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Compliance of Conditions Precedent to Restoration Order U/S 252 of The Companies Act, 2013



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INTRODUCTION

According to provisions of Section 248 of the Companies Act, 2013, the Registrar under certain circumstances shall serve notice of striking off of the name of a company from its registrar. These circumstances are as follows:

- (1) A company, which has failed to commence its business within one year of incorporation;
- (2) A company neither carried its business for a period of two years nor applied for obtaining dormant status u/s 455;
- (3) The subscribers to the MOA have not paid subscription money and necessary declaration u/s. 10A(1) is not filed;
- (4) The company is not carrying any physical business as revealed after the physical verification is done u/s. 12(9)

The registrar after the expiry of the notice period as mentioned in such

notice shall order for a strike of all such companies and publish their names in the official gazette.

Any person aggrieved by such order may appeal to Tribunal (NCLT) u/s. 252. Such an appeal can be filed within a period of 3 years from the date of the order. Tribunal in such circumstances gives an opportunity of being heard to the registrar. The Tribunal after being satisfied with the fact that the strike-off is unjustified may order restoration of the name. Not only direct stakeholders of the company but also the Registrar himself can apply for restoration of names of such struck-off company.

Offlet Registrar of Companies (RoC), in the exercise of its powers u/s. 248 has strike-off numerous companies on the grounds of not being in the business for a period of more than 2 years. The litmus test applied by the RoC was non-filing of annual returns with it, and accordingly many companies who were derelict in filing annual returns but being in operations were struck off.

The stakeholders in a few of such companies chose to file an appeal before the Tribunal against the order of RoC. Many such applicant companies have enclosed filed income tax returns, approved Annual Financial Statements by its shareholders, vendor bills, bank statements, etc. The NCLT in its powers may ask these applicant stakeholders to prove the existence of operations of struck-off companies and on being satisfied directs them to pay an amount as a fine and file pending annual returns statements with RoC and direct RoC to restore such companies.

Such restored companies are expected to make all the necessary compliance of orders of restoration before starting business operations or before starting disposal of the company's assets. We in this piece, have discussed the effect of partial compliance with such restoration orders.

Operating para of Order of Restoration (Standard)

"Accordingly, this appeal is allowed. The Public Notice of Registrar of Companies, striking off the name of the company, is hereby declared illegal and set aside. The restoration of the company's name to the Register of Registrar of Companies is ordered subject to its filing of all outstanding documents with proper filing fees

along with additional fees required under law and completion of all formalities, including payment of any late fee or any other charges which are leviable by the respondent for the late filing of statutory returns, and also subject to payment of Rs. 25,000/- to be paid to Prime Minister's Relief Fund."

Effect of Order

From the bare perusal, it can be interpreted that the appeal filed for restoration of the company has been duly allowed but such restoration is subject to certain conditions like filing of outstanding documents, payment of filing fees, completion of all formalities, and payment of the cost imposed if any (INR 25,000/- to PM Relief fund).

Under the provisions of Section 252(2) of the Companies Act, 2013, the copy of the order of the Hon'ble tribunal shall be submitted to the Registrar within 30 days of the date of order. Generally, the process being followed post obtaining of order by Hon'ble Tribunal is that the appellants have to submit that order with the respective registrar, after which, the registrar changes the status of the company from 'Struck off' to 'Active' to enable the company and its director to do the necessary filing.

A careful reading of orders of restoration issued by NCLT is always conditional upon applicants. The conditions such as filing restoration order with RoC, filing of pending annual returns with RoC, payment of penalty as directed by NCLT, etc. always condition precedent to restarting business operations of the Company.

Mis-use of Order

Promoters of restored companies having property(ies) may mis-use restoration orders to their benefit by making the company status "active", in the records of RoC, and start disposing of assets of the company without complying with the order in toto.

Effect of such transactions

It is to be understood that until full compliance with the company's order is done, the company's restoration is subjective and such a company will be considered restored only after compliance with all directions given in order. The changing of status as 'Active' only enables the company to do the necessary filing and it does not in any

manner constitutes that the company is fully restored. And, till then, the company does not have any right to enter into any transactions and hence all such transactions are void ab initio.

Conclusion

Off let few of the delinquent applicants of such restored companies misused orders passed by Hon. NCLT. Typically, such orders were filed with RoC, and penalty, as directed by NCLT, was paid and then assets of the company were disposed of without complying with conditions imposed by Hon. NCLT is like filing pending annual returns with RoC. Disposal of assets like withdrawal of money from the Bank Accounts, disposal of properties, movable and immovable, without complying with other conditions imposed by Hon. NCLT is tantamount to contempt u/s 425 of the Companies Act, 2013.

