



## **DUTIES TO BE DISCHARGED BY DIRECTOR UNDER COMPANIES ACT 2013**

Each director has a fiduciary duty towards the company. All the powers entrusted to the director are only exercisable by them in this fiduciary capacity. The duties of director can be discussed under the following broad heads:

### **A. FIDUCIARY DUTIES(SECTION 166)**

A director owes fiduciary duties towards the company, and not to individual shareholders, creditors (other than during winding up when their interest has to be taken care of) or fellow director. These generally consist of the following:

- Good faith and bona fide acts : Director must act honestly, without negligence and in good faith in the bona fide best interests of the company.
- Proper use of powers: Director must not exercise the powers conferred upon them for purposes different from those for which they were conferred.
- Unfettered discretion: Director must not fetter their discretion for any reason whatsoever. They cannot validly contract or act pursuant to any arrangement either with one another or with third parties as to how they shall vote at board meetings or otherwise conduct themselves in the future.
- Lack of conflicting interests: Director must not, without the informed consent of the company, place themselves in a position in which their personal interests or duties to other persons are liable to conflict with their duties to the company or where there is a real and distinct possibility of conflict.

## **B. COMMON LAW DUTIES (SECTION 166)**

A director is required to discharge certain common law duties towards the company, which generally consist of the following:

- Duty to exercise reasonable skill and care.
- Duty to act within the powers of the company
- Duty to exercise independent judgment
- Duty of supervision
- Duty of confidentiality

## **C. SPECIFIC DUTIES**

### **1. Administration and compliance**

Director are vested with a number of administrative responsibilities in order to enable them to manage and administer the company. These administrative responsibilities include, amongst others, the following:

- Filing returns with the registrar of companies,
- Convening shareholders meetings , within their stipulated periods,
- Approval of company's documents by director
- Audit requirements in cases of winding up or liquidation, the director must ensure that books of account of the company are completed and audited up to the date of winding up order issued by the company court.

### **2. Restriction on activities and disclosure of information**

The companies act has prescribed and / or supplemented the common law duties with certain other obligations on director that relate to their position, including the following:

- Declaration of interest (Section 184): Director, who are concerned or interested in a proposed contract or arrangement with the company in any way, must disclose the nature of their concern or interest to the board.
- Receipt of compensation (Section 191): Director must not receive, in connection with a transfer of property or shares of the company, any payment as compensation for loss of profit or in consideration for retirement from office. If they do so, they must hold such an amount in trust for the company.
- Attending board meetings: Director are under an obligation to attend the board meetings as prescribed by the Articles, or such as may be called by the

chairman (if any) of the board. Attending the annual general meeting is must for all the director.

### 3. Duties during voluntary winding up of a company

The director must file the petition for winding up of the company (in a voluntary liquidation situation) before the relevant court. The director are also required to file a statement of the affairs prior to the voluntary winding up of the company, upon appointment of an official liquidator by the court. The following other duties are also required to be discharged, in connection with the winding up of the company:

- Notice of resolution for winding up
- Declaration (Section 305): The director of the company may at a meeting of the board, make a declaration verified by an affidavit, to the effect that they have made full inquiry into the affairs of the company, and as to the solvency of the company i.e., the company has no debts, or that it will be able to pay its debts in full within such period not exceeding three (3) years from the commencement of the winding up as may be specified in the declaration.
- Notice of appointment of liquidators (Section 310): Director must give to the concerned Registrar of Companies a notice of the appointment of the liquidator of the company, and also give notice to such registrar of companies of the filling of any vacancy occurring in the office of such liquidator of the company.
- Cease exercise of powers (Section 313): It is imperative for the director to cease exercising all powers of the board, and likewise for the managing or whole-time director to cease exercise of such powers, except for the purpose of giving the notice of appointment of the liquidator mentioned in the immediately preceding paragraph.
- Meeting of creditors (Section 306): In case of creditors' voluntary winding up, the Director must cause a meeting of the creditors of the company. At such creditors' meeting, the director must present a statement of the position of the company's affairs together with a list of creditors of the company and the estimated amount of such creditors' claims.
- Filing Notice :The director must file the notice of any resolution passed at the creditors' meeting mentioned in the immediately preceding paragraph.

### 4. Duties during involuntary winding up of a company

The director must defend the Company in the winding up petition filed by a creditor or any other person recognized by the Companies Act. The requirement to file a statement of the affairs of the company by each of its director, upon appointment of

an official liquidator by the court, applies to involuntary winding up as well. In addition, the director are also required to assist the official liquidator from time to time, by providing relevant information and assistance, in case of involuntary winding up of the company.

## **LIABILITIES OF DIRECTOR**

### **1. DIRECTOR'S PERSONAL LIABILITY**

As a general rule, since the company and its director are separate entities, the director has no personal liability on behalf of the company. However, under certain circumstances, a director may be held liable on behalf of the company. These circumstances are:

- Liability for tax (Section 179 of the Income Tax Act 1961): Under the Income tax act, 1961, where any tax due from a private company in respect of any income of any previous year cannot be recovered from such private company, then, every person who was a director of such private company at any time during the relevant previous year is liable, jointly and severally, for the payment of such tax. A director (including any past director but only for the duration when he was in office) can, however, escape such liability if he or she proves that the non-recovery of such tax cannot be attributed to any gross neglect, misfeasance or breach of duty on his or her part in relation to the affairs of such private company.  
Under the central sales tax act and certain state sales tax laws, liability may be fastened on director of a company, which is wound up, for recovery of sales taxes due from such liquidated company.
- Debts of the company: Generally, a director is not personally liable for any debt of the company unless fraud on the part of such director can be established.
- Liability for company's contracts: A director is, generally, not liable for any contract entered into by the company, unless expressly provided for, or fraud on the part of such director can be established.
- Refund of share application money: A director is personally liable along with the company to repay the share application or excess share application money, as the case may be, if the same is not repaid within the stipulated time limit.
- Liability to pay for qualification shares: If the director has not acquired his or her qualification shares within the prescribed time period and the company

goes into liquidation the day after this period expires, the director will be called upon by the official liquidator to pay for the shares he or she was supposed to have purchased.

- Mis-statement in the prospectus: Civil liability can be imposed on a director for any untrue statement in the prospectus of a public company if he or she is a director at the time of the issue of the prospectus, unless he or she proves that he or she withdrew consent before the issue of the prospectus or that it was issued without his or her authority or consent or without his or her knowledge or that, once he or she came to know of the untrue statement, he or she withdrew consent and gave reasonable public notice of the same, or proves that he or she believed the impugned statements to be true.
- Fraudulent conduct of business: A director may be held personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company if he or she was knowingly party to the fraudulent carrying on of business
- Unlimited liability: The liability of any or all of the director of a limited company can be unlimited if so provided by the memorandum, or can be so done if approved by a special resolution as authorized by the articles.

## 2. Criminal liability

- Dishonoured cheques (Section 141 in Negotiable Instruments Act, 1881): The director signing a cheque which is dishonoured so as to constitute an offence under the Negotiable Instruments Act, 1881, can be prosecuted along with the company.
- Mis-statement in the prospectus: The Companies Act imposes criminal liability on any person who was responsible for a mis-statement in the prospectus of a public company.
- Offences under the Income Tax Act: An offence committed by a company under the Income Tax Act, 1961 is attributed to the persons who were responsible for and in charge of the business of such company.
- Offences under Labour Laws: An offence committed by a company under the various labour legislations (specifically in case of Employees Provident Funds and Miscellaneous Provisions Act, 1952 and Factories Act, 1948) is attributed to the persons who were responsible for and had control over the affairs of the company. Hence, director would be personally liable for offences committed by a company under the relevant labour legislations. However, this liability is not one imposed on all director uniformly; it is only imposed on such director who are in overall control of the affairs of the company (this implies control over the day-to-day affairs of the company).

Those director who are not in overall charge of the company, but are only in control of certain aspects; or are aware of the policy of the company, but are not in charge of it, would not be held liable.

### 3. Lifting of corporate veil

A company is an independent entity and, as a general rule, the director of the company is not liable for any offence or, breach or liability of the company. However, in certain cases, the common law doctrine of 'lifting the corporate veil' is utilized to impose penalty on the person, or persons, controlling in reality the actions of the company (such as, director) and certain statutes impose liability on such person or persons in charge of, or responsible to, the company for the conduct of its business.

- Lifting the veil under the Companies Act: If, in the course of winding up, it appears that any business of the company has been carried on with an intent to defraud the creditors of the company or any other person, or for any fraudulent purpose, the persons who were knowingly parties to the carrying on of the business in such fraudulent manner shall be personally responsible without any limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct.
- Lifting of Veil as recognized by courts: The scope of this principle as applied by Indian courts is broad and largely dependent on the facts of an individual case. The corporate veil may be lifted where:
  1. a statute itself contemplates this;
  2. where fraud or improper conduct is intended to be prevented;
  3. where a taxing statute or a beneficial statute is sought to be evaded;  
or
  4. where associated companies are inextricably connected as to be, in reality, part of one concern.

The nature of the impugned conduct, the involvement of the public interest and the effect on the affected parties are all relevant considerations while determining whether or not to lift the corporate veil.

The court has, in one instance, lifted the corporate veil and recognized an individual as having acted on behalf of the company, who had resigned from the board of a company and had ceased to be member of the company.

### 4. OTHER ACTIONS AGAINST DIRECTOR

## Claims by liquidators, creditors and contributories / members, post winding up, reconstruction, compromise and arrangement:

The claims may arise because all has not been well with the company and that certain decisions were taken by director / director who need to be held accountable for that decision. Normally, such claims relate to the fraudulent conduct of business when a company is in the course of winding up. These claims will arise when the company continues to carry on business and incur debts at a time then there is, to the knowledge of the director, no reasonable prospect of the creditors ever receiving payment of those debts. The director are personally liable in such a case for such debts of the company.

Claims may arise against director to furnish such information particularly stating material interests of the director or managing director of the company, whether in their capacity as such or as members or creditors of the company or otherwise. This is instrumental in gauging the effect of those interests on the compromise or arrangements so proposed. The director also owe a duty to the official liquidator, where a winding up order has been made by the High Court, to submit and verify a statement as to the affairs of the company.

## **ROLES AND RESPONSIBILITIES OF BOARD OF DIRECTOR UNDER COMPANIES ACT, 2013**

### A. Obligations & responsibilities of the board of director :

The board of director of the company stands in a fiduciary position in relation to the company and its stakeholders and the director are responsible for the better working of the management of the company in a prosperous manner with high endeavors. Following are the few obligations and responsibilities which the director needs to take an extra care in discharging the same:

1. Board to ensure the additional disclosures with respect to annual return filed by the companies, boards report.
2. Board to ensure the additional disclosures in the director's responsibility statement regarding internal financial controls and regulatory compliance.

3. Board to ensure the constitution and functioning of various committee are as per the Companies Act 2013.
  - i. Audit committee.
  - ii. Corporate social responsibility committee.
  - iii. Stakeholders relationship committee.
  - iv. Nomination and remuneration committee.
4. Board to ensure the mix of executive and non-executive director including independent director on the board.
5. Board to ensure the appointment of whole-time key managerial personnel through a board resolution.
6. Board to define terms of reference for the audit committee.
7. Disclosure of information:
  - a. Members of the board and key executives are required to disclose to the board whether they, directly, indirectly or on behalf of third parties, have a material interest in any transaction or matter directly affecting the company.
  - b. The board and top management to conduct themselves in a manner so as to meet the expectations of operational transparency to stakeholders while at the same time maintaining confidentiality of information in order to foster a culture for good decision-making.

#### B. Number of directorships to be held by a director (Section 165) :

- I. No person shall hold office as a director, including any alternate directorship, in more than 20 companies at the same time.
- II. Out of the threshold of 20 companies, a person shall not be appointed as a director in more than 10 public companies.
- III. For reckoning the limit of public companies, directorship in private companies that are either holding or subsidiary company of a public company shall be included.

### C. Women director (Section 149) :

The following classes of companies shall have at least one woman director on the Board:

- i. Every listed company.
- ii. Every public company having a paid-up share capital of **Rs. 100 Crores or more.**
- iii. Every public company having a turnover of **Rs. 300 Crores or more.**

### D. Resident director (Section 149 (3)) :

Every company shall have at least one director who has stayed in India for a total period of not less than 182 days in the previous calendar year.

## MANDATORY COMPLIANCES



### MEETINGS OF THE BOARD

After registration following are the mandatory compliances for every company:

- Meeting of board of director (Section 173):  
First Meeting of board of director is required to be held within 30 days of incorporation of company and thereafter 4 meetings are required to be held in every financial year in such a manner that the gap between 2 board meetings should not be more than 120 days.
- Benefits to small company(Section 173 (2)):

Small company means private limited company which has paid up capital less than Rs. 50 lakh & turnover less than Rs. 2 Crore. It is sufficient to conduct only 2 board meeting for a small company.

- Calling of meeting (Section 173 (3)):

Meeting of board of director should be called by giving not less than 7 days notice to director at his registered address through by hand delivery, by post, by electronic means.

- Participation of director in board meetings (Section 173 (4)):

Director may, apart from attending the meeting physically, participate in the meeting by way of video conferencing and other audio visual means.

Matter which cannot be dealt at a meeting held though video conferencing.

1. Approval of the annual financial statements;
2. Approval of the board's report;
3. Approval of the prospectus;
4. Audit committee meetings for consideration of accounts; and
5. Approval of the matter relating to amalgamation, merger, demerger, acquisition and takeover.

- Quorum of board meeting (Section 174):

1/3 rd of total strength or 2 (Two) director, whichever is higher.

Where meeting of board could not be held for want of quorum, the meeting shall automatically adjourn to same time, same place at next week (Not being national holiday).

If number of director reduced below quorum, then the remaining director may hold the meeting for the following purposes:

1. To call a general meeting
2. Increase the number of director.

- Passing of resolution by circulation (Section 175): A company may get approval on a resolution by board of director without conducting a board meeting; company can do it by passing of resolution by circulation.

- Procedure of passing of resolution by circulation (Section 175 (1)):

- I. The company will circulate draft resolution along with necessary papers, if any to all the director at their registered address through, hand delivery, post and electronic means.
  - II. Resolution should be approved by majority of director, who are entitled to vote on the resolution.
  - III. Resolution passed by circulation shall be noted at a subsequent meeting of the board and made part of the minutes of such meeting.  
Note: If before passing of resolution request is made by 1/3 of total number of director to decide such matter at a meeting, the chairperson shall put the resolution to be decided at the meeting of the board.
- Annual general meeting (Section 96) :  
Every Company , apart from One person Company ( OPC ) must have to hold in addition to other meetings, by giving a notice about the meeting, not more than 15 months in between the date of AGM to the next. A Company may hold its first AGM within the period of 9 months from closing of its first financial year otherwise in other cases within the period of 6 months.
  - Minutes of proceedings of meeting of board of director (Section 118):  
It is mandatory for every company to cause minutes of the proceedings of every meeting of board of director, General meeting within 30 days of conclusion of meeting concerned. Minutes shall be preserved permanently and shall act as evidentially value in case of any dispute.
  - Report by board of director: Every company has to prepare a board report in which details of the state of the company, operations during the year, net profit, dividend declaration and its compliance with a set of financial, accounting and corporate social responsibility standards contain.