THE INSTITUTE OF
Company Secretaries of India
IN PURSUIT OF PROFESSIONAL EXCELLENCE
Statutory body under an Act of Parliament

CLG:MCA:2016 February 15, 2016

Shri Tapan Ray
Secretary
Ministry of Corporate Affairs
Shastri Bhawan
New Delhi 110001

Dear Sir,

Sub:Para no. 7.6 of Part II of the Report of Companies Law Committee
Ref: Notice inviting comments on the Report of Companies Law Committee reg.

This is with reference to subject captioned above, wherein Ministry has invited comments from the stakeholders in Report of Company Law Committee. In order to avoid repetition/duplication of comments/suggestions, the Ministry desired the members/ patrons of the Professional Institutes/ Councils/ Industry Chambers to route their comments/ suggestions through respective Institute/Council/Chamber.

In this regard, the ICSI has invited comments from its members and other stakeholders. After receiving the comments, the said comments / suggestions were placed before Special Meeting of the Central Council of ICSI and after due deliberations, we hereby submit as under:

1. Para no. 7.6 of Part II of the Report of Companies Law Committee is reproduced as under:

   *Section 92(2) read with Rule 11(2) prescribes that an annual return, filed by a listed company or a company having paid-up share capital of ten crore rupees or more or turnover of fifty crore rupees or more, shall be certified by a Company Secretary in practice in Form no. MGT-8.***The Committee considered the suggestions to expand the scope of certification of annual return and agreed that Company Secretaries in employment should be allowed to certify annual returns.**

   ICSI submissions with reference to the recommendation that Company Secretaries in employment should be allowed to certify annual return is that the Annual Return must be certified independently by a Company Secretary in Practice only and not by the same person who has made the Annual Return himself.

   JUSTIFICATION:

   a) We submit that Part II of the Report relates to the recommendations proposing the amendments to the Rules. Para no. 7.6 of Part II proposes amendment to the relevant rule for allowing company secretaries in employment to certify annual return whereas sub-section (2) of section 92 of the Act requires that the annual return filed by specified companies shall be certified by company secretary in practice. It is submitted that since Rules should be in consonance with the Act, the proposed recommendation in the rules to allow employee Company Secretaries to certify

Annual Return will not be in addition but in derogation of what is prescribed in the Act.

The legislature in its wisdom had clearly drawn the distinction of signing and certification of annual return and also tried to distinguish that only certain category of companies will be subject to certification.

Signing of Annual Return: Section 92(1) of the Companies Act, 2013 requires that Annual Return of every company should be signed by a director and the company secretary. When a director and a company secretary in employment sign the Annual Return under section 92(1), they authenticate the correctness of the facts stated in the return.

Certification of Annual Return: Section 92(2) of the Companies Act, 2013 requires that the Annual Return ***filed by a listed company or a company having paid up share capital of ten crore rupees or more or turnover of fifty crore rupees or more*** shall be certified by a company secretary in practice.

Certification is an independent scrutiny of the information furnished by the management of the company in the Annual Return. Since, this certification requires independent view, it should not be done by the same individual who is in any case required to verify the content of said Annual Return by putting his signature under section 92(1) of the Act.

There should be two different signing mechanism one for the purpose of **signing** under section 92(1) of the Companies Act, 2013 and the other for **certification** under section 92(2) of the Companies Act, 2013. The **maker and checker** concept should be established clearly with the verification of records.

Considering the clear intent of the legislature and respecting the views of the committee, the recommendation to allow Company Secretaries in employment to certify Annual Return, which is against the intent of the legislature, be withdrawn as Rules cannot override the Act.

b) *Section 6 of Company Secretaries Act 1980 prohibits certification by Company Secretary in employment*

In terms of Section 24, any person who being member of the Institute, but not having the certificate of practice represents that he is in practice or practises as a company secretary shall be penalised. The Company Secretary in practise is specialised in assignment relating to certification, accordingly, certification being their forte, a company secretary in employment should not be allowed to certify.

c) *Standing Committee in its Report on the Companies Bill, 2009*

The Standing Committee in its Report on the Companies Bill, 2009 recommended the insertion of the provision relating to certification by Company Secretary in practice in addition to the signing of the annual return by Company Secretary in employment.

The relevant extracts are as under:

"7.8 Further, the suggestion for placing an obligation on the Company to provide every assistance to the Company Secretary in whole time practice to enable him to verify any record or information etc. in connection with certification of annual return of the company may be considered for inclusion in the clause."

"7.13 The Committee recommend that the new provision requiring return to be filed with Registrar, in case promoters" stake changes beyond a limit, in order to provide audit trail of ownership may be duly incorporated in the Bill. The Committee would also recommend in this regard that any adverse remarks or qualification, made by the Company Secretary-in-whole time practice, while certifying the annual return, should be necessarily explained for or commented upon in the Board's report."

d) *Annual Compliance certificate by PCS is not a new concept. (Introduced vide Companies (Companies (Amendment) Act, 1988)*

Certification of Annual Return is not a new provision introduced by the Companies Act, 2013. Section 161 of the Companies Act, 1956 provided for the certification by the Practicing Company Secretaries of Annual Returns of listed companies. Further, Section 383A of the Companies Act, 1956 provided for the annual compliance certificate by the practicing company secretaries for the companies with paid-up capital of Rs.10 Lacs or more and upto Rs.5 Crore. The scope of 383A (Compliance Certificate) has been, to a large extent, done away with having regard the cost of compliance for the smaller companies.

e) *Annual Return contains critical information which requires scrutiny to provide comfort level to stakeholders of the specified companies*

Annual Return contains particulars such as registered office, principal business activities, particulars of holding, subsidiary and associate companies, its shares, debentures and other securities, members, promoters etc. It also states details of the meetings of members, Board of Directors and its committees, remuneration of directors, KMP and whole range of matters related to compliances and important non-financial disclosures. The Annual Return thus gives at one place a comprehensive view of the structure of the company during the year and makes vital non-financial disclosures.

Certification of Annual Return involves verification of vital documents to check correctness/ facts of data provided by management of the company. Accordingly,

Annual Return Certification has to be conducted by an independent professional and this provision is aimed at self regulation.

The objective of certification is to give the necessary comfort to the various stakeholders that the facts stated in the annual return are correct and adequate and that the affairs of the company are being conducted in accordance with the legal requirements. The certification also protects the companies from the consequences of non - compliance of the provisions of the Act. Accordingly, the concept of certification and signing are made to achieve the legal compliance process under the Act.

Accordingly, we once again submit that the proposed recommendation in Para no. 7.6 of Part II may be withdrawn and Annual Return must be certified independently by Company Secretary in Practice.

Thanking you,

Yours Sincerely,

(CS Mamta Binani)
President

Shri Amardeep Singh Bhatia
Joint Secretary
Ministry of Corporate Affairs
Shastri Bhawan
New Delhi

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Shri Tapan Ray
Secretary, Ministry of Corporate Affairs
ShastriBhawan
New Delhi

Dear Sir,

Sub: Para No. 13.11 of Part I of the Report of Companies Law Committee
Ref: Report of Companies Law Committee

This is with reference to subject captioned above, wherein Ministry has invited comments from the stakeholders in Report of Company Law Committee. In order to avoid repetition/duplication of comments/suggestions, the Ministry desired the members/ patrons of the Professional Institutes/ Councils/ Industry Chambers to route their comments/ suggestions through respective Institute/Council/Chamber.

In this regard, the ICSI has invited comments from its members and other stakeholder. After receiving the comments, the said comments / suggestions were placed before Special Meeting of the Central Council of ICSI and after due deliberations, we hereby submit as under

1. Para No. 13.11 of Part I of the Report of Companies Law Committee reads as under:

   At the same time, **the Committee also recommended enabling a whole time Key Managerial Personnel (KMP), holding necessary qualifications, to hold more than one position in the same company at the same time**, so as to reduce the cost of compliance for such companies, and also to utilise the capacities of these officers to the optimum level.

2. We submit that merging all the three positions may not be in the interest of duties. ICSI submissions with reference to Para no. 13.11 of Part I is that one individual should hold one position of KMP. The justification is as under:

   a. Each of the Key Managerial Personnel has specificassigned role to be performed under the Actand responsibilities being onerous, one individual would not be in a position to effectively discharge the duties envisaged.
   b. The CFO looks after the financial aspects of a company whereas the company secretary is the compliance officer who ensures compliance of all laws, therefore the roles cannot be said to be complementary.
   c. One person holding all three key offices or more than one key offices would lead to concentration of power in a few hands and would be against the spirit of good governance.
   d. Requirement of appointment whole time ‘KMP’ is applicable only to public companies with a paid up share capital of Rs. 10 crore or more.

In view of the enormous challenges faced by corporates, particularly in areas related to corporate compliances, corporate governance, Board Processes, Stakeholder Relationship etc., services of whole time company secretary is the need of the hour, therefore individual responsibilities of different KMPs should not be mergedand they should remain responsible for the specific position they are holding in their organisation.

Thanking you,

Yours Sincerely,

(CS Mamta Binani)
President

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Dear Sir,

Sub: Para no. 13.13 of Part I of the Report of Companies Law Committee
Ref: Report of Companies Law Committee

This is with reference to subject captioned above, wherein Ministry has invited comments from the stakeholders in Report of Company Law Committee. In order to avoid repetition/duplication of comments/suggestions, the Ministry desired the members/ patrons of the Professional Institutes/ Councils/ Industry Chambers to route their comments/ suggestions through respective Institute/Council/Chamber.

In this regard, the ICSI has invited comments from its members and other stakeholder. After receiving the comments, the said comments / suggestions were placed before Special Meeting of the Central Council of ICSI and after due deliberations, we hereby submit as under:

1. Para no. 13.13 of Part I of the Report of Companies Law Committee reads as under:

   "Section 203(3) provides that "whole-time" Key Managerial Personnel shall not hold office in more than one company except in its subsidiary company at the same time. The Committee noted that Section 13 of the General Clauses Act, 1897 provides that 'singular' shall include the 'plural', ***unless there is anything repugnant in the subject or the context****. Thus, "whole-time" Key Managerial Personnel may hold office in more than one subsidiary company as per the present law. Accordingly, the Committee recommended no change in this regard."*

2. ICSI submissions with reference to Para no. 13.13 is that the provisions of section 13 of the General Clauses Act, 1897 has to be read keeping in view the words "unless there is anything repugnant in the subject or context" The most common rule of interpretation is that every part of the statute must be understood in a harmonious manner by reading and construing every part of it together. The maxim "A *Verbislegis non estrecedendum*" means that you mustnot vary the words of the statute while interpreting it.

   The object of interpretation of statutes is to determine the intention of the legislature conveyed expressly or impliedly in the language used. In ***Santi swarup Sarkar v pradeepkumarsarkar***, the Supreme Court held that if two interpretations are possible of the same statute, the one which validates the statute must be preferred.

Further, Supreme Court in **M.T. Khan & Ors V. Government of Andhra Pradesh & Ors** [2004] RD-SC 10 (5 January 2004) granting the Leave in the appeal against order of High Court clarified that the decisions of the High Courts including the impugned judgment, as noticed hereinbefore, have proceeded on the basis that having regard to the provisions of Section 13 of the General Clauses Act and Article 367 of the Constitution of India, a singular would include a plural. The High Courts while adopting the said view, in our opinion, committed an error insofar as they failed to take into consideration the crucial words occurring in Article 367 of the Constitution "unless the context otherwise requires".

It is a well-settled principle of law that the provisions of the Constitution shall be construed having regard to the expressions used therein. The question of interpretation of a constitution would arise only in the event the expressions contained therein are vague, indefinite and ambiguous as well capable of being given more than one meaning. Literal interpretation of the Constitution must be resorted to. If by applying the golden rule of literal interpretation, no difficulty arises in giving effect to the constitutional scheme, the question of application of the principles of interpretation of a statute would not arise only. It is to be noted that the definition of Key Managerial Personnel is given in section 2(51) of the Act. The same is reproduced as under:

"key managerial personnel", in relation to a company, means—
(i) the Chief Executive Officer or the managing director or the manager;
(ii) the company secretary;
(iii) the whole-time director;
(iv) the Chief Financial Officer; and
(v) such other officer as may be prescribed;"

However, when seeing it in the context of section 203 of the Act, it is "whole time key managerial personnel" and not a key managerial personnel. It is pertinent to point out that a whole time key managerial personnel may be a key managerial personnel in other companies but when it is to be seen in the context of "whole time key managerial personnel, the legislature in it wisdom has restricted to only one subsidiary and not all the subsidiaries. If one sees above, whole time director is independently defined as one of the key managerial personnel under section 2(51) of the Act but in the context of section 203, whole time director is clubbed and will be categorised only as whole time key managerial personnel if there is no managing director or manager or chief executive officer. Further under section 2(51) of the Act, key managerial personnel may include such other persons as may be prescribed but there is nothing as such in section 203 of the Act. Accordingly, there is a clear distinction provided between "key managerial personnel" and "whole time key managerial person".

Therefore it is respectfully submitted that the Committee's presumption that "singular includes "plural" under the General Clauses Act is erroneous in the law and is not in the context, which the legislature has seen.

3. ICSI submits that the appointment of Key Managerial Personnel should not be extended to 'subsidiaries'.The justification is as under:

   a. Legislative intent is that whole time KMP should not serve in more than one company.

   We invite your kind attention to section 316 of the Companies Act, 1956 wherein it is provided that no public company and no private company which is a subsidiary of a public company shall appoint or employ any person as managing director (one of the KMP under Companies Act, 2013), if he is either the managing director or the manager of any other company (including private company which is not a subsidiary of a public company), except as provided in sub-section (2).

   b. KMP is whole time employee, which is also 'officer in default' under section 2(60).There are many companies which are joint venture companies which are subsidiaries of holding companies. In addition, there are companies where holding company and its subsidiary companies are listed entities. Further it is seen that one holding company has layer of subsidiaries, both horizontally as well as vertically. If the concept of one whole time KMP is also extended to all the subsidiaries, it will impact the work of the whole time KMP and the possibilities of his devoting time and attention will get hampered. He should not be held responsible and thereby should not become officer in default for the non-compliances of more than one company.

   c. Appointment of KMP of a holding Company in more than one subsidiary is not possible unless it is a chain of subsidiaries.

   When a person holds position in more than one subsidiary, then his position would be that he is a company secretary in holding company, and of subsidiary company and of other subsidiary company. Section 203 is violated when the first and second subsidiary does not hold holding-subsidiary relationship.

   d. Notes on clauses in Companies Bill refers to appointment of KMP in one Subsidiary

   The Notes on Clauses in Companies Bill, 2011 relating clause 203 dealing with Appointment of Key Managerial Personnel reads as under:

   'This is a new clause and seeks to provide that every company belonging to such class or description of companies, as prescribed by the Central Government, shall have managing director, or chief executive officer or manager and in their absence, a whole time director and a Company Secretary, as whole-time key managerial personnel. It also seeks to provide that a whole-time key managerial personnel shall not hold office in more than one company (**expect in a subsidiary)** at the same time except that of a director if company permits him in this regard. This clause further provides for punishment in case of contravention. It indicates that a person can hold position as Key Managerial Personnel in maximum one subsidiary.'

e. *Appointing a KMP in more than one subsidiary may not justify his position*
The purpose of Section 203 is promotion of compliance and governance by requiring companies to have Key Managerial Personnel who have specified obligations under the Act. KMPs have specific responsibilities. Appointing a person as KMP in more than one subsidiary may not justify his position considering his role and responsibilities.

f. Section 165 of Companies Act 2013 and *Other Regulations restricts number of directorships*

There are restrictions with respect to number of directorships and their membership in board committees under the Companies Act.
Regulation 25 of SEBI(LODR) Regulations, 2015 also restricts a person to serve as independent director in more than seven companies. It further provides that if such person is serving as whole time director in any listed company, shall not be independent director in more than **three** listed companies.

g. *Each subsidiary is a separate legal entity.*

Each subsidiary is reckoned as separate legal entity for the purpose of compliance of CSR provisions under Section 135 of the Companies Act, 2013.

h. Ceiling on number of statutory Audits does not exclude subsidiary.

Thus, it is requested that it may be clarified by way of suitable amendment in the Companies Act that the interpretation of 'plural' with reference to subsidiaries relating to appointment of Key Managerial Personnel in this report, is to be construed as 'singular' i.e. only one subsidiary.

Thanking you,

Yours Sincerely,

(CS Mamta Binani)
President

Shri Amardeep Singh Bhatia
Joint Secretary
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New Delhi