

Due diligence in ensuring compliances of Approval Route for FDI under FEMA

As per Section 22 of the Company Secretaries Act, 1980, ('the Act') "*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 to ensure compliance of applicable regulations of the FEMA for bringing investment from foreign countries through approval route while certification of e-forms.

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').
2. The Complainant has alleged that on perusal of Form INC-20A (declaration for commencement of business) filed by one Private Limited Company (hereinafter referred to as 'the company') on MCA21 Portal, it has been observed that the company has not received the subscription money. Hence, the Respondent who is well versed with the Companies Act, 2013 has deliberately chosen to overlook these major lapses and has helped to incorporate a shell company. The Complainant has further alleged that one specific email id was used during registration of document is associated with numerous such similar shell companies incorporated in Delhi, Haryana, Hyderabad & Bengaluru. This warrants further inquiry into the matter. The Complainant has alleged that the Respondent has failed to perform the minimum due diligence as a certifying professional who has certified fabricated documents and appear to be involved in suspicious/ illegal activities and aiding the incorporation of suspected company.
3. The Complainant has alleged that the Respondent has not exercised due-diligence while certifying Form INC-20A for declaration of commencement of business of the company and has helped to incorporate a company.
4. The Respondent has denied the charges and submitted that he has only acted in his professional capacity and was neither associated with any of the Board members

nor any business activity of the company, in respect of which the complaint is made. He has no connivance with any director. The Respondent has submitted that the company got incorporated on 21st February, 2020 with an authorized capital of Rs. 1,00,00,000/- with the directors; and he was not allotted certificate of practice by that time. Thus, there is no connection with incorporation of the company in any manner whatsoever.

5. The Respondent has further submitted that the company sought a solution for filling out forms in respect of change in directors of the company. When he tried to file the Form DIR-12, the error appears "*Since the company has not filed the Form INC-20A, filing of Form DIR-12 is not allowed*". When the company got incorporated, the investment from China was under the Automatic Route and the company was set to bring the subscription money under that route. But due to tension at India and China border, the regulations of the FEMA were changed vide notification DPIIT File no. 5(5)12020-FDI dated on 17th April, 2021 which envisages bringing money from China only after approval from the RBI. The Respondent has further stated that he had approached the office of the ROC, NCT of Delhi and Haryana and MCA helpline with the above query regarding filing of Form DIR-12 but did not receive any satisfactory reply. He also sought assistance from senior professional colleagues but did not receive any satisfactory response.
6. The Respondent has further stated that the company had spent more than two lakhs as stamp duty and professional expenses for incorporation of the company and since the company has already applied for approval from RBI to bring funds, the client sought the solution for which he used his prudence and took a declaration from the Board of directors of the company that they will not commence any business until they get approval from RBI for bringing the funds from approval route. The same has been attached to Form INC-20A filed by the company. The Respondent has further stated that Form INC-20A was not filed for the commencement of the business of the company but with the sole intention of enabling the company to file Form DIR-12, and to comply with the provisions related to the change in directors. The same has been declared through the attachment in the Form INC-20A. Also, the company did not commence its business and will commence the business only after the requisite approvals. The Respondent has further stated that the email is in question used in more than 30 shell companies as the Complainant was used at the time of incorporation, and this activity was not performed by him. Also,

there is no way or system by which any professional can track the number of companies registered with one or different e-mail id.

7. The Complainant vide rejoinder reiterated the allegations made against the Respondent and stated that there is reasonable expectation of due diligence while certifying the exit of any director. The Respondent certified Form INC-20A but knowing well that the same was not filed for the commencement of business.
8. The Director (Discipline) *prima facie* opined that the Respondent is 'Guilty' of Professional Misconduct under Clause (7) of Part-I of the Second Schedule to the Act. The Disciplinary Committee agreed with *prima facie* opinion based on the preliminary findings of the Director (Discipline) and decided to adjudicate the matter against the Respondent in accordance with Rule 18 of the Rules read with the Act to finally conclude as to whether the Respondent is guilty or not in the matter.
9. The Respondent denied the allegations and reiterated no relation in whatsoever manner with the incorporation of the company. The Respondent has further stated that the company got incorporated on 21st February, 2020 and he got his Certificate of Practice on 17th August, 2020. The impugned form was certified on 13th August, 2021. He was residing in another state and was not in a position to go where the company was registered. The director of the company was unable to resign from directorship, as the company was unable to file Form INC-20A due to non-receipt of paid-up capital from the directors. He was approached by another Company Secretary for this work and has certified the impugned form in good faith trusting his professional colleague. He has certified the Form INC-20A with a declaration that the company shall not commence its business unless the subscriber pays the subscription money through necessary approval. The company has not made a single transaction after filing Form INC-20A. The Respondent has further stated that the contention of the Complainant that the form was filled for exit of the dummy director is not maintainable. The Respondent had no knowledge about the same and there is no certain procedure to ascertain a dummy director. The same can be ascertained only after a deep inquiry and inspection. The Respondent has prayed for a lenient view from the Committee against the decision to be taken as the Respondent is relatively a young professional. The certification of the said impugned forms, was made at the initial period of the professional career by the Respondent, lacking the practical knowledge at that time.
10. The Respondent pleaded not guilty to the charges. The Complainant reiterated the allegations. The Respondent argued and broadly reiterated the submissions made in written statement. The Disciplinary Committee heard the submission and observed that the Respondent got Certificate of Practice after the incorporation of the company. Hence, his involvement in incorporation of the

company has no merits. The Disciplinary Committee observed that the Respondent has certified and filed Form INC-20A without mandatory attachment '*subscribers' proof of payment for value of shares*'. Instead of mandatory attachment, the Respondent has attached declaration from the directors that the company has not commenced business yet and the form is filed for intimation that the investors have decided not to carry out business in India.

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 ₹ 5000/- (Rupees Five thousand) under Section 21B (3) of the Company Secretaries Act, 1980.

Comments?

Suggestions?

We want to hear from you!



YOUR OPINION MATTERS

‘Chartered Secretary’ has been constantly striving to achieve Excellence in terms of Coverage, Contents, Articles, Legal Cases, Govt. Notification etc. for the purpose of knowledge sharing and constant updation of its readers. However, there is always a scope for new additions, improvement, etc.

The Institute seeks cooperation of all its readers in accomplishing this task for the benefit of all its stakeholders. We solicit your views, opinions and comments which may help us in further improving the varied segments of this journal. Suggestions on areas which may need greater emphasis, new Sections or areas that may be added are also welcome.

You may send in your suggestions to the Editor, Chartered Secretary, The ICSI at cs.journal@icsi.edu