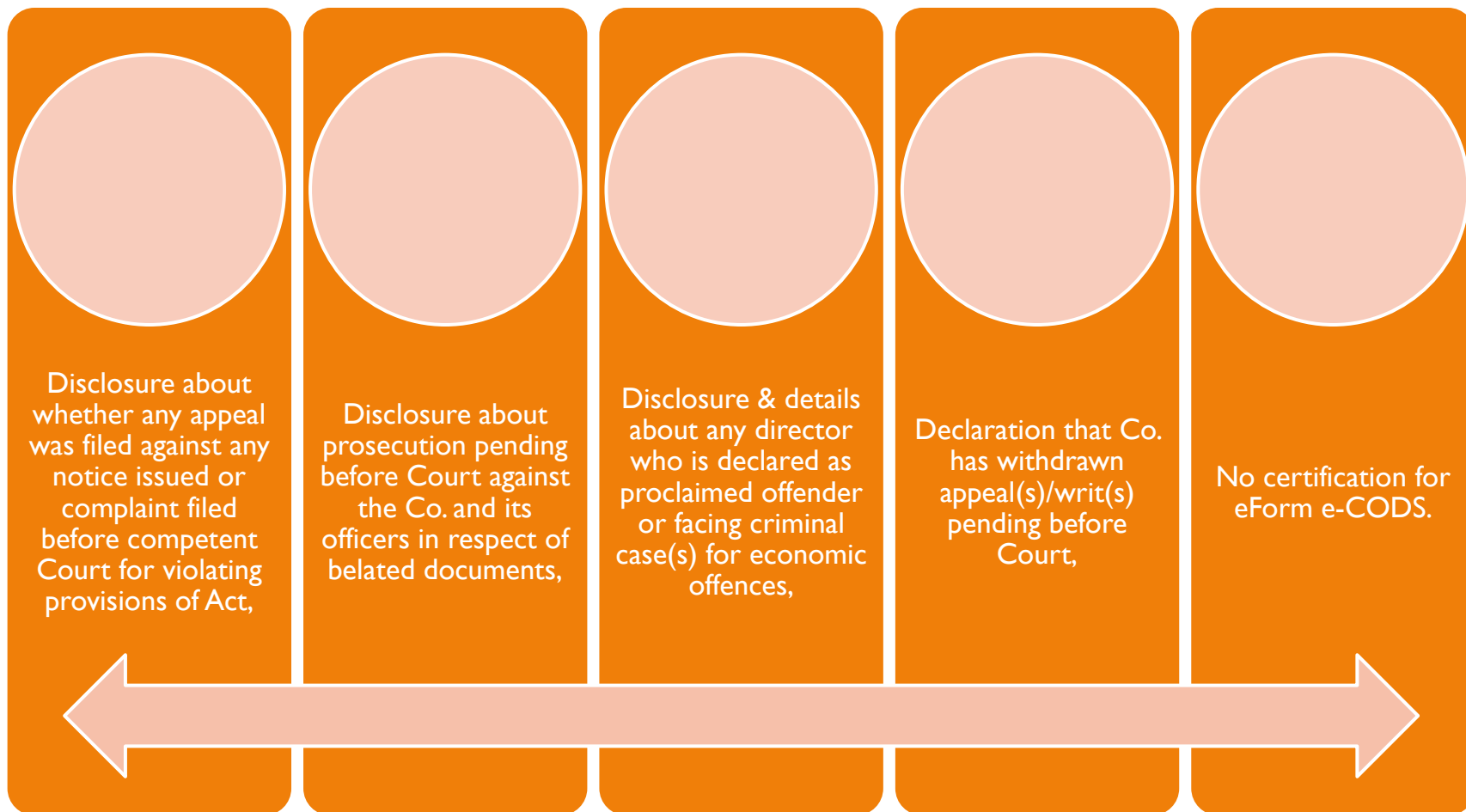
Registrar of Cos. shall withdraw the prosecution(s) pending, if any, before the concerned Court(s) for all documents filed under the Scheme,

This Scheme, is without prejudice to action u/s 167(2) of the Act, Civil and Criminal Liabilities, if any, of such disqualified directors during the period remain disqualified,

Registrar of Companies may take necessary actions against the defaulting Cos. which have not availed the Scheme and continue to default in filing documents;

# Key Features of eForm Cods, 2018:

42



43

## Who are the beneficiaries of the Scheme?

Some hint....

# PIB Press Release: Restriction on Bank A/cs of de-registered cos.

44

Dept. of Financial Services advises all Banks to take immediate steps to put restrictions on bank accounts of over two lakh 'struck off' cos.

*“Banks have also been advised to go in for enhanced diligence while dealing with Cos. in general. **Co. even having an active status on the website of MCA but defaulting in filing of its due Financial Statement(s) or Annual Return(s) of Particular of Charges on its assets on the secured loan should be seen with suspicion** as, prima facie, the Co. is not complying with its mandatory statutory obligations to file this vital information for availability to its stakeholders.”*

45

## Whether director's disqualification 'removed'?

.... Some hint

# Post Scheme, Removal of disqualification?

46

Representations have been received from stakeholders seeking clarification as to whether immunity from disqualification of directors pursuant to sec. 164(2)(a) of CA, 2013 will be applicable w.r.t. cos. who have filed Balance Sheets and Annual Returns on or after 1-4-2014, but before coming into force of CLSS – 2014 w.e.f. Aug. 15, 2014.

*Matter has been examined and it is clarified that in case of cos., who have filed their Balance Sheets and Annual Returns on or after April 1, 2014 but prior to launch of CLSS – 2014, disqualification sec. u/s 164(2)(a) of CA, 2013 shall apply only for prospective defaults, if any, by such cos.*

**MCA Circular dated Oct. 15, 2014**

# Uday Kotak Committee on Corporate Governance

## Chapter VI: Disclosures & Transparency

# Disclosures Pertaining to Disqualification of Directors – Certificate of Practising CS

48

*Certificate from Company Secretary in practice that none of the directors on the board of the company have been debarred or disqualified from being appointed or continuing as directors of the companies by the SEBI / MCA or any such authority.*

## **What is contemplated to check:**

- ✓ *Debar or Disqualify,*
- ✓ *From being appointed or continuing as Directors*
- ✓ *SEBI / MCA or any such authority.*



49

# Strike-off of Companies & Restoration

Case Laws (Recent & Relevant)

( Some more patience, Please 😊 )

50

# Can a Co. de-registered under FTE Scheme be restored?

# Facts of case

51

- Due to general depression in the market during the 2011 to 2013, the Petitioner Co. could not commence its operations as it required a huge amount of capital infusion. During the said period, even the subscribed capital was not received from initial subscribers and, therefore, the project remained a non-starter;
- Petitioner Co. filed an application and Form FTE as per the Fast Track Exit Scheme, 2011, u/s 560 of 1956 Act with ROC, for striking off its name from the Register of Companies;
- Petitioner Co., by way of present petition u/s 560(6), seeks restoration of its name, on the ground that there had been a change of business environment in the country;

# ... Facts of case

52

- Co. stated that because of Govt.'s special attention towards ease of doing business in the country, there were renewed excitement in the air-conditioning market and that it was expected to grow at a rapid pace of upto 12% p.a.;
- Co. contemplating to start a manufacturing unit for manufacturing roof mounted air conditioners for railway;
- Present petition u/s 560(6), seeking restoration of the name of the Petitioner Co. was instituted by Director of the Petitioner Co.

**Issue was whether Name of a Co. which has been struck off under Fast Track Exit Scheme can be restored subsequently, u/s 560(6) of the Act**

*Delhi High Court “it would be just and proper to order restoration of the name of the Petitioner Company in the Register of Companies maintained by the Respondent”*

**Intec Corporation (P.) Ltd. Vs RoC,  
(N.C.T. of Delhi & Haryana)**

# HC relied on foll. judgments:

54

- Siddhant Garg v. Registrar of Companies [2012] 112 SCL 99/18 taxmann.com 312 (Delhi): *As a matter of law, it cannot be said that where the company's name has been struck off on an application filed under Simplified Exit Scheme, the company cannot be restored*
- Madhya Pradesh HC in VI Brij Fiscal Services P. Ltd. v. RoC, (2010) 155 Comp.Cas. 157 (MP.) *has restored a company which had been struck off under Simplified Exit Scheme*

55

# What is 'carrying on any business or operations'

# Broad facts of case

56

- Appellant Co. was incorporated on 3-2-2004 under provisions of 1956 Act
- Appellant had acknowledged a receipt of notice sent by ROC to Co. & its directors to show-cause along with copies of documents,
- Appellant Co. had claimed that at the time when its name was struck off it was carrying on business and its operation were in progress;
- Appellant Co. had claimed that it had 84 employees on its payroll as on 31-3-2017 and it had paid a salary of Rs. 6.86 lakh to its employees for the month of May, 2017;
- Appellant Co. had also provided services to Hitachi Systems Micro Clinic Pvt. Ltd.



# NCLT observed & held that:

57

- Appellant Co. had claimed that it availed services and procured equipment required for running its operations;
- It availed services from Next Gen Networks including laying of CAT6UTP cable on telephone clip and invoice number SER-NEXT-17-18-03 dated 8-6-2017 was issued against the Appellant Co.;
- It also paid MTNL bills as was evident from the Bank Statement;
- Co. had taken office space on lease for running its operations.
- *Appellant Co. fulfils the requirement of Section 252(1) & (3) of Cos. Act which overwhelming warrant its restoration.*

**Microtech Infoserve (P.) Ltd.Vs RoC**  
**[NCLT, New Delhi Bench]**

58

## Director's medical emergency considered a reason for Co. Restoration

# Facts of the case

59

- Petitioner Co. was engaged in manufacturing and trading, etc., of clothes. BoD was informed that necessary documents [*Annual accounts, returns, etc.*], as required had not been filed with the ROC and in view of the same, the name of the company was struck off;
- Petitioner Co. filed the instant petition seeking restoration of name of the company in the ROC;
- Petition was filed on the ground that the ROC did not follow the prescribed procedure of giving 3 months notice to the Co. as mandatorily required u/s 560(3) of 1956;
- Petitioner Co. stated that the action of the ROC was arbitrary and needed to be quashed.

# Restoration of Co.

60

- *Even though one of the directors had suffered heart stroke as evident from the medical record it begs for an answer as to what the other directors were doing in fulfilling the obligations of Co. particularly in relation to the statutory requirement which is a moot point;*
- *Taking into consideration that the Co. is a running Co. and that it will be seriously prejudiced if not restored in the register of Registrar of Companies, the petition is allowed*

61

**NCLT permitted application for name restoration, observes land development agreement during Co. de-registration**

## ***Vasudev Hemubhai Dabhi Vs Registrar of Cos.***

# ‘Carrying on business activity’

62

- NCLT allowed application filed by Member and Director of Sehan Developers Pvt. Ltd. for seeking restoration of Sehan Developers Pvt. Ltd.’s name in Register of Companies;
- NCLT noted that the Co. was registered with the object of doing real estate business and it entered into an MoU to purchase certain lands for the development;
- NCLT perused Sec. 252(3) of the Act that requires carrying on the business / operation on date of strike off;
- Accordingly, allowed application for name restoration.

# Name Restoration powers are 'discretionary'

**NCLT (New Delhi Bench)  
Prudent Fire Services Pvt. Ltd.**

# Board facts of case

64

- In 2001, Prudent Fire Services Pvt. Ltd. ('Co.') had applied for striking off under Easy Exit Scheme, 2011 duly supported by an affidavit and indemnity bond from directors u/s. 560 of Cos. Act, 1956, as it was inoperative for past 6 years and was not able to sustain with prevailing competition in market/ continuous accumulation of losses;
- Co. submitted that its directors/ shareholders want to revive it to do the same business and, if required, new directors/ investors would be inducted to cope with market demands;



## Power to restore name is not a ‘ritual’ or ‘ceremony’

65

- NCLT (New Delhi) dismissed application filed by for restoration of its name in the Register of Cos., maintained by ROC;
- NCLT ruled that power to restore name is ‘Discretionary power’, which can be exercised for a substantial reason, and not as a ritual or ceremony;
- As the Co. itself admitted that it was inoperative for 6 years and directors/ shareholders themselves had applied for strike off, NCLT opined that *“When they themselves apply for exit, there cannot be any grievance in the striking off of the name of Co.”*

66

# Q & A Session

Directors' Disqualification, CODS 2018, Co. Strike Off & Restoration  
By Gaurav Pingle, Company Secretary, Pune

Sat., Jan. 6, 2018

**Thank you EIRC ICSI for the wonderful opportunity!! 😊**

**Thank you Members for active participation!! 😊**

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