DIRECTOR'S INTEREST - at stake

This paper provides a critical analysis of the provisions relation to the disclosures of interest of Directors, etc., as per the Companies Act, 2013 and rules made there under which are in force as on date. The data and analysis for the information purpose only. In view of the nuance of the subject dealt with this paper, professional advise may be taken before taking any action and R & A neither assumes nor accepts any responsibility for any loss arising to any person acting or refraining from acting as a result of material contained in this paper.

DIRECTOR'S INTEREST– *at stake,.*

Provisions of Section 184 of the Companies Act, 2013 stipulates that every Director of a Company (both Public and Private) shall disclose their interest or concern in third party. The purpose is to ensure that the Company, before entering into a contract or arrangement with such third party be informed to take fair decisions in order to protect its own interests and comply with the Law.

The Director holds a fiduciary position in the Company and he should not use it for his personal benefits, by entering into contracts with his related Parties. The concept of fiduciary duty connotes that a person holding the fiduciary position cannot at the same time protect his interest and also that of the Company. The Section requires the Directors to disclose his concern or interest in Companies, Body Corporates, etc. The expression "*concern or interest*", is not defined in the Act and has been left to wisdom of the Board of Directors. Defining the the expression of "Concern or Interest" would have bought limitations on its scope. To have the benefit of independent, unabiased and collective judgement, opinion and wisdom of the Board and to protect the interest of the Stakeholder, the scope of the expression was kept wider in its scope. The words used in this Section have been purposely used (both in 1956 and 2013 Act) in as much general sence as possible to increase its ambit and scope.

DISCLOSURE OF DIRECTOR'S INTEREST:

Disclosure to be made for the purposes of Sub-section (1) of Section 184, should include the direct (i.e., personal and not of his relatives) ***concern and interest*** of such director, which shall also include his shareholding in any of the, -

- Company(ies)
- Body Corporate (LLP, Society and Foreign Companies)
- Firm
- Association of Individuals

The Director shall submit the declaration to the Board in Form MBP-1.

The Act requires all the Directors of a Company (both Private and Public) to disclosure the "Concern or Interest" (i) annually at the first Board Meeting in the Financial year [Sub-section (1)] as well as (ii) at the time of entering into a contract or arrangement or proposed contract or arrangement [Sub-section (2)]. The expressions ***"in any way, whether directly or indirectly, concerned or interested"*** used in Sub-section (1) of Section 299 of Companies Act, 1956 was independent and was widest in its scope. The same expression was repeated only in Sub-section (2) of Section 184 of the Companies Act, 2013 indicating that wider disclosures are required only when the Director is holding either by himself or in association with any other director, 2% or more of the shareholding in other Company or body corporate and other scenarios as mentioned in Clause (a) & (b) of Subsection (2) of Section 184. Which signifies that, the concern or interest in any way, whether directly or indirectly may not required to be disclose in the Board meeting, if the Directors are not coming under the purview of Clause (a)&(b) of Subsection (2) of Section 184. Further, by virtue subsection (2) of Section 184 read with Rule 15 (2) a director who is interested in any contract or arrangement with Related Party such director shall not be **present** in the meeting. So one has to ensure that interested directors is sent out of the Board Room and the minutes should indicate to this effect.

Further Sub-section (1) of Section 184 of the Companies Act, 2013 does not use the expressions ***in any way, whether directly or indirectly***, hence it may safely be argued that the dislcosure to be made in Form MBP-1, should contain only the concerns and interests of Director's and not that of his personal relationships (relatives), directly or indirectly. This understanding is further supported by the contents of Form MBP 1.

As per the Companies Act, 1956 the disclosure under section 299 is a General Disclosure and it was not mandatory on the part of Director to provide such disclosures.

Even the penal provisions under that section were not applicable, if the Director did not give any such declaration as long as he is not concerned or interested in any transaction.

This scenario has changed now by advent of Companies Act, 2013. The Disclosure to be given as per Section 184 is **mandatory** to every Director of any Company.

No specific exemption is provided to any company (i.e., Private, OPC, Small Company and Section 8 Companies) for non-applicability of these sections.

Also as per the provisions of Section 189(2) of the Act, every Director and KMP, shall within 30 days of his appointment or relinquishment, shall disclose his interest in **other associations** as per Section 184(1) of the Act.

Disclosure of interest or concern by Director or KMP within 30 days of relinquishment looks very strange and need to wait and see for more clarity on this by the Ministry.

DISCLOSURE SHALL BE MADE IN

- First Board Meeting where he is appointed as Director
- First Board meeting of the Financial year i.e., on or before 30th June.
- Next immediate board meeting if there is change in the disclosures already made.

Even one share held by the Director or any change in the Shareholding, even being sale, purchase, transfer, allotment of one share shall attract the provisions of the Section 184 read with Sections 179 & 117 of the Companies Act, 2013.

FILING OF RESOLUTION WITH REGISTRAR

Section 179 of the Companies Act, 2013 deals with Powers of the Board, which Directors shall exercise by passing a resolution in the Board Meeting. One of the Powers of the Board as per the Act and rules is to take note the Declaration of interest given by the Directors.

The provisions of these sections have lead to certain ambiguities, such as:

- Is ***taking note*** of declaration is a power of the Board?
- The Section prescribes a procedure to exercise a power i.e., by a way of resolution, but taking note by way of a resolution – looks odd for general understanding.

However by combined reading of the provisions of Sections 179 (3) read with the Rule 8 of the Companies (Meetings of Board and its Powers) Rules, 2014 take note of Directors interest and shareholding is a power to be exercised by the Board only in Board Meeting and the concerned resolution should be filed in Form MGT -14 (as per Section 117 of the Companies Act, 2013) within 30 days of taking note of such declaration in the Board meeting.

CONSEQUENCES OF NON-DISCLOSURE:

- The Director shall be liable to
  - An imprisonment which may extend to one year [or]
  - A minimum fine of Rs. 50,000/- which may extend to Rs. 1,00,000/- [or]
  - Both imprisonment and penalty.
- Such director shall also vacate his office as Director of the Company as per Section 167 (1) of the Act.

REAL TIMESCENARIO

All the Companies as on 1st April, 2014 are required to hold a Board Meeting before 30th June, 2014 and consider, inter alia, an item to take note of the diclosure of interest of Directors of the Company.

Now as we understand provisions let us apply the same in few real time pratical scenarios we might face.

- What if the director trades regularly on stock market?

  Then it is a night mare for the Director, as each and every transaction made in the stock market by him in regard to Shares, even preferance shares shall be declared by theDirector in next Board meeting as there is change in his interest in regard to that particlar company in which he trades.

- Will the Company be liable under Sections 117 and 179 if director does not provide declaration?

  Section 184 states that the Director shall give a declaration to the Company, which means,the onus of providing the declaration shall be on the Director and not on the Company. Obtaining the declaration from Director is not the Company'sduty and the event of filing of MGT – 14 does not arise until and unless the Board takes note of the Declaration. When there is nosuch declaration given to the Board, the Company may not have a resolution to take note of the disclosure.

- Should we attach Directors declaration to MGT – 14?

  The basic reason for filing MGT -14 is to file certain resolutions and agreements with the Registrar of Companies. Thus, by going with

the letter of law, attaching the Declaration of Directors Interest is not required. It is always advisable to attach the declaration of the Directoralong with the resolution in the MGT – 14.

- Dealy in filing Form MGT-14?

  The Company is allowed to File Form MGT-14 upto 270 days beyond the due date of 30 days with an additional fee. If the Company fails to file Form MGT-14 within the extended time, The Company shall be liable with a fine of minimum Rs. 5 Lacs and Every Officer in default with a minimum fine of Rs. 1 Lacs.

CONCLUSION

The responsibility of every director has been taken to next level in the Companies Act, 2013. Any intent of non declaration may also lead to fraud and the penal provisions provide for the imprisonment of the Director.

Even though the provisions of Section 184 (2) of the Companies Act, 2013 are not as extensive as of the previous act, still the essence has been captured to certain extent.

At last one can conclude by saying that the Government has taken necessary steps to protect the interest of Shareholders by making Directors mandatorily disclose their personal interests.

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