



*(Contributed by CS Gaurav Pingle)*

*Is it mandatory for a private company whose debt securities are listed, to constitute an Audit Committee under Companies Act, 2013?*

Sub-section (1) of section 177 of the Companies Act, 2013 ('Act') states that the board of directors of every listed public company and such other class or classes of companies, as may be prescribed, shall constitute an Audit Committee. Pursuant to the Rule 6 of the Companies (Meetings of Board and its Powers) Rules, 2014, the Board of directors of every listed public company and a company covered under Rule 4 of the Companies (Appointment and Qualification of Directors) Rules, 2014 shall constitute an 'Audit Committee' and a 'Nomination and Remuneration Committee of the Board. Rule 4 of the Companies (Appointment and Qualification of Directors) Rules, 2014 relates to 'Number of Independent directors', which states that the following class or classes of

companies shall have at least 2 directors as independent directors: (i) Public Companies having paid-up share capital of ₹ 10 crore or more; or (ii) Public Companies having turnover of ₹ 100 crore or more; or (iii) Public Companies which have, in aggregate, outstanding loans, debentures and deposits, exceeding ₹ 50 crore. In all the above provisions, there is a reference to 'public companies' or 'listed public companies'. Taking into consideration the above relevant provisions and necessary amendments by Companies (Amendment) Act, it is not mandatory for a private company whose debt securities are listed, to constitute an Audit Committee under the Act.

*Pursuant to clause (b) of sub-section (1) of section 167 of the Companies Act, 2013, the office of director shall become vacant if he absents himself from all the meetings of the Board of Directors held during a period of twelve months with or without seeking leave of absence of*

*the Board. How is the period of twelve months to be counted?*

Pursuant to clause (b) of sub-section (1) of section 167 of the Companies Act, 2013, the office of director shall become vacant if he absents himself from all the meetings of the Board of Directors held during a period of twelve months with or without seeking leave of absence of the Board. The director is required to attend at least one board meeting within a period of 12 months. Here '12 months' neither mean calendar year nor financial year. *E.g.*, Board meetings of a company are held on January 24, 2017, April 21, 2017, June 8, 2017, September 10, 2017, December 12, 2017, March 4, 2018 and May 23, 2018. The last attended board meeting by one of the directors of the company was on January 24, 2017. Taking into consideration the provisions of clause (b) of sub-section (1) of section 167 of the Act and facts of the case, 12 months shall be counted from April 21, 2017 (*i.e.*, from the day on which director has not attended the meetings of board of directors). Therefore, in order to avoid 'vacation of office of director', the director shall attend a meeting of the board on or before April 21, 2018. Pursuant to the extant provisions, the concept of 'leave of absence' has become redundant from the perspective of 'vacation office of directors'.

*If a director of a company has vacated the office under section 167 of the Act, can the board of directors or shareholders or any other authority or Court condone it?*

Section 167 of the Act (relating to 'Vacation of office of director') provides for 8 occasions where the director vacates his office. Neither the section nor the Rules provide for condonation for non-compliance. The vacation of office of director is automatic. In *Bharat Bhushan v. H.B. Portfolio Leasing Ltd.* [1992] 74 COMP. CASE 20 (Delhi), the High Court held that "Section 283(1)(g) of Companies Act, 1956 lays down that the office of a director shall become vacant if he absents himself from three consecutive meetings of the board of directors, or from all meetings of the board for a continuous period of three months, whichever is longer, without obtaining leave of absence from the board. This particular provision does not contemplate the passing of any board resolution for showing that the office of the director has been vacated by a particular director. It appears that the vacation of the office of director is automatic as soon as a director is found to have incurred the disability as contemplated by clause (g)".