

Article



The Combinations of KMP positions in a Company - Unravelling a mystery

Barsha Dikshit
Team Vinod Kothari & Company
barsha@vinodkothari.com
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Article

There is a perplexity with regard to the co-existence of certain executive posts in a company. The term 'Chief Executive Officer' ('CEO') was not defined in Companies Act, 1956. However, Companies Act, 2013 ('Act, 2013') has not only defined CEO but has also brought the post under the definition of KMP. Thus the role and importance of the post of a CEO has become critical and worthy of discussion. Now the question arises whether a company may legally have a combination of two executive posts borne by two different individuals simultaneously?

Herein we discuss the various combinations a company can explore with respect to its executive posts:

1. **CEO and Manager:-** Before the discussion proceeds, one must peruse the following provisions of law:-

Definition of Chief Executive Officer under Section 2(18) of Act, 2013:

“Chief Executive Officer” means an officer of a company, who has been designated as such by it.

Definition of manager under Section 2(53) of Companies Act, 2013:

*“manager” means an individual who, subject to the superintendence, control and direction of the Board of Directors, has **the management of the whole, or substantially the whole, of the affairs of a company**, and includes a director or any other person occupying the position of a manager, **by whatever name called**, whether under a contract of service or not.*

Meaning of the expression “Substantial power of management”

Explanation to Section 2(54) elucidate the meaning of phrase “Substantial power of management’ The expression has been defined to not include administrative acts of routine nature such as power to affix common seal or to draw and endorse any cheque on the account of the company in any bank or to draw and endorse any negotiable instrument or to sign any certificate of share or to direct registration of transfer of any share. Although, the meaning is inclusive in nature, yet it is clear from the meaning of the expression that routine functions will not qualify to be exercise of substantial powers of management.

Our Analysis

It is clear from the very nomenclature that the CEO is intended to be the “chief” of the executive posts of a Company and sits at the top of hierarchy of command. He is taken to



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be the in-charge of not only the executive functions but also entire management of a company. Further, the definition itself clarifies that it's a designation based post. Thus one can conclude that the post of CEO is nothing other than that of the deemed manager of a company who has powers of management, whether substantially whole or whole.

Question may arise at this point that where there are other posts which we come across in a company such as unit manager, branch manager etc. do all of them qualify to be designated as CEO? The answer is "No" because they are overseeing a unit or a particular part of an organisation but not the entire office of a company, hence they do not fall under the provision of section 2(53) of the Act, 2013.

Now if we focus on the definition of manager it perceptibly says that: a) an individual who manage entire or substantially the entire power of management and; b) who is not in charge of the routine work of the company c) the post is irrespective of the designation.

Although there is no specific bar in the Act on any company from appointing a manager and a CEO being two different individual at the same time but analysing the functions performed by them and the powers that they have it is apparent that having two individuals with the same power at the same time will be illegal.

- 2. Two simultaneous posts of managers -** Logically when we ask if a company can appoint another person to a post with 100% power which is already entrusted to another person, it simply seems irrational.

From the discussions in point 1 above one can safely conclude that two individuals cannot manage the whole or substantially the whole of the affairs of a company since this will lead to replication of the same functions in a company.

- 3. Manager and a Managing Director:-**

Definition of Managing Director under Section 2(54) of the Act, 2013:-

*“managing director means a director who, by virtue of the articles of a company or an agreement with the company or a resolution passed in its general meeting, or by its Board of Directors, is entrusted with **substantial powers of management** of the affairs of the company and includes a director occupying the position of managing director, **by whatever name called**”.*

Looking at the definition it is evident that a Managing Director is also a person entrusted with **extensive powers** of management but he is not entrusted with **entire powers** of management. At the same time it is also important to understand that a Managing Director need not be a Whole time Director since 2(94) of the Act, 2013 states that “a whole time director includes a director in the whole time employment of a company”, which may not be an MD.



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Now, **Sec 196(1)** states that

“No company shall appoint or employ at the same time a managing director and a manager”

Thus it becomes lucid from the Act, 2013 that the posts of manager and Managing cannot subsist at the same time. The reason behind the specific prohibition in section 196(1) is that where on the one hand the managing director is entrusted with management of the substantial powers of the company, the company cannot have another office that is in-charge of the extensive powers, whether entire or substantial. This will lead to overlapping of the functions discharged by the two.

4. **A CEO and a MD:-** As stated above an individual designated as CEO is the ‘chief’ of the executive machinery of a company. The designation not only gets its importance by the power assigned to it by the Act, but also from being included in the definition of the **KMP**. Further, the CEO is also taken to be the **deemed manager** by virtue of the function performed by it. Hence the posts of CEO and MD cannot co-exist.
5. **Two CEOs:-** Envisaging two CEOs is similar to envisaging two managers – hence not possible. However specific carve out has been made under 2nd proviso to section 203(1) which states as under:
“Provided further that nothing contained in the first proviso shall apply to each class of companies engaged in multiple businesses and which has appointed one or more Chief Executive Officers for each such business as may be notified by the Central Government”
6. **Two MDs: -** From the definition of MD it is ostensible that the office is entrusted with substantial power of management and not the whole. Thus a company can appoint two MDs at the same time by distributing powers between them. This is anyway in line with the current practice of companies of appointing joint MDs.

Is there a conflict between the power of MD and the Board?

Definition of Managing Director under **Section 2(26) of the Act, 1956** in its 2nd proviso specifically stated *that a managing director of a company shall exercise his powers subject to the superintendence, control and direction of its Board of directors*. However, the proviso has been omitted in the definition of MD under section 2(56) of the Act, 2013. Does this mean that now MD has an autonomous power?

The reason of omission of the above proviso is subject to the fact that ultimately Board is the policy maker and executive body cannot act beyond the power delegated to it by the Board of Directors. The **Standing Committee on Finance** via Companies Bill, 2011 in **Para 4.1 “Suggestions on the Companies Bill, 2011”**¹ Clarified that since it is implied

¹ http://164.100.47.134/Isscommittee/Finance/15_Finance_57.pdf



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from the law itself that MD being an executive body, act within the power delegated by the Board, it is not necessary to include the proviso exclusively in the definition. Therefore, the omission does not make any difference in the power of MD.

Conclusion

From the above discussion it may be concluded that a Company cannot appoint two offices being two different individual with the same sovereignty concurrently since it will lead to duplication of functions. But a company can appoint two individuals at a post where power can be distributed among them.

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