Due Diligence in Incorporation of Companies - KYC and Particulars of Subscribers/Promoters/Directors

As per Section 22 of the Company Secretaries Act, 1980, *"professional and other misconduct"* shall be deemed to include any act or omission provided in any of the Schedules, but nothing in this section shall be construed to limit or abridge in any way the power conferred or duty cast on the Director (Discipline) under sub-section (1) of Section 21 to inquire into the conduct of any member of the Institute under any other circumstances.

Company Secretaries in Practice are expected to exercise due diligence while certifying or filing forms for Incorporation of Companies. Due care regarding KYC documents and particulars of Subscribers/Promoters/ Directors is important.

A member of the Institute in practice shall be deemed to be guilty of professional misconduct under Clause (7) of Part I of the Second Schedule to the Company Secretaries Act, 1980, if he does not exercise due diligence, or is grossly negligent in the conduct of his professional duties.

CASE STUDY:

1. A complaint of professional or other misconduct was received against one Practicing Company Secretary (hereinafter referred to as 'the Respondent'). The Complainant has *inter-alia* stated /alleged that the Respondent on behest of foreign nationals has facilitated the incorporation of one Private Limited Company for ulterior motives knowing the fact that documents submitted for incorporation are apparently fabricated/ fake or morphed or using the documents, which were submitted by the unemployed youth for getting employment, etc. KYC documents (photos, PAN Card/Aadhaar Card/Bank account details etc.) of BPO employees/ unemployed youth have been used to register the Company by appointing them as directors and subscribers to the MOA and AOA of the Company. In Form DIR-2, consent to become director of such person are attached to show their consent, but it is not known as to whether the Respondent and perpetrator have misused their Digital Signature Certificate (DSC) and system without their knowledge.

2. The Complainant has alleged that in Form INC-32 SPICe, filed for the incorporation of the Company by the Respondent, the premises/address mentioned therein, was shown as the registered office of the Company by attaching NOC and utility bill. However, proof of ownership has not been attached as required under Rule 25(2)(c) of the Companies (Incorporation) Rules, 2014 read with Section 4 and 12 of the Companies Act, 2013. The Complainant has also alleged that in the said Form INC-32 SPlCe, phone numbers of both the directors is given as '000000' which is fake. This may be done to conceal their identity. The Complainant has referred to the email id mentioned for the Company.

3. The Respondent has denied the allegations and *inter-alia* stated/contended that he was engaged by the promoters/directors of the Company to incorporate a Company while ensuring compliance of the applicable laws and rules. The Respondent has facilitated the incorporation of the aforesaid Company on the basis of the information and documents, in original, provided to him. He has checked and verified all the original documents before certifying the Form INC-32 SPICe of the Company. He has done proper due diligence before checking the documents. No person has been appointed by the Respondent in the Company with any intention of committing fraud and has not been roped in by him. The Respondent used the DSC of the directors at time of incorporation of the Company only after proper authorization/permission from the directors and they were always aware of the use of their DSC.

4. The Respondent has stated that as per the MoA, the Company had intentions to carry business of manufacturing and sales of auto parts and motorcycle accessories etc. He believes that the Company has not even commenced its business; and has not received any FDI/ Capital/ Subscription amount. Even if the Company has any intention to commit fraud, the Complainant has no grounds or evidence to prove that any foreign national belonging to the Company or the Respondent has any intention to commit fraud.

5. The Respondent has stated that in Form INC-32 SPlCe, correspondence office address of the company has been provided. Further, the Email id provided by his client at the time of its incorporation, was mentioned as email id of the Company. Form INC-32 SPICe required a landline number [phone (with STD/ISD code)] allowing 8 digits only and the directors were not having any landline number. Moreover, the phone numbers of the directors have not been specified in the Form DIR-2 signed and certified by the directors to be true and correct.

6. The Complainant in rejoinder submitted that the Complaint filed is self-explanatory.

7. The Respondent has stated that he has filled the information in the Form based on the notarized and apostilled documents submitted by his client. PIN Code was not specified in those documents, and he was not aware of PIN Code of Foreign Nation. Further, the information uploaded in the form is duly verified by the CRC (MCA) and the same was never objected by them. Email ids of the directors were provided by his Client, a Consulting Company, and they apprised the

Respondent that they want to use their email id till the time the Company starts its operations.

8. The Respondent has also stated that due to clerical error different ids of directors were filled in the Form INC-32 SPICe. It was without any ill intention and the same can be rectified. Incorporation form was not accepting contact numbers of outside India due to which he has mentioned the numbers provided by his Client, a Consulting Company.

9. The Respondent has further submitted that mentioning wrong date of birth is a typing error. The correct date of birth is mentioned in Form INC 32 SPICe which shows his Bonafide intention. The Respondent has stated that he has maintained the original email id and the contact number of subscribers and directors in his official records and apologized for his errors in the forms.

10. The Disciplinary Committee observed that the Respondent has certified Form INC-32 SPICe for incorporation of the Company, in which the email id, telephone number, PIN Code and date of birth has been mentioned incorrectly. It is further observed that address of the first subscriber Company/ promoter/ director is of a foreign nation for which PIN code is mentioned as '000000'. In Form DIR-2 common email id is used for all three promoters/directors; while one another email id has been mentioned in Form INC-32 SPICe for subscribers/promoters/directors. Email id of one foreign national is mentioned differently at two places. Phone number of subscriber companies, their authorised representative and foreign national promoters/directors were wrongly mentioned as "0000-000000". In Form DIR-2 mobile number of Indian promoter/ directors is apparently, a land line number in India. Very same contact number is wrongly mentioned in Forms DIR-2 of both the foreign national promoters/ directors. In Form INC-32 SPICe this land line is mentioned as phone number (with STD code) of Company having correspondence address in another city. Different date of birth *(month is different)* of Indian promoter/ director is mentioned in Form INC-32 SPICe and in Form DIR-2.

11. The Disciplinary Committee after considering the materials on record, the nature of issues involved in the matter and in the totality of the facts and circumstances of the case, held the Respondent 'Guilty' of Professional Misconduct under Clause (7) of Part I of the Second Schedule to the Act for not exercising required due diligence. After giving an opportunity of being heard to the Respondent, the Disciplinary Committee passed an order of 'Reprimand' and Fine of ₹ 20000/- (Rupees Twenty thousand) under Section 21B (3) of the Company Secretaries Act, 1980.