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Highlights

i. Court ruling on executive directors above the age of 70 years

ii. Indian companies with foreign shareholding over 50% unshackled from the FCRA chains

I. Court ruling on executive directors over the age of 70 years

The Bombay High Court has held in the case of Sridhar Sundararajan vs Ultramarine & Pigments Limited that Managing Directors and Whole-time Directors ("EDs") will be deemed to have lost their corner-office jobs if they cross 70 years of age during the tenure of their appointment. Unlike Companies Act, 1956, the new Companies Act 2013 under Section 196(3)(a) prescribes that "no company shall appoint or continue the employment of any person as managing director, whole-time or manager who is below the age of twenty-one years or has attained the age of seventy years."The proviso to Section 196(3)(a) however states that he can be appointed by passing a special resolution and indicating in the explanatory statement the justification for appointment of such person. Thus, such persons who may already have crossed 70 years on or after 1st April 2014 will be disqualified from holding the position of ED.

In the present case, a Managing Director was appointed for a term of 5 years with effect from 1st August 2012. He had crossed 70 years halfway of his term on 11th November 2014 and consequently, on that day, it was held that he was deemed to have vacated the office of MD. The Court reversed the decision of the Single Judge who had held that such an MD should be allowed to complete his full tenure. The counter-argument made by the MD that this section cannot operate retrospectively was rejected by the court.

Source: Bombay High Court, Ordinary Original Civil Jurisdiction, Appeal (L) No.632 OF 2015

VA View

The rule, which came into force on April 1, 2014, lacked clarity whether it impacted the tenures of those already elected. The High Court ruling has created a flutter in corporate boardrooms of companies having sexagenarian and septuagenarian board members. The language of section 196(3)(a) is plain, simple and unambiguous and it applies to all the Managing Directors who have attained the age of 70 years and the section does not make any distinction between the Managing Directors who have been appointed before 01/04/2014 and those after 01/04/2014. The moment therefore, a Managing Director attains the age of 70 years, disqualification mentioned in Section 196(3)(a) would operate immediately. The rationale behind the approval through special resolutions is to have younger board members, but at the same time have experienced heads provided a special majority of the shareholders feel that such people can add value and their appointment is in the larger interests of the company.

II. Indian companies with foreign shareholding over 50% unshackled from the FCRA chains

The union budget 2016 has delivered much needed relief to Indian companies having foreign shareholding over 50% by insertion of a new proviso to Section 2(j)(vi) of the Foreign Contribution (Regulation) Act, 2010 (“FCRA”), unshackling such companies from the restrictive provisions of the FCRA regulations.

The following proviso is sought to be inserted in Section 2(j)(vi) of the FCRA, namely:

> *“Provided that where the nominal value of share capital is within the limits specified for foreign investment under the Foreign Exchange Management Act, 1999, or the rules or regulations made thereunder, then, notwithstanding the nominal value of share capital of a company being more than one-half of such value at the time of making the* ***contribution,*** *such company shall not be a foreign source;”*

Section 2(j) of the FCRA defines ‘foreign source’ to include an Indian company having more than 50% of its share capital being held by persons or entities that are foreign. The Delhi High Court in the case of Association for Democratic Reforms and Anr. Vs. Union of India and Ors. (2014) 3 Comp LJ 41 (Del), a case under FCRA, 1976, had held that even though the donors are companies registered in India under the Companies Act, 1956, if more than one-half of their share capital is held by a foreign company, in view of the mandate of the FCRA, the donations in favor of the political parties are to be construed as emanating from a 'Foreign Source' and fall within the prohibition imposed by the Act.

Subject to the provisions of the Foreign Exchange Management Act, 1999, the present amendment aims at rectifying the defect of a company incorporated under the Indian laws being restricted under the FCRA regulations in view of the nominal value of shares held by a foreign entity being more than 50%. The amendment is sought to be given retrospective effect from September 26, 2010 i.e. from the date of commencement of the FCRA Act, 2010.

VA View

The amendment has sought to legislatively overrule the decision of the Delhi High Court in the case of Association for Democratic Reforms and Anr. Vs. Union of India and Ors. (2014) 3 Comp LJ 41 (Del). The companies incorporated in India and having foreign shareholding in excess of 50% and within the limits specified for foreign investment under the Foreign Exchange Management Act, 1999 are freed from the cumbersome process of contribution to an entity irrespective of whether it is registered or not under the FCRA. The amendment clears the hurdle for such companies to comply with the Corporate Social Responsibility obligation prescribed under Section 135 of the Indian Companies Act, 2013.

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