Signing and filing of e-Forms by Company Secretary in Employment

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 employment are expected to be cautious and make compliances while signing/ filing e-Forms for their employer company with MCA.

A member of the Institute in practice shall be deemed to be guilty of Other Misconduct under Clause (2) of Part IV of the First Schedule to the Company Secretaries Act, 1980, if in the opinion of the Council of the Institute, his act or omission, has brought disrepute to the profession or the Institute, whether related to professional work or not.

CASE STUDY:

1. A Complaint has been filed against a Company Secretary in employment (hereinafter referred to as 'the Respondent') for Misconduct under Section 21 of the Company Secretaries Act, 1980 (hereinafter referred to as 'the Act') read with Rule 3 of the Company Secretaries (Procedure of Investigations of Professional and other Misconduct and Conduct of Cases) Rules, 2007 (hereinafter referred to as 'the Rules').

2. The Complainant has stated that a Private Limited Company (the company) has increased its authorized share capital for issue of preference shares and has filed the Form for increasing Authorised Share Capital of the company to which altered Memorandum of Association (MoA) was attached. The said Form was also signed by the Respondent as the authorized person of the company. In the said altered MoA, the company has changed its first subscriber's sheet also. The initial document signed at the time of incorporation is not supposed to be changed at any time during the lifetime of the company.

3. The Respondent was the Company Secretary in employment of the company. The Respondent has denied the allegations and has *inter alia* contended that the company was incorporated as a 100% foreign-owned company, much before the Respondent joined it as Company Secretary. The company had its authorized, issued, subscribed and paid-up capital of Rs.36 crores consisting of 3.6 crore equity shares of Rs.10 each. The Board of Directors of the company in its meeting passed a resolution to increase its authorized share capital from Rs. 36 crores to Rs. 66 crores by adding new 3 crore preference shares of Rs. 10 each totalling to Rs. 30 crores, which was also duly approved by the members of the company in its Extraordinary General Meeting (EGM). To this effect, the Memorandum of Association (MoA) of the company was altered, at clause V, to reflect its updated authorized share capital. The company has filed the Form with the Registrar of Companies and duly complied with all applicable requirements, such as correct and full amount of stamp duty, details of revised capital structure including authorized, issued, subscribed and paid-up capital as on that day before issuances of corresponding number of Preference Shares etc. The amended MoA of the company (altered at clause V to reflect its updated authorized share capital) was believed to have been submitted along with Form without any further alterations by the Respondent as Company Secretary to the company.

4. The Respondent has further stated that there was no reason to expect any alteration in the rest of the MoA except clause V. The Respondent had *bona fide* belief that the rest of the MoA (except Clause V) submitted with the ROC was unaltered, unfabricated and true. The alleged alteration in first subscriber's sheet of the MoA was not within the knowledge of the Respondent as the said MoA was received from the preceding Company Secretary of the company and the Respondent has placed trust in his documentation. Thus, any alterations regarding equity share capital in first subscriber's sheet can be reasonably presumed to have existed upon handover of the documents to the Respondent from the preceding Company Secretary.

5. The Respondent has further stated/ contended that *mens rea* is a pre-requisite to impose penalty. Penal provisions are only a tool to safeguard against deliberate contravention of rules. The knowledge of contravention on the part of accused is fundamental for presence of *mens rea.*

6. The Complainant in the rejoinder has stated that the averments made in the complaint are reiterated and that the reply of the Respondent lacks merit and is liable to be rejected outrightly.

7. The Director (Discipline) has *prima facie* opined that this matter may be referred to the Council for its opinion under Clause (2) of Part IV of the Act, as to whether the action of the Respondent has brought disrepute to the profession and/or the Institute or not.

8. The Board of Discipline referred the matter to the Council for its opinion under Clause (2) of Part IV of

First Schedule to the Company Secretaries Act, 1980, as to whether the act of the Respondent has brought disrepute to the profession and/ or the Institute, or not.

9. The Council opined that the act of the Respondent as alleged has brought disrepute to the Profession and the Institute in terms of Clause (2) of Part IV of the First Schedule to the Company Secretaries Act, 1980.

10. The Board of Discipline noted the opinion of the Council and decided to proceed further in the matter in accordance with the Act and Rule 14 of the Rules. The Complainant and the Respondent broadly reiterated their submissions before the Board of Discipline.

11. The Board of Discipline observed that the Respondent has digitally signed the Form for increasing the Authorised Share Capital of the company, being a Company Secretary in employment. MoA of the Company was attached with the impugned Form which contains alteration. The Board of Discipline further observed that the MoA signed at the time of incorporation is not supposed to be changed at any time during the lifetime of the company. However, in the instant case form was filed with MCA with an altered MoA. The number of shares taken by subscribers was changed.

12. The Board of Discipline, after considering the material on record, the nature of issues involved in the matter and in the totality of the facts and circumstances of the case, holds the Respondent 'Guilty' of Other Misconduct under Clause (2) of Part IV of the First Schedule to the Company Secretaries Act, 1980. In terms of Rule 15(1) of the Rules, an opportunity of being heard was granted to the Respondent before passing an order under sub-section (3) of Section 21A of the Company Secretaries Act, 1980.

13. After giving an opportunity of being heard to the Respondent, the Disciplinary Committee passed an Order of 'Reprimand' and Fine of Rs. 25000/- (Rupees Twenty-Five Thousand) under Section 21B (3) of the Company Secretaries Act, 1980.