

## Due Diligence before certifying e-forms during Annual Filings

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 required to exercise due diligence before certifying e-forms for client companies especially during annual filings. Company Secretaries are expected to cross check the details from the statutory registers and records of the company.

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 Practising Company Secretary (hereinafter referred to as ‘the Respondent’).
2. The Complainant has *inter alia* stated that there were two directors in a private limited company (hereinafter referred to as ‘the Company’) since its incorporation, namely, Mr. M, Director (now deceased) and the Complainant himself. The company’s name was struck-off by the ROC in September, 2018 as a consequence of notice STK-1 issued by the ROC. The company had filed revival petition in NCLT without the knowledge of the Complainant through backend procedure and accordingly, an order was passed by NCLT in May, 2019 for revival of the company.
3. The Complainant has stated that after the demise of Mr. M (hereinafter referred to as ‘deceased director’) his son, Mr. MM allegedly appointed himself as director of the company without the knowledge and approval of the Complainant (the only surviving director) and without the following prescribed procedures and compliances required under the Companies Act, 2013 for appointment of new director in the company. The Complainant has further stated that the Respondent had certified Form MGT-7 and Form AOC-4 of the company and filed it before ROC along with the financial statements and Board Reports for the year ended from 2015 to 2018 having signature of only one director, who is deceased now, which is in violation of Section 134(1) and (6) of the Companies Act, 2013. Further, the financial statements attached with the forms for all the years were stamped by notary public, but neither bears the signature of notary public nor his registration number mentioned on it.
4. The Complainant has stated that the balance sheet of the company for the years 2016 to 2020 which is not signed by the Complainant, has been filed with the Registrar of Companies by the alleged director Mr. MM, whose appointment is in question, with his digital signature which has been certified by the Respondent. The Complainant has further stated that the Respondent has falsely mentioned in forms MGT-7 and AOC-4 that the AGM of the company for the financial year ended 31<sup>st</sup> March, 2015 to 31<sup>st</sup> March, 2018 held on 28<sup>th</sup> September, 2015, 30<sup>th</sup> September, 2016, 30<sup>th</sup> September, 2017 and 30<sup>th</sup> September, 2018, respectively, but, no such meeting(s) were held and neither notices of such meeting(s) have been served to the Complainant nor the Complainant has attended any such meeting(s). The Complainant has stated that the Respondent falsely mentioned the dates of board meeting(s) in Form MGT-7 of the company held for the financial year ended 31<sup>st</sup> March, 2015 to 31<sup>st</sup> March, 2018 as neither notices of such board meetings nor agenda and notes on agenda items were given to the Complainant.
5. The Complainant has stated that the financial statements for the year ended 31<sup>st</sup> March, 2015 to 31<sup>st</sup> March, 2018 are back dated and the signature of the deceased director was forged by his son Mr. MM. The Complainant further stated that the financial statement for the year ended 31<sup>st</sup> March, 2017 contains signature of Mr. M (deceased director) under the name of Complainant. Further, the signature of Mr. M when compared from the financial statements for the year ended 31<sup>st</sup> March, 2016 to the year ended on 31<sup>st</sup> March, 2019, the dissimilarity is very much evident despite which the Respondent had certified the forms.
6. The Complainant has stated that the telephone number provided in form MGT-7 is the office telephone number of the Respondent. The Complainant further stated that the forms AOC-4 and MGT-7 for the year ended 31<sup>st</sup> March, 2015 to 31<sup>st</sup> March, 2018 were filed in August, 2020, by the Respondent after the demise of Mr. M. The Complainant has further stated that all the offences in the company have taken place under the guidance of the Respondent. The Complainant further stated that he had also filed case against the Chartered Accountant.
7. The Respondent in his Written Statement has stated that since the company was struck-off and its name was removed from ROC on non-filing of Annual Returns for year ended 31<sup>st</sup> March, 2015 to 31<sup>st</sup> March, 2018 due to which the directors of the company were disqualified, and their DIN were deactivated by ROC. The Respondent

has further stated that during the month of December, 2018, Mr. M, director of the company, has filed petition of the said company under Section 252 of the Companies Act, 2013 before NCLT. The said petition was duly signed by the said director and attested by the notary general at the notary office and the said sign was duly registered and in the same way other documents and attachments filed were signed and attested by Mr. M as director of the company. The Respondent further stated that after signing of petition by the Director, the copy was submitted by the company to ROC, Income tax department and finally original copy with the NCLT. In May, 2019, order for revival of the company was passed by NCLT and ROC was asked to restore the name of said company in the Register of the companies.

8. The Respondent has stated that the company, in compliance with the order of the NCLT, paid penalty of Rs.10,000/- and certified copy of NCLT order was filed before ROC requesting to activate the status of the company for e-filing, which was activated. Since both directors, namely Mr. M and the Complainant were disqualified by ROC and the DIN were deactivated, the ROC asked the company to file offline backend insertion of two directors and accordingly, in July, 2019, necessary documents were filed through Mr. M with ROC and after which the DIN of Mr. MM was inserted by ROC.
9. The Respondent has stated that after the death of Mr. M in July, 2020, Mr. MM and the Complainant along with their other relatives visited the office of the Respondent for seeking legal guidance on their properties as well as on compliance of the NCLT order. Since, at that time MCA filing fees including penalty was very high, the Respondent suggested them to wait for MCA amnesty scheme in future, for which they agreed. The Respondent has stated that at the time of filing Annual Returns with ROC during the period of MCA amnesty scheme, disputes between the Complainant and other director's family has been increased and the Complainant had filed many cases against the family of deceased director. The Respondent has stated that the Annual Returns of the company were not filed within the stipulated time as per NCLT order and there was pressure from ROC that due to further non-filing of annual returns, the company will be struck-off again and the company's directors were insisting the Respondent to file the same because the company was holding some lands in its name. The Respondent further stated that during filing of annual return; to be on safer side and also as standard practice of practicing professionals, the Respondent has attached the same notarized papers and documents which were attached to original petition filed with NCLT.
10. The Complainant vide his Rejoinder reiterated his allegations and stated that for filing the petition under Section 252 of the Companies Act, 2013 before the NCLT, one requires an affidavit verifying the petition from all directors of the company and being one of the directors of the company at that time, the Complainant has not signed any affidavit for verification. The Complainant has further stated that for backend appointment of the director, a meeting of the promoters/shareholders must be held as well as a resolution is to be passed for the appointment of same. The Complainant further mentioned that two names have been stated for the appointment as the director from backend procedure, however, on MCA website, the name of another director is not reflected. The Complainant has questioned the appointment of the Respondent as Company Secretary of the company.
11. The Director (Discipline) prima facie opined that the Respondent is prima facie 'Guilty' of Professional Misconduct under clause (7) of Part I of the Second Schedule to the Company Secretaries Act, 1980 for not exercising due diligence while performing his professional duties. The Disciplinary Committee agreed with the prima facie opinion of the Director (Discipline) and decided to adjudicate the matter in accordance with Rule 18 of the Company Secretaries (Procedure of Investigations of Professional and other misconduct and conduct of cases) Rules, 2007 (the Rules) to finally conclude as to whether the Respondent is guilty or not in the matter.
12. The Respondent pleaded 'not guilty' to the charges before the Disciplinary Committee. The Respondent stated that he has not exercised due diligence while certifying the forms AOC-4 and forms MGT-7 of the company for FY 2015, 2016, 2017, 2018 and 2019. The Respondent has further submitted that he has also created false and back dated documents of the company which is clearly evident in the documentary record. The Respondent argued that he was not involved in proceeding for the revival of the company before the NCLT. The Respondent has submitted that he had relied on the notarized papers and documents which were attached to the original petition filed with NCLT before certifying the forms AOC-4 and form MGT-7 of the company for the FY 2015, 2016, 2017, 2018 and 2019.
13. The Disciplinary Committee has observed that the Respondent has certified the forms AOC-4 and form MGT-7 of the company for the FY 2015, 2016, 2017, 2018 and 2019. The Respondent in his Written Statement has admitted that he has not checked the company's record and had relied on the notarized papers and documents, which were attached to original petition filed with NCLT before certifying the forms AOC-4 and form MGT-7 of the company for FY 2015, 2016, 2017, 2018 and 2019. This establishes that the Respondent has not exercised due diligence, while certifying the forms AOC-4 and form MGT-7 of the company for the FY 2015, 2016, 2017, 2018 and 2019 of the company.
14. The Disciplinary Committee held the Respondent 'Guilty' of Professional Misconduct under Clause (7) of Part I of Second Schedule to the Company Secretaries Act, 1980 for not exercising due diligence before certifying the forms AOC-4 and form MGT-7 of the company for the FY 2015, 2016, 2017, 2018 and 2019 of the company. After giving an opportunity of being heard to the Respondent, the Disciplinary Committee passed an Order of 'Reprimand' and Fine of Rupees Twenty-five thousand under Section 21B (3) of the Company Secretaries Act, 1980.