

Vacation of office of director under Section 167 (1) (c) due to contravention of Section 184 of The Companies Act, 2013

Introduction:

Section 283 of the erstwhile Companies Act, 1956, governed the provisions of vacation of office of directors and states various grounds where an office of a director becomes automatically vacated under operation of law. The corresponding Section 167 of the new Companies Act, 2013 (the "Act"), upon becoming effective on 01st April 2014, was modified but retained the principal that a director will vacate office if he/she fails to fulfil his/her fiduciary duties as a director.

Several articles have been written highlighting automatic vacation of office due to non-compliance either by incurring disqualification under section 164 or by not attending all board meetings held during a year with or without seeking leave of absence of the Board. The present article shall lay emphasis on deemed vacation due to non-disclosure of interest either on timely basis or prior to occurrence of any event, or both, as framed under the provisions of Section 184 of the Act.

Scope of Section 167:

Section 167(1) of the Act contemplates deemed vacation of office as a director in the following instances:

- a. disqualification under section 164 of the Act;
- b. being absent from all the board meetings (either by video/audio conference call or physical presence) held during a period of 12 months with or without seeking leave of absence of the Board;
- c. **contravention of the provisions of section 184 relating to entering into contracts or arrangements in which the director is directly or indirectly interested;**
- d. **failure to disclose interest in any contract or arrangement in which the director is directly or indirectly interested, in contravention of the provisions of section 184;**
- e. disqualification by an order of a court or the Tribunal;
- f. conviction by a court of any offence, whether involving moral turpitude or otherwise and sentenced in respect thereof to imprisonment for not less than six months notwithstanding filing of any appeal against the order of such court;
- g. removal pursuant of the provisions of the Companies Act, 2013;
- h. ceasing of an ex-officio appointment.

Scheme of Section 184:

Section 184 of the Act is a directive provision, which requires every director to compulsorily disclose their interest in various other entities and associations, at the following events –

- a. first board meeting of the financial year, which can also be termed as general disclosure;
- b. first board meeting after any change in the already disclosed interest; and
- c. prior to the company entering into any contract or arrangement with an entity in which the director is directly or indirectly interested.

Single offence - Dual Penalty:

A director contravening the provisions of Section 184, even if it is non-deliberate, will be penalised under two sections as set out below: -

- Under sub section (4) of Section 184 - imprisonment for up to one year or with fine which may extend to INR 1,00,000 or both.
- Under section 172 – minimum fine of INR 50,000 which may extend to INT 5,00,000.

Automatic vacation of office as director under section 167 is altogether different from removal under the provisions of section 169 of the Act. Section 169 i.e. 'Removal of Directors' provides a scope for show cause, where a director is entitled to defend himself and justify his actions before the company. But, section 167 does not leave any no room for explanation by the director and he must immediately vacate his office upon knowing the infringement by the company and the director.

The Board can either pass a resolution noting the automatic vacation or can simply take note of the same without the need for a resolution. However, the company is required to disclose the documentary evidence of the vacation of office.

Re-appointment:

Where the company is satisfied that the failure of a director to disclose his other contracts or arrangements is inadvertent, the company can re-appoint that director as per the provisions of the Act, but, only after such director has rectified his non-compliance by submitting his current dated disclosures and also voluntarily applying for compounding his offence of non-compliance before the National Company Law Tribunal (NCLT). The director after receiving the compounding order from the NCLT may approach the company to complete necessary actions for re-appointing him on the Board of the company.

In certain cases where the company has only two directors and one of the directors is disqualified from holding office as director, it may create considerable complications for the

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company and potentially bring its activities to a standstill. Therefore, it is the duty of the director to make timely disclosures and also the responsibility of the company to ensure that the directors are effectively and efficiently complying with the law.

Conclusion:

The intention of the legislators in the course of drafting section 167 (c) and (d) of the Act is very clear and transparent enough to ensure that the directors perform their duties diligently and without any misconduct, and to be mindful of the consequences for non-compliance with the Companies Act, 2013.

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