

Article- Vacation of Office of a Director under section 167(1) of the Companies Act 2013

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Section 167 (1) (b) Vacation of office due to non-attendance of Board Meetings:

Section 167 of the Act of 2013 (CA13) which came into force w.e.f. 1st April 2014 correspondence to Section 283 of the erstwhile Companies Act of 1956 (CA 56).

Both the said sections deal with vacation of office of director on various grounds. Of the numerous grounds mentioned therein, one of the grounds deals with non-attendance of board meetings leading to vacation of office.

Section 167(1) (b) of CA 13 which corresponds to Section 283 (1) (g) of CA56 lays down that the office of a director shall become vacant in case he absents himself from all the meetings of the Board of Directors held during a period of twelve months with or without seeking leave of absence of the Board.

Background for the introduction of 167(1)(b)

The lawmakers seems to have accepted the recommendations in toto made in the J.J.Irani Committee Report on Company Law dated 31.5.2005, under Point No.20 of the said report titled “ Vacation of office by the Director” .

Point No.20 in the said report talks about a continuous period of one year regardless of leave of absence or otherwise.

The only difference being 12 months in place of the recommended continuous period of one year has been incorporated in Sec.167(1)(b)

Key Challenges (Period of 12 Months)

At first reading the prescribed period of “12 Months” seems to be clear and easy to understand, however when we try and fit the same into a director’s attendance, the devil in the wordings of “12 Months” reveals itself.

Unfortunately, there is no clarification from MCA or Rules made under the Companies Act 2013 as on date. So, it is left to Company law practitioners to ensure compliance while keeping intact both the letter as well as the spirit of the law.

Let's us try and frame the issues at hand.

First Issue - Period of 12 Months:

- The period of 12 months has no beginning and hence it would be difficult to label the same as financial year (April to March Period) or calendar year (January to December period), even though both these cover a period of 12 months.
- Financial year U/s.2(41) of the CA13 means the period ending on 31st day of March every year. So, the coverage is from 1st day of April to 31st May of March?
- Or should we consider the same to ensure its synchronization with the requirements of Section 173(1). Section 173(1) deals with "Meetings of Board" and provides that a Company shall hold a minimum of four Board Meetings every year in such a manner that not more than one hundred and twenty days shall intervene between two consecutive meetings of the Board.

Second Issue- Definition of "Month"

Lets us look at the meaning of "Month" as defined in various sources-

- Companies Act and Rules thereunder
 - The Act or the rules made thereunder have not clarified what "Month" stands for.
- Cambridge Dictionary definition of "Month"
 - A period of about four weeks, especially, one of the twelve periods into which a year is divided. And here year stands for calendar year from January to December.
- Section 3(25) of the General Clauses Act, 1897
 - "month" shall mean a month reckoned according to the British calendar.
- Court Judgements
 - A study of the various judgements passed by the High Courts of the land, especially on income tax matters, have held differing views on the definition of "Month". Some of the High Courts have also held that the definition of a "Month" as provided in the General Clauses Act can only be assigned if there is nothing repugnant in the context.

- However, it is also worth noting that there are numerous judgements of various High Courts, related to income tax matters where in deferring views have been held by the Honorable Courts on the definition of a month and held that meaning under the General Clauses Act can only be assigned if there is nothing repugnant in the context.
- The Courts have also held that the term “month” must be given the ordinary sense of the term of thirty days of period and not as provided U/s. 3(35) of the General Clauses Act.
- Supreme Court in the matter of Bibi Salma Khatoon Vs. State of Bihar [2001(7) SCC 197] while considering the three months limitation period had calculated the said period by referring to the meaning given by Halsbury’s Law of England.

Inferences based on above:

The word “Month” not having a clear definition, can we take the liberty to interpret the “12 Months” period as provided in Section 167(1)(b) to mean 360 days (30*12) irrespective of whether it is calendar or financial year ?

Further it seems that the law makers have intentionally not used “Financial Year” even though there is a specific definition assigned to it U/s. 2(41) in the Act and hence for us to allude to 12 Months as a Financial or Calendar Year would not be in sync with the stated intentions.

Any attempt to do so, may severely limit the non-compliance to a period to period and thereby restrict its applications and defeat the intentions altogether in certain situations , which would play foul to the intentions of the law makers.

Author’s Views

In the absence of requisite clarifications/directions and on the presumption that companies would hold the minimum number of Board Meetings as prescribed under section 173(1) of CA 2013 every year in a manner so that it covers both financial as well as calendar year and further ensuring that not more than 120 days shall elapse between two Board Meetings.

The period of 12 months shall run from the date of the first meeting from which a Director absents himself, without seeking leave of absence till the lapse of 12 months therefrom

Now let’s look through a practical real-world scenario-

Scenario 1:

- For the Financial Year 2018-19, the Board of a Company held four board meetings ensuring its compliances with the requirement of Sec.173(1) of CA13 on the following dates- 9th February 2018, 24th May 2018, 9th August 2018, 13th November 2018 and 12th February 2019.
- One of the Directors after attending the 9th February 2018 Board Meeting did not attend any of the subsequent Board Meetings of the Company. He had sought leave of absence and provided copy of his incapacitation due to medical grounds.

Here the period of 12 months would commence from 24th May 2018 and end on 24th May 2019 and hence he will not incur any disqualification during the Calendar year 2018 or during the Financial Year 2018-19 under Section 167 (1) (b) of CA 13.

Further it is immaterial how many Board Meetings are held during the said period of 12 consecutively running months.

Scenario 2:

The situation remains the same, and he did not attend the 9th February 24th May and 9th August meeting.

So, his period of absence would start on 9th February 2018 and end on 9th February 2019, and thereby bringing his term in office to end on 9th February 2019 under section 167(1)(b)?

Apparently not since there was no Board Meeting on 9th February 2019.

However, if he fails to attend the 12th February 2019 meeting, he will attract the provisions of the said section, even though the period of 12 months will be extended.

Another way of looking at would be , 12 months, means 12 whole months irrespective of the dates contained therein , so February 2018 to end of February 2019 would constitute 12 months and hence even if a Board meeting is held on the last date of the 12th month and a director attends the same, he would escape the rigor of this section.

Deciding Triggers

In my view while considering the period of 12 months we should also not overlook the meetings held during the period, since non-attendance of Board Meeting is the primary trigger and if no meetings are called by the Company during a period of 12 months, a director can't be removed under this section.

Time for a Re-Look

We all agree that the era of 1956 and of 2013, or even when the J.J. Irani Committee considered issues in 2005 is dramatically different as compared today. The onerous responsibilities and expectation on Board members and their performance, ever changing demands on corporate governance requirements.

The recent matters related to tussles in the Board of big corporates, with the matter having reached Supreme Court is an indication of Board Meeting and meetings of its crucial sub-committees especially the mandatory ones like Audit Committee, Nomination Committee and Stakeholders Relationship Committee.

Hence it is high time to bring these statutory Committees at par with Board Meeting for the purposes of Section 167(1)(b) of the CA13.

Board Sub- Committees:

The J.J. Irani Committee Report of 2005 had done an exhaustive recommendations for the need for having certain Board Committees, a relevant extract from their report on this matter is as follows “..... Point No.17- *While recognizing the need for discretion of the Board to manage and govern the company through collective responsibility, the Committee recognizes the need for focus on certain core areas relevant to investor / stakeholder interests. In such areas, law may mandate the requirement of constitution of specific Committees of the Board whose recommendations would be available to the Board while taking the final decisions....*”

Going further the Committee had recommended the constitution of Audit, Remuneration and Stakeholder’s Committee in this regard.

The Committee although apostilling on having such sub-committees of the Board as part of the Corporate Governance and over-sight function but did not make any recommendations on meeting attendance as it had done in the case of Board Meetings.

The Companies Act Of 2013 envisages mandatory constitution of the following Committees for certain class of companies (ref. Rule 6 of Cos (Meeting of Board & its Powers) Rules, 2014 and so does SEBI (Listing Obligations and Disclosure Requirements) Regulations 2015 (LODR 2015) as under:

Sl. No	Board Committee's	Companies Act of 2013	SEBI (LODR) 2015
1	Audit Committee	Section. 177	Regulation 18
2	Nomination & Remuneration Committee	Section 178(1)	Regulation 19
3	Stakeholders Relationship Committee	Section 178(5)	Regulation 20

Further Section 178(8) prescribes stiff penal and pecuniary penalties incase of any default by the Company or its officers for any contravention of the said section 177 and 178.

The intent of the legislators while framing of the provisions of Section 177 and 178 is quite evident and the importance they have placed on the aforementioned Board Committees and the role and responsibilities expected of them as part of the Corporate Governance structure of the Company is quite evident and includes-

- A. Committee Structure and minimum qualification of its members
- B. Number of Meetings expected to be held by them
- C. Roles and Responsibilities
- D. Periodical Committee related reporting's to stakeholders.

The aforementioned Committees are expected to have an oversight on many critical and crucial areas of the Company and make suitable recommendations to the Board on the matters coming within their preview, key among them being-

- i. Appointment, re-appointment and removal of Directors and their Compensation structure;
- ii. Key senior managerial appointments, re-appointments, removal and compensation structure;
- iii. Performance evaluation of Board, its members and of the KMP's;
- iv. Oversight on the financial reporting process ad ensuring the financial statements is correct, sufficient and credible;
- v. Recommendations on appointment, remuneration and terms of appointment of Company Auditors.
- vi. stakeholders' grievances and their timely resolution.

Since most of the crucial and critical matters in a life of a Company are deliberated at the first level by the aforementioned Committees and their recommendations then taken up/ ratified by the Board, it is more so important that such critical Board-Committees have proper attendance, without which the purpose of having these

committees would to a great extent get diluted and the intent of the legislators would be lost.

Hence, it may be time to include attendance criteria of these Board Committees under Section 167(1)(b).