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Lecture on the ambit and scope of activation of Director Identification Number (DIN) at Webinar dated 09.10.2020 organised by Lex Locum Consultants LLP, Delhi

A warm welcome to the co-speakers and participants.

A very important topic for discussion has been taken up today in this webinar organised by Lex Locum Consultants, Delhi. The large scale disqualification of directors in terms of Section 164(2) of The Companies Act, 2013 has created a piquant situation. In this lecture we will look at the genesis of the issue, the remedies available as also whether such disqualification notices by the ROC is legally sustainable.

What is DIN

The Director Identification Number (DIN) is an unique identification number allotted by the Central Government to individuals intending to be a director of a new company or an existing director. It is compulsory for all directors of a company to have a DIN, which is obtained through an online process of filing an application. Every document authorised by a Director should mention his DIN.

Genesis of the issue

The issue regarding deactivation of a Director's DIN has arisen by virtue of Section 164(2) of the Companies Act, 2013 ('Act'). Section 164(2) states that a director is ineligible to be

re-appointed as a director of a company or appointed as a director in another company for five years from the date on which the company of the director fails to comply with the following:

- i. It has not filed annual returns or financial statements for a continuous period of three financial years; or
- ii. It has failed to repay any deposits accepted by it, pay interest on deposits, to redeem debentures on the due date, pay the interest due on debentures or pay any dividend declared and the failure to redeem or pay continues for one year or more.

In 2017, various ROCs published the list of defaulting companies and the disqualified directors as per provisions of Section 164(2) of the Companies Act, 2013. The ROCs considered the companies that had defaulted in filing the financial statements and annual returns from the financial year 2014-2015 while compiling the list of defaulting companies and flagging the disqualified directors. The Ministry of Corporate Affairs by taking the ambit of Section 248 which talks about 'Power of Registrar to remove name of company from register of companies,' struck off more than 2 lakh companies which were not filing its returns for the last many years.

Those companies were given a chance by the respective ROCs to reply to the notices issued to them before striking them off. Since no reply was given, the companies ultimately

were struck off by the concerned ROCs. The Directors of such companies were marked as "Disqualified Directors." The list of such disqualified directors is available at the website <http://www.mca.gov.in/MinistryV2/disqualifieddirectorslist.html>.

The main reason behind issuing Disqualified Director List was also that the Government was of the view that there are a large number of Shell Companies which are converting their black money into white while not complying with any law and not filing their returns. Hence, all the directors of such shell companies were declared disqualified.

The different types of companies in this regard are as under:

1. Defaulting Companies: having Active Status but Directors stand disqualified because of Non-Filing of their return;
2. Genuine Active Companies having genuine business but all directors are having disqualified status: Since the directors of these active companies were also directors of any other struck off or disqualified companies, the said directors stand disqualified in respect of all companies where they hold directorship. Hence return in respect of this company could not be filed.
3. Strike Off Companies, i.e. companies which got struck off and resultantly their directors got disqualified.

For the First two classes of companies, Government launched the COPS Scheme 2018 whereby such companies were given one time option to file their annual return and balance sheets with ROC and get the status of their Directors Approved from Disqualified. But the problem still persists for the directors who were declared Disqualified on account of Struck Off Companies.

Consequences of losing the DIN

The consequences of losing the DIN are very harsh. The Directors whose DINs were cancelled due to disqualification under Section 164(2) by the ROCs in 2017 stand debarred from appointment as directors in any other company for five years. As per the Act, once a director is disqualified under Section 164(2) of the Act, he/she will be eligible to be re-appointed as a director of a company only after de-flagging the disqualification of DIN by the MCA. And the MCA will de-flag the disqualified DIN only after five years from the date of disqualification.

Remedies available

The Companies Act, 2013 does not provide any remedial measure for removal of the disqualification of DIN. In case of DIN disqualification, a director can appeal to the National Company Law Appellate Tribunal (NCLAT) and temporarily ask for a stay order. Under the Act, the order disqualifying a

director will not be effective until the next 30 days of passing the order.

As soon as a director initiates an appeal before the NCLAT, he/she will continue to be a director of the defaulting company for the next seven days. Within seven years, a director can file the annual returns to prevent the order of disqualification. However, there exists no procedure to reappoint a disqualified director. A disqualified director can only be reappointed after five years from the date of disqualification.

The directors can also appeal to the High Courts by way of a writ petition to remove director disqualification. Now in this respect different scenarios may arise which are discussed hereinafter:

First, there may be a situation where the Company is a going concern and default was only for non-filing of return. In such a case, while approaching the High Court, it has to be proved that the company is a going concern. For this, latest utility bills in name of the company like electricity bill or where GST return has been filed, copy of such GST return may be filed with the High Court, which will prove that the company is a going concern. In such a case, the High Court is likely to give a temporary reprieve to enable the Company to file the Annual Return, in which case the disqualification of the Company would go and the Director's DIN would become valid.

A second situation may arise where the Company has shut shop but has some asset which needs to be disposed of. Where the company has been struck off and the Directors have been disqualified, it would be impossible to dispose of the assets of the company. In such a case, the remedy would be to approach the High Court and the High Court is likely to give a temporary reprieve to enable the directors to dispose off the assets of the company.

A third situation may arise where the Company is inactive but due to disqualification of director, other going concern companies where he was a director, are not able to file return, in that case also the High Court is likely to grant temporary reprieve to enable filing of return within a specified time.

If however the company has shut shop and there are no assets remaining, there is no likelihood of obtaining any relief from High Courts.

Validity of disqualification of directors by ROC:

In a recent decision in the case of **Yashodhara Shroff Vs. UOI [2019 SCC OnLine Kar 682]** the Karnataka High Court has upheld the constitutional validity of Section 164(2) of the Act and has further gone on to hold that issuance of pre-disqualification or post-disqualification notice to the directors was not required and the non-issuance of notice did not constitute violation of the principles of natural justice.

A perusal of Section 164(2) of the act and Rules 11 & 14 of the Companies (Appointment and Qualification of Directors) Rules, 2014 prima facie does not show any power or authority with the ROC to cancel the DIN of Directors on the ground of default u/s 164(2) of the Act. Hence there is a legal possibility of challenging the action of cancellation of DIN by ROC by way of writ petition before the High Court on the ground of absence of power.

The provisions of Rules 11 & 14 of the Companies (Appointment and Qualification of Directors) Rules, 2014 are set out herein below for ready reference:

11. Cancellation or surrender or Deactivation of DIN. –

(1) The Central Government or Regional Director (Northern Region), Noida or any officer authorised by the Regional Director may, upon being satisfied on verification of particulars or documentary proof attached with the application received from any person, cancel or deactivate the DIN in case -

(a) the DIN is found to be duplicated in respect of the same person provided the data related to both the DIN shall be merged with the validly retained number;

(b) the DIN was obtained in a wrongful manner or by fraudulent means;

(c) of the death of the concerned individual;

(d) the concerned individual has been declared as a person of unsound mind by a competent Court;

(e) if the concerned individual has been adjudicated an insolvent:

Provided that before cancellation or deactivation of DIN pursuant to clause (b), an opportunity of being heard shall be given to the concerned individual;

(f) on an application made in Form DIR-5 by the DIN holder to surrender his or her DIN along with declaration that he has never been appointed as director in any company and the said DIN has never been used for filing

of any document with any authority, the Central Government may deactivate such DIN:

Provided that before deactivation of any DIN in such case, the Central Government shall verify e-records.

14. Disqualification of directors under sub-section (2) of section 164. –

(1) Every director shall inform to the company concerned about his disqualification under sub-section (2) of section 164, if any, in Form DIR-8 before he is appointed or re-appointed.

(2) Whenever a company fails to file the financial statements or annual returns, or fails to repay any deposit, interest, dividend, or fails to redeem its debentures, as specified in sub-section (2) of section 164, the company shall immediately file Form DIR-9, to the Registrar furnishing therein the names and addresses of all the directors of the company during the relevant financial years.

(3) When a company fails to file the Form DIR within a period of thirty days of the failure that would attract the disqualification under sub-section (2) of section 164, officers of the company specified in clause (60) of section 2 of the Act shall be the officers in default.

(4) Upon receipt of the Form DIR under sub-rule (2), the Registrar shall immediately register the document and place it in the document file for public inspection.

(5) Any application for removal of disqualification of directors shall be made in Form DIR-10.

A perusal of Rule 11 shows that cancellation of DIN can be made on the grounds set out therein, but the said grounds do not mention disqualification u/s 164(2) as one of the grounds. On the other hand Rule 14 relates to S. 164(2) and provides for disqualification of the Director but does not expressly provide for cancellation of the DIN as a result thereof. Rather, onus is placed on the company to report default u/s 164(2) by filing DIR 9 and on non-compliance, all the officers of the company will be officers-in-default. It is therefore possible to

challenge the act of ROC in issuing notification for cancellation of DIN of Directors for violation of S. 164(2).

Gujarat High Court decision – a guiding light

This view has been upheld by the Gujarat High Court in the case of **Gaurang Balvantlal Shah Vs. UOI [2018 SCC OnLine Guj 4866]**. The High Court at paras 35 & 36 of its judgment has held that -

“35. Rule 11 provides for cancellation or surrender or deactivation of DIN. Accordingly, the Central Government or Regional Director or any authorized officer of Regional Director may, on being satisfied on verification of particulars of documentary proof attached with an application from any person, cancel or deactivate the DIN on any of the grounds mentioned in Clause (a) to (f) thereof. The said Rule 11 does not contemplate any suo motu powers either with the Central Government or with the authorised officer or Regional Director to cancel or deactivate the DIN allotted to the Director, nor any of the clauses mentioned in the said Rule contemplates cancellation or deactivation of DIN of the Director of the “struck off company” or of the Director having become ineligible under Section 164 of the said Act. The reason appears to be that once an individual, who is intending to be the Director of a particular company is allotted DIN by the Central Government, such DIN would be valid for the lifetime of the applicant and on the basis of such DIN he could become Director in other companies also. Hence, if one of the companies in which he was Director is “struck off”, his DIN could not be cancelled or deactivated as that would run counter to the provisions contained in the Rule 11, which specifically provides for the circumstances under which the DIN could be cancelled or deactivated.

36. In that view of the matter, the Court is of the opinion that the action of the respondents in

deactivating the DINs of the petitioners Directors along with the publication of the impugned list of Directors of “struck off” companies under Section 248, also was not legally tenable....”

Various other writ petitions by Directors are presently pending before other High Courts. A batch of writ petitions is also pending before Delhi High Court.

Hence any Director whose DIN has been cancelled by ROC in terms of Section 164(2) of the Act, is entitled to challenge such cancellation by filing writ petition before High Court.

Thank you.

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