

MCA Clarifies the Prosecution Proceedings against Independent Directors

(MCA) on Monday assured that no prosecution proceedings would be initiated against Independent and Non-Executive Directors of Companies ***without the availability of sufficient pieces of evidence*** of their involvement in frauds committed by the companies.

MCA issued a circular to its ***Regional Directors, Registrar of Companies (RoCs) and official liquidators*** with respect to prosecution proceedings against Independent and Non-Executive Directors. The circular was issued in the wake of the instances of Independent and Non-Executive Directors coming under the scanner for alleged corporate misdoings.

Generally, a whole-time director (WTD) and key managerial personnel (KMP) are associated with day to day functioning of the Company; hence, such WTDs and KMPs would be liable for defaults committed by a company. However, actions against Independent and Non-Executive Directors can only be initiated if sufficient evidence is available against them.

As per the circular in case the irregularities are attributable to the decisions taken by the Board or its Committees, it should be ensured that civil or criminal proceedings are not unnecessarily initiated against the IDs or the NEDs unless sufficient evidence exists to the contrary. Moreover, no prosecution can be initiated against IDs or NEDs without the explicit approval of the government.

Suggestions are given in the circular to avoid unnecessary prosecution of Independent and Non-Executive Directors

To avoid unnecessary prosecution of Independent and Non-Executive Directors, MCA suggested that:

- The records available in the office of the Registrar including e-forms DIR-11 or DIR-12 and copies of the annual returns or financial statements should be examined to discover whether a whole-time director (WTD) or key managerial personnel (KMP) was serving in the Company as on the date of default.
- Independent Directors can only be held responsible for irregularities of records if the Company has no whole-time directors (WTD) or key managerial personnel (KMP).
- During the inquiry, inspection, investigation of Companies the Registrar of Companies (RoCs) must seek documents of the concerned officers of the Company to discover the role of directors and avoid unnecessary civil or criminal action.

- If there is any doubt related to liability of any person for proceedings, Regional Directors or Registrar of Companies can seek guidance from the Ministry of Corporate Affairs (MCA) through the office of Director- General of Corporate Affairs. Prosecution proceedings can be initiated by RoCs only after receiving due sanction from the ministry.
- The cases in which prosecution has been already filed but does not meet the criteria mentioned in the circular issued by MCA, such cases "may be referred to the ministry for necessary examination and further direction."
- All the Regional Directors, Registrar of Companies (RoCs) are directed to immediately follow the above mentioned standard Operating Procedure with respect to all the ongoing cases.

Take Away

The circular issued by MCA to its Regional Directors, Registrar of Companies (RoCs) and official liquidators with respect to prosecution proceedings against Independent and Non-Executive Directors gives a breather to IDs and NEDs who have been receiving notices from RoCs and Regional Directors for irregularities in the Company. The issued circular intends to shield Independent and Non-Executive Directors from prosecutions for both civil and criminal offences unless there is any availability of strong evidence against them.