

Miscellaneous Provisions (Sections 312 – 314)

Prohibition of assignment of office by director (Section 312)

Question 1

'X' was appointed as Managing Director for life by the Articles of Association of a private company incorporated on 1st June, 1970. The articles also empowered 'X' to appoint a successor. 'X' appointed by will 'G' to succeed him after his death. Examine in this connection

- (a) Can 'G' succeed 'X' as Managing Director after the death of 'X'?
- (b) Is it possible for the company in general meeting to remove 'X' from his office of directorship during his life time?

Answer

- (a) Section 312 prohibits assignment of his office by a director and such assignment shall be void. It was held in *Oriental Metal Pressing Works Private Ltd. vs. B.K. Thakoor (A.I.R.) 1960 Bom. 167* that the appointment of one as managing director by the will of one D was void in view of the provisions contained in Section 312, since, according to the High Court, the words 'any assignment' were comprehensive enough to include every assignment to transfer of a director or of the appointment by a director of a person to the office of a director in his place, whether by a deed *inter vivos* or by will. But this ruling has been reversed by the Supreme Court (*vide A.I.R. 1961 S.C. 573*). The Court considers that the word 'assignment' in Section 312 does not mean or include 'appointment'. From its every nature transfer inevitably imports the passing of a thing from one person to another. A transfer without the passage of the thing, even when that is an office is inconceivable. On the other hand, an 'appointment' has nothing to do with passing from one person to another; it connotes the putting in of someone in a vacancy. So transfer and appointment are dissimilar. It would be an unusual statute, which by using a single word intended to prohibit at the same time, two wholly different acts. A construction leading to such a result cannot be permitted. The Court observed that 'the section talks of assignment of his office by the director. The word 'his' would indicate that the office contemplated was one held by the director at the time of assignment. An appointment to an office can be made only if the office is vacant. It is legitimate, therefore it infer that by using the word 'his' the legislature indicated that an appointment by a director to the office which he previously held but did not hold at the date of appointment was not to be included 'assignment'. In view of the Supreme Court decision, 'x' has not made any assignment of his office prohibited by section 312 and 'G' can succeed 'X' as Managing Director after the death of 'X'.

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- (b) Section 284 empowers the company to remove a director, by ordinary resolution before the expiry of his period of office. This section applies to both public and private companies. It applies to permanent directors or life directors and directors appointed for a fixed term even though they might have been appointed by the Articles of Association or otherwise. But directors appointed by the Central Government under section 408 cannot be removed by the company under this section. Proviso 1 to sub-section (1) of section 408 exempts life directors who were holding office in private companies on 1st April, 1952. As the private company in this case was incorporated on 1st June, 1970, it is not entitled to this exemption. Hence 'X' can be removed as a director under section 284 even though he is a permanent director and once he is removed as a director, he also ceases to be a Managing Director.

Director, etc not to hold office or place of profit (Section 314)

Question 2

Mr. X is serving in a company in the dual capacity of a director and an employee? Referring to the provisions of the Companies Act, 1956. State:

- (a) *Whether there is any prohibition/restriction serving in the dual capacity?*
- (b) *If so whether a director serving as an employee would amount to holding an office or place of profit?*
- (c) *Whether the remuneration drawn by the director as an employee of the company would be governed by the provisions relating to managerial remuneration?*
- (d) *What would be your answer if the said director is rendering services of a professional nature?*

Answer

There is no prohibition contained in the Companies Act for a director acting in the dual capacity of a director and an employee. However, Section 314 puts a restriction for a director while accepting office or place of profit in the company. For this purpose, the director's appointment in the office or place of profit needs to be approved by the shareholders in the general meeting. A director however, without recourse to Section 314 can render services to the company in his professional capacity on one time basis.

Question 3

A is proposed to be appointed as a marketing executive on a monthly salary of Rs.60,000 in a company in which his father is a director.

Answer

As per Section 314(1B) no relative of a director of a company shall hold any office or place of profit which carries a total monthly remuneration of not less than such sum as may be prescribed except with the prior consent of the company by a special resolution and the approval of the Government. The limit of monthly remuneration prescribed by the Central

Government is ₹ 50,000/-, therefore, the company is required to pass a special resolution and get approved by Central Government before Mr. A is appointed.

Recently this limit of ₹ 50,000 has been increased to ₹ 2,50,000 under the Director's Relatives (Office or Place of Profit) Amendment Rules, 2011 issued by Ministry of Corporate Affairs vide Notification No. 303(E) dated 6th April, 2011.

Question 4

Mr. Smart is a director of ABC Ltd., accepts the offer of employment as "Chief Executive-Technical Operations" of the same company on a monthly remuneration of Rs.15,000. Can he be an employee at the same time being the director of the company? In case his son is appointed to the same post, does it attract any provisions of the Companies Act?

Answer

Ordinarily, the shareholders in general meeting elect a director, and once so elected, he enjoys well-defined rights and powers under the Act. An employee is appointed by the company under a contract of service is a servant of the company and the company can always direct his actions and interfere with his work. *In Lee Behrens & Co. (Re [1932] 2 com cas. 588* it was observed that directors are elected representatives of the shareholders engaged in directing the affairs of the company on its behalf. However, there is nothing in law to prevent a director from accepting employment under the company under a special contract, which he may enter into with the company. *(R.R. Kothandaraman vs. Commr. of I.Tax (1957)*. Section 314 provide for a director holding an office or place of profit under a company.

Except with the consent of the company accorded by a special resolution no director shall hold any office or place of profit and no partner or relative of his, no firm in which he or his relative is a partner, no private company of which he is a director or member and no director or manager of such a private company shall hold any office or place of profit carrying a monthly remuneration of ₹ 10,000 or more. The special resolution may be passed before or a general meeting of the company held for the first time after the holding of such an office or profit. If it is done without the knowledge of the director, the consent of the company may be obtained either in the general meeting held for the first time after the holding of such an office or within 3 months from the date of appointment whichever is later.

If a partner or a relative of a director or manager, a firm in which such director or manager or relative of either is a partner or a private company of which such a director or manager or relative of either is director or member can not hold any office or place of profit which carries a total monthly remuneration of Rs.20,000 or more except with the prior consent of the company by special resolution and the approval of the Central Government.

Thus, in the instance case, Mr. Smart can accept the offer of employment as Chief Executive-Technical Operations. If his son is appointed to the said post, it requires the consent of the company.

Recently the limit of ₹ 10,000 has been increased to ₹ 50,000 under Companies (Central Government's) General Rules and Forms (Amendment) Rules, 2011 issued by Ministry of Corporate Affairs vide Notification No. 514(E) dated 7th July, 2011.

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Question 5

Mr. True is a director of a company and also a chartered accountant by profession and one of the partners in M/s True & Fair Co. The company appointed the said firm as chartered accountant of the company on a regular basis. Does Mr. True holds any office or place of profit in the company. Would your answer be different if his appointment is on a case-to-case basis?

Answer

Chartered Accountants appointed by a company on a regular basis are hit by a restrictive provisions of sub-sections I and I(b) of Section 314 if he is a director receiving remuneration over and above to which he is entitled. In case the office or place of profit is held by an individual other than a director or by any firm, private company or other body corporate, if it obtains from the company anything by way of remuneration whether as salary, fees, commission perquisite or otherwise, approval of the company is not required where the monthly remuneration is less than ₹ 10,000/-. Accordingly, if a director is holding the place of chartered accountants for the company he would be covered by Section 314(3) irrespective of the fact that office or place of profit carries a total monthly remuneration less than Rs.10,000/-.

Recently the limit of ₹ 10,000 has been increased to ₹ 50,000 under Companies (Central Government's) General Rules and Forms (Amendment) Rules, 2011 issued by Ministry of Corporate Affairs vide Notification No. 514(E) dated 7th July, 2011.

Question 6

Mr. V, a Chartered Accountant is a Director in PQR Limited. The company proposes to appoint/engage the firm V & Co. in which Mr. V is a partner in one or more of the following capacities:

- (i) Consultants on regular retainer basis.*
- (ii) Authorised representatives to appear before tribunals.*

Discuss whether the provisions of Section 314 of the Companies Act are attracted in the above situations.

(May, 2000)

Answer

Apparently the prohibition under Sub-section (1) & (1B) of the Section 314 of the Companies Act, 1956 is not applicable to remuneration/compensation given to concerned persons (i.e. directors) for the services of a professional nature rendered by them to the company in their professional capacity such as advocate, chartered accountant, solicitor etc. However, prohibition will apply to them if they bind themselves on regular retainer ship basis. Therefore,

- (i) Chartered Accountants appointed by a company on a regular retainer basis as advisers, consultants, internal auditors, etc., also hold the position or place of consultant or adviser and accordingly such appointments are hit by the restrictive provisions of Sub-sections (1) and (1B) of Section 314.*

- (ii) Based on the above analogy as contained above the bare engagement of a Chartered Accountant in a particular case and the payment to him of his professional fees in that case would not attract the provisions of Sub-sections (1) and (1B) of Section 314 of the Companies Act. Engaging a person in his professional capacity for performing a particular function, say, for attending to a particular case or for undertaking a particular assignment of consultancy, or rendering advice on a specific matter, would not by itself constitute appointment to an office or place of profit in or under the company. But if the terms of engagement of a Chartered Accountant are that he should attend to all the tax cases or act as adviser in all connected matters, whether generally or in a particular city or town, then even though he may be paid on a case by case basis, it would amount to appointment to a "place of profit" under the company.

Question 7

Examine the validity of the following:

Mr. Q, a Director of PQR Limited proceeding on a long foreign tour, appointed Mr. Y as an alternate director to act for him during his absence. The articles of the company provide for appointment of alternate directors. Mr. Q claims that he has a right to appoint alternate director.

(May, 2002)

Answer

Section 313 of the Companies Act, 1956 provides that the Board of Directors of a company may, if authorised by its articles or by resolution passed by the company in general meeting, appoint an alternate director to act for a director during his absence for a period of not less than 3 months from the State in which the meetings of the Board are ordinarily held. The alternate director can be appointed only by the Board of Directors and only in cases where the Board is authorised by Articles or by the company in general meeting. Hence Mr. Q, the director in question, is not competent to appoint alternate director and the appointment of Mr. Y as alternate director is not valid.

Question 8

M/s Kith and Kin Consultants Private Limited seeks your legal advice regarding the following appointments relating to directors and their relatives:

- (i) *Mr. Nephew, who is a relative of one of the directors, is to be appointed as the Managing Director on a monthly salary of Rs.30,000 plus other perquisites as applicable to other executives of the company.*
- (ii) *Miss Niece, a relative of a director, is to be appointed as Chief Executive Officer on a consolidated salary of Rs.25,000 per month.*

Advise explaining the relevant provisions of the Companies Act, 1956.

(May, 2002)

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Answer

According to the provisions of section 314 of the Companies Act, 1956, except with the consent of the company accorded by a special resolution, no director of a company or relative shall hold any office or place of profit except that of Managing Director or manager of the company. Thus Mr. Nephew, if he is appointed as the Managing Director of the company, the provision of section 314 are not attracted, even though he is related to one of the directors of the company. This is because the appointment of Managing Director or manager is outside the purview of the provisions of Section 314.

Further according to section 314 (1B) no relative of director can be appointed to any office or place of profit under the company which carries a monthly remuneration of not less than Rs.50,000/- (previously ₹ 20,000/-) except with the prior consent of the company by a special resolution and the approval of the central Government. Thus in the case of Mr. Wellconnected who is related to the managing director, his appointment requires not only the passing of a special resolution by the company but also the approval of the Central Government. The special resolution is required to be passed before the appointment. However in the case of Miss Niece, her appointment requires only prior passing of the special resolution and not the approval of Central Government because the remuneration proposed to be paid is less than ₹ 50,000/- per month.

Recently this limit of ₹ 50,000 has been increased to ₹ 2,50,000 under the Director's Relatives (Office or Place of Profit) Amendment Rules, 2011 issued by Ministry of Corporate Affairs vide Notification No. 303(E) dated 6th April, 2011.

Question 9

Mr. A, an Advocate, is a Director of M/s ABC Limited and he is proposed to be engaged by the company as an Advocate to appear before the court in connection with a case, on a remuneration of Rs.10,000.

Will it amount to an 'Office' or Place of Profit' attracting Section 314 of the Companies Act, 1956?

Will your answer be different, if he is proposed to be appointed on a regular retainer basis for rendering legal advice on a retainer fee of Rs.5,000 per month either by ABC Limited or its subsidiary?

State also whether the proposed appointments can be made by the Board of Directors of the Companies.

(May, 2004)

Answer

Office or place of profit means in the case of a director, if the director obtains remuneration over and above the remuneration to which he is entitled as a director. Such remuneration may be as salary, fees, commission, perquisites, right to occupy any premises free of rent or in any other way [Section 314(3)(a) Companies Act, 1956].

An advocate who renders professional services as and when called upon to do so cannot be said to be holding an office or place of profit under the company or in the company. An advocate who cannot by reasons of his status at the Bar held any direct contractual relations with his clients in regard to the performance of his professional work and duties and he acts essentially as an officer of the court when he appears before the court. Hence A cannot be said to be holding an office or place of profit under Section 314 and the appointment can be made by the Board.

But if Mr. A. is appointed on a regular retainer basis for rendering legal advice, other than appearance in courts, the provisions of Section 314(1) will be applicable. (DCA's Circular No. 14 of 1975 dated 5th June, 1975) and A will be said to be holding an office or place of profit. For the same reason, A will be considered as holding an office or place of profit if he gets the retainer fee from the subsidiary of ABC Ltd.

The exemption from Section 314(1) in respect of offices of profit carrying remuneration of less than Rs.10,000 per month applies only to the partners relatives, etc of a director and not to the director himself. In the case of a director, the section will hit any office of profit, however small the remuneration attached to it may be.

Hence A cannot be appointed on a regular retainer basis on a retainer fee of Rs.5,000 per month without obtaining the consent of the company (ABC Ltd.) by a special resolution.

If A receives retainer fee from the subsidiary of ABC Ltd., special resolution must be passed by both the holding company and the subsidiary company unless A remits the retainer fee received from the subsidiary company to the holding company.

Recently the limit of ₹ 10,000 has been increased to ₹ 50,000 under Companies (Central Government's) General Rules and Forms (Amendment) Rules, 2011 issued by Ministry of Corporate Affairs vide Notification No. 514(E) dated 7th July, 2011.

Question 10

Excellent Technical Consultants Ltd. has approached you seeking your opinion on the following appointments relating to directors and their relatives

- (i) *Appointment of Mr. Sonata (relative of one of the directors) as the Managing Director of the Company on a monthly remuneration of Rs.40,000 and other perquisites as are currently being allowed to other executives of the Company.*
- (ii) *Appointment of Mr. Romesh (relative of one of the directors) as the General Manager – Marketing of the Company on a consolidated monthly remuneration of Rs.30,000.*
- (iii) *Appointment of Mr. Kamal (relative of one of the directors) as an Accounts Manager of the Company on a consolidated monthly remuneration of Rs.18,000.*

Express your opinion explaining the relevant provisions of the Companies Act, 1956?

(November, 2004, November, 2006)

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Answer

As per provisions of section 314(1) of the Companies Act, 1956, except with the consent of the company accorded by way of a special resolution, no director or relative of a director shall hold any office or place of profit except that of Managing Director or Manager of the Company.

Further, as per the provisions of Section 314(1B) of the Companies Act, 1956, no relative of a director can be appointed to any office or place of profit under the company which carries a monthly remuneration of not less than Rs.50,000/- (as per Notification vide 5th February, 2003) except with the prior consent of the company by way of a special resolution and the approval of the Central Government.

In the light of above legal provisions the opinion on the appointments of various persons as stated in the question can be expressed as follows:

Mr. Sonata is being appointed as the Managing Director of the Company, the provisions of section 314(1) are not attracted even though he is a relative of a director. This is because the appointment of Managing Director or Manager is outside the provisions of section 314 of the Companies Act, 1956. If Mr. Sonata is not already a director of the company, steps must be taken to appoint him first as an additional director/director. Thereafter he may be appointed as Managing Director by complying with the requirements under section 269 read with Schedule XIII to the Companies Act. The appointment can be made by the Board subject to the approval of the company in general meeting as the proposed remuneration is within the limits laid down in Schedule XIII.

Since the remuneration proposed to be paid to Mr. Romesh does exceed Rs.50,000/- per month, his appointment does not require the passing of special resolution by the company and also the approval of the Central Government is not required. However, as the proposed remuneration exceeds Rs.10,000/- his appointment shall require the passing of special resolution by the company. The special resolution is required to be passed at a general meeting of the company held for the first time after such appointment.

In case of Mr. Kamal, since the remuneration proposed to be paid to him exceeds Rs.10,000/- but does not exceed Rs.50,000/- per month, his appointment shall require the passing of special resolution by the company only and the no approval of the Central Government is required. The special resolution according the consent may be passed at a general meeting of the members of the company held for the first time after such appointment.

Recently this limit of ₹ 50,000 has been increased to ₹ 2,50,000 under the Director's Relatives (Office or Place of Profit) Amendment Rules, 2011 issued by Ministry of Corporate Affairs vide Notification No. 303(E) dated 6th April, 2011.

Question 11

Mr. Kamlesh, son of Managing Director of a Public Company, is proposed to be appointed as Chief Executive of the Company on a Monthly remuneration of Rs.75,000. State the provisions of the Companies Act, 1956 which are required to be complied with by the company in this regard?

Will it make any difference if Mr. Kamlesh is appointed as Whole-Time Director on the same remuneration?
(CA Final, New Course, November 2009)

Answer

Under Section 314(1B) of the Companies Act, 1956, in case relative of a Director holds office or place of profit under the Company on a monthly remuneration of Rs.50,000 or more, the Company is required to obtain prior consent of the company by special resolution and approval of Central Government. In the present case, the Company is accordingly required to pass a special resolution and obtain approval of the Central Government.

In case Mr. Kamlesh is appointed as Whole Time Director in the Company, Section 314 will not be attracted in view of sub-section (3) thereof, as he will be drawing remuneration in his capacity as a Director. He will be governed by the provisions of Section 269 read with Schedule XIII of the Act, according to which approval of Central Government is not required as the proposed remuneration of Rs.75,000. per month is within the ceiling provide in Part II of Schedule XIII provided the conditions prescribed in Part I of the Schedule have been complied with by the Company and the appointee.

Recently this limit of ₹ 50,000 has been increased to ₹ 2,50,000 under the Director's Relatives (Office or Place of Profit) Amendment Rules, 2011 issued by Ministry of Corporate Affairs vide Notification No. 303(E) dated 6th April, 2011.

Question 12

Under the provisions of the Companies Act, 1956, examine the validity of the following appointments made by Board of VMR Ltd.

- (i) *ABC Ltd. is a subsidiary company of VMR Ltd. in which Y is a Director. Y has been appointed as Manager - Research & Development in V.M.R. Ltd. on a monthly salary of ₹ 2 lacs per month with effect from 1st April, 2010.*
- (ii) *What would be your answer in case VMR Ltd. is a subsidiary of ABC Ltd?*

(CA Final, New Course, November 2010)

Answer

According to Section 314(1) of the Companies Act, 1956, except with the consent of the company accorded by a special resolution-

- (a) no director of a company shall hold any office or place of profit, and
- (b) no partner or relative of such director, no firm in which such director, or a relative of such director, is a partner, no private company of which such director is a director or member, and no director or manager of such a private company, shall hold any office or place of profit carrying a total monthly remuneration of such sum as may be prescribed,

except that of managing director or manager, banker or trustee for the holders of debentures of the company,-

- (i) under the company; or

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- (ii) under any subsidiary of the company unless the remuneration received from such subsidiary in respect of such office or place of profit is paid over to the company or its holding company.

From the wordings of the question it is not very clear whether 'Y' is director in ABC Ltd. or in VMR Ltd. The question can be answered on any of the following two assumptions viz.

- (1) That Y is the director in VMR Ltd.
- (2) Y is the director in ABC Ltd.

If Y is director of VMR Ltd. then answers to both sub questions (i) and (ii) remain the same, as a director of a company is appointed in the same company to the office of profit. Therefore, Section 314(1) is attracted in both the cases, and special resolution is required.

ALTERNATIVE:

Y is a director of ABC Ltd. Since the appointment is made in VMR Ltd. the status of VMR is relevant. In the first part of the question VMR Ltd. is the holding company thus Section 314(1) is applicable only to a director of a holding company being appointed to an office of profit in subsidiary. Here a director of a subsidiary company i.e. ABC Ltd. is appointed to an office of profit in the holding company i.e. VMR Ltd. In such a case Section 314(1) is not attracted.

Ind Part: Q.3 (b) (ii):

Here VMR Ltd. is the subsidiary. Since the director of a holding company is holding an office of profit in a subsidiary hence, Section 314(1) is attracted unless the entire remuneration received by Y is paid back to either of the company, special resolution is required.

When a director of one company is appointed to an office of profit to another company, the relationship between these two companies becomes relevant. Section 314(1) is attracted only if the director of a holding company is appointed to an office of profit in its subsidiary. If the director of a subsidiary company is appointed to an office of profit in its holding company, Section 314(1) is not applicable. Therefore, when we assume that a director of VMR Ltd. is appointed to an office of profit in VMR Ltd. itself, Section 314(1) is attracted, both in respect of part (i) and (ii) of the question. The answer will be different as explained above only when Y is a director of ABC Ltd.