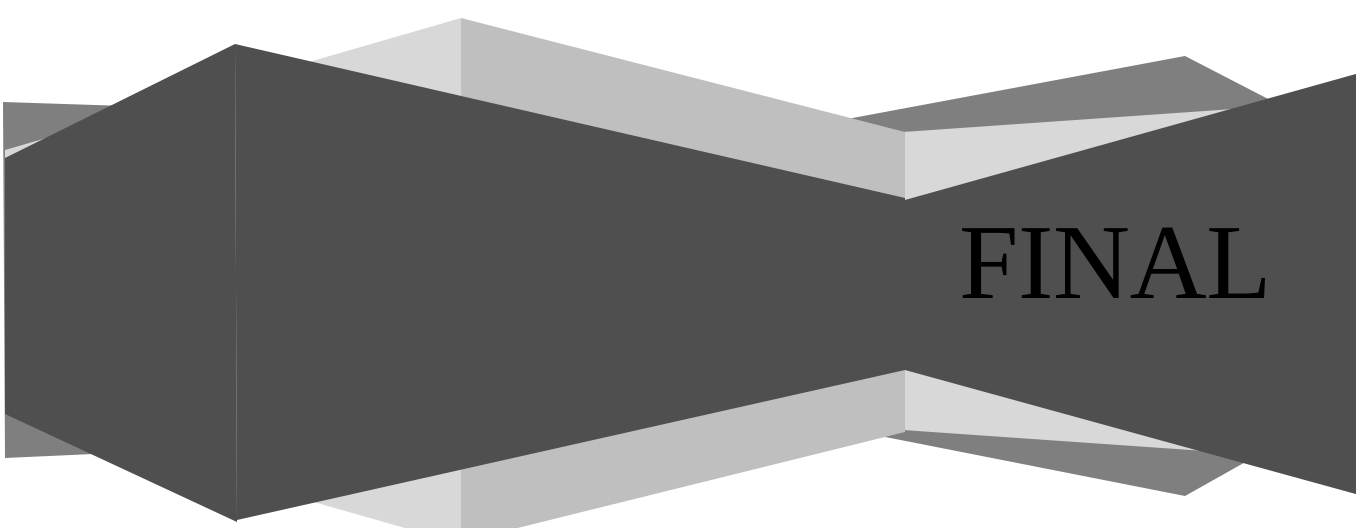


CS/CA FINAL

APPOINTMENT OF MANAGERIAL PERSONNEL

For CA/CS Final Students

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FINAL

Appointment of Managerial Personnel

This handout deal with certain provisions related to Appointment of Managing Director, Whole-time Director and Manager along with their qualification and disqualification and role of Central Government in the appoi ntment of Managerial Remuneration.

Other features of this handout are:

1. A person cannot be appointed as a managing or whole-time director unless he is already a director in the company
2. Appointment of a non-director as a managing or whole-time director cannot be made
3. Appointment of additional director as a managing or whole-time director
4. Appointment of alternate director as a managing or whole-time director
5. Certain companies are compulsorily required to have a managing or whole-time director or manager
6. Appointment of managing director, wholetime director & manager without approval of the Central Government
7. Appointment of managing director in case of private limited companies
8. Prohibition on appointment of a firm or body corporate as manager
9. Director may also be appointed as a manager
10. Applicability of the provisions on appointment of a manager
11. Modes of appointment in a public company or a private company, which is subsidiary of a public company
12. Company may have more than one managing director
13. Company cannot have more than one manager
14. Disqualification of Managing Director, Whole time Director and Manager
15. Appointment of Managing Director or WholeTime Director or Manager with the Approval of the Central Government.

Definition of "Managing Director"

In terms of section 2(26), a managing director means a director who, by virtue of an agreement with the company or of a resolution passed by the company in general meeting or by its Board of directors or by virtue of its Memorandum or Articles, is entrusted with substantial powers of management which would not be otherwise exercisable by him, and includes a director occupying the position of managing director, by whatever name called. The definition of the Managing Director may be analysed as under:—

- (a) he must be a director of the company;
- (b) he must be entrusted with substantial powers of management, which would not otherwise be exercisable by a director;
- (c) the general powers to do administrative acts are not to be deemed to be the substantial powers of management;
- (d) the powers of management may be entrusted with the managing director by an agreement or by a resolution passed at a general meeting by the members or a Board meeting or by the Memorandum or the Articles of Association of the company;
- (e) the powers of management entrusted with a managing director must be exercised by him subject to the superintendence, control and directions of the Board;
- (f) a person who occupies the position of the managing director even without being designated as such would also be deemed to be a managing director.

Meaning of "Deemed Managing Director"

The test to determine whether a person is a managing director or not, is the position holds and not the designation or name. Therefore, a person may be deemed to be a managing director, although he is not so appointed and designated as such. It was held in the case of *CIT v Sarabhai Sons Ltd.* (1983) 1 Comp LJ 203 (Guj) that the Chairman of the Board had exercised the powers of management and rendered his services to the company in managing its business, although he was not appointed as managing director was deemed to be the managing director.

Definition of "Manager"

Section 2(24) of the Companies Act, 1956 defines the term '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, and whether under a contract of service or not.

Meaning of "Whole-time Director" (Important)

As per section 269 of the Act, a whole-time director includes a director in the whole-time employment of the company. In other words, a director who devotes his whole time to the affairs of a company is called a whole-time director of the company. A whole-time director of a company cannot accept the position of a whole-time director in other companies, though he may accept office of non-whole-time director in other companies subject to the limits imposed by section 275 read with sections 277 and 278.

A person cannot be appointed as a managing or whole-time director unless he is already a director in the company

A person, who is proposed to be appointed as a managing director or whole-time director, unless he is already a director in the company, cannot be appointed as such. Holding of office of director is a pre-requisite for holding of office of managing or whole-time director. **Even if the approval of the Central Government has been obtained for appointment of a person as managing or whole-time director, the requirement of holding of office as a director cannot be dispensed with.**

Appointment of a non-director as a managing or whole-time director cannot be made

If a company intends to appoint an individual, who is not a director of the company, as its managing or whole-time director then he shall have to be first appointed by the Board as an additional director. The appointment of a person as an additional director is governed by the provisions of section 260 and the regulations contained in the Articles of the company.

Appointment of additional director (Section-260) as a managing or whole-time director

(If a person while he was the additional director of a company had been appointed as the managing or whole-time director, the later appointment also ceases simultaneously with the cessation of his directorship at the commencement of the annual general meeting. However, if such a person is re-elected as full-fledged director at the annual general meeting and thereby he continues as a director of the company, he shall continue as a managing or whole-time director also for the period for which he is so elected by the annual general meeting.)

Comment [a1]: Important Provision

Appointment of alternate director (Section-313) as a managing or whole-time director

If an alternate director has been appointed as a managing or whole-time director, the moment he ceases to be a director of the company, he ceases to be the managing or whole-time director also.

Appointing authority in case of a public company or a private company which is a subsidiary of public company

The appointment of managing or whole-time director or manager in a public company or a private limited company which is a subsidiary of a public company shall be made by the Board of directors subject to the approval of members at the general meeting by way of ordinary or special resolution as may be required subject to the conditions of the Schedule XIII of the Act and/or with the approval of the Central Government.

Certain companies are compulsorily required to have a managing or whole-time director or manager (Section-269)

[As per section 269(1), a public company or a private company which is a subsidiary of a public company, having a **paid up share capital of rupees five crores or more** shall have a managing or wholetime director or manager.]

Comment [a2]: Not applicable to a purely Private Limited Company

Therefore, a private company is not statutorily required to have managing or whole-time director or manager.

APPOINTMENT OF MANAGING DIRECTOR, WHOLE-TIME DIRECTOR & MANAGER WITHOUT APPROVAL OF THE CENTRAL GOVERNMENT

Appointment of managing director in case of private limited companies

The appointment of managing or whole-time director or manager is not mandatory in the case of independent private companies. However, an independent private company can appoint them in accordance with the provisions contained in the Articles of Association.

[If Articles of the concerned independent private company do not provide for such office then the Articles will have to be first altered by following the procedure laid down u/s 31 of the Companies Act, 1956.]

Comment [a3]: Very important para for practical & professional working.

Provisions in Articles relating to the appointment of a manager

The regulations contained in Table A of Schedule I come into operation in case of companies limited by shares to the extent these are not excluded or modified by the Articles of these companies.

Regulation 82 of Table A provides that subject to the provisions of the Act, —

- (1) A manager or secretary may be appointed by the Board for such term, at such remuneration and upon such conditions as it may think fit; and any manager or secretary so appointed may be removed by the Board;
- (2) A director may be appointed as a manager or secretary.

Appointment and remuneration of manager in the case of an independent private company will be governed by the relevant regulations contained in the Articles of Association of the company. In the absence of any provisions in this regard, the appointment shall be made and remuneration shall be fixed in the general meeting of the company.

Prohibition on appointment of a firm or body corporate as manager

A company shall not appoint or employ any firm, body corporate or association as its manager. **Section 384 applies to all companies, whether public or private.**

Director may also be appointed as a manager

A director of a company may also be appointed as its manager. In such a case, if the individual ceases to hold office of director for any reason then his office of manager will not come to an end and he will continue to hold the office of manager of the company as per terms of his appointment.

Number of companies in which a person may be appointed as a manager

Section 386(2) provides that a company may appoint or employ a person as its manager if he is the manager or managing director of one, and not more than one other company. Moreover, such appointment or employment shall be made or approved by a resolution passed at a meeting of the Board with the consent of all the directors present at the meeting, and of which meeting and of the resolution to be moved thereat, specific notice has been given to all the directors then in India.

Applicability of the provisions on appointment of a manager

However, the Central Government may, by order, permit any person to be appointed as a manager of more than two companies, if the Central Government is satisfied that it is necessary that the companies should, for their proper working, function as a single unit and have a common manager. Section 386 does not apply to an independent private company [section 388A]. Further, a Government Companies is also exempted from the provisions of this section.

Modes of appointment in a public company or a private company, which is subsidiary of a public company

Section 269 discusses two modes of appointment of a managing director. These are:—

- (i) Appointment without the approval of the Central Government (appointment in consonance with the provisions contained in Schedule XIII); or
- (ii) Appointment with the approval of the Central Government.

Company may have more than one managing director

The managing director of a company may be entrusted with substantial power of management but not necessarily to give the whole or substantially the whole of the affairs of a company. A company, may, therefore, have more than one managing director such as the Managing Director (Finance), Managing Director (Administration), Joint Managing Director, etc.

Comment [a4]: Important provision for your knowledge.

Company cannot have more than one manager

A company can have only one manager. The logic behind this is that only one individual can have the management of the whole, or substantially the whole of the affairs of a company.

DISQUALIFICATION OF MANAGING OR WHOLE-TIME DIRECTOR

Restrictions on a person to be appointed or to continue as a managing or whole-time director

Section 267 provides that a company shall not appoint or employ, or continue the appointment or employment of, any person as its managing or whole-time director who:—

- (a) is an undischarged insolvent, or has at any time been adjudged an insolvent;
- (b) suspends, or has at any time suspended, payment to his creditors, or makes, or has at any time made, a composition with them; or
- (c) is, or has at any time been, convicted by a Court of an offence involving moral turpitude.

Further, section 267 not only prohibits appointment, or employment after conviction but also expects discontinuance of appointment or employment already made prior to his conviction.

Disqualifications for a person to be appointed as a managing or whole-time director

Certain other disqualification for a person to his appointment has been given under the Companies Act, 1956 as under:—

- (a) Only an individual can be appointed as a managing or whole-time director and a body corporate, association or firm cannot be appointed as director as such.
- (b) Undesirable persons such as undischarged insolvent, fraudulent person not to be appointed as a managing or whole-time director.

Sections 202(1) states that if any person being an undischarged insolvent:—

- (a) discharges any of the functions of a director, or acts as or discharges any of the functions of the manager, of any company; or
- (b) directly or indirectly takes part or is concerned in the promotion, formation or management of any company;

he shall be punishable with imprisonment for a term which may extend to two years, or with a fine which may extend to fifty thousand rupees, or with both.

- (c) Restrictions imposed on a fraudulent person from managing companies.

Section 203(1) enacts that where—

Comment [a5]: Good section for knowledge.

- (a) a person is convicted of any offence in connection with the promotion, formation or management of a company; or
- (b) in the course of winding up of a company, it appears that a person—
 - (i) has been guilty of any offence for which he is punishable (whether he has been convicted or not) under section 542; or
 - (ii) has otherwise been guilty, while an officer of the company, of any fraud or misfeasance in relation to the company or of any breach of his duty to the company;

The Court or Tribunal may make an order that person shall not, without the leave of the Court or Tribunal, be a director of, or in way, whether directly or indirectly, be concerned or take part in the promotion, formation, or management of company, for such period not exceeding five years as may be specified in the order.

- (d) He shall not cease to hold the necessary share qualification in accordance with the provisions of the articles of the company and section 270 of the Act, through out the tenure of the managing or whole time directorship.
- (e) He cannot be appointed as a managing or whole-time director if he is disqualified in terms of the provisions of section 274 for becoming a director.

In case of **Salam M. Bavazier v Mohd. Azgaruddin (1995) (AP)** it was held that mere conviction of a director or managing director of a company of any offence in connection with the promotion, formation or management of a company would not be sufficient to invoke the provision of clause (a) of section 203(1); it could be invoked only when the conviction is for an offence involving fraud.

Section 267 has drawn a distinction between a director and a managing director and provision in case of latter are more stringent as compared to former and in case of managing or whole-time director, disqualification is visited and takes effect as soon as conviction is recorded by a competent court. Where subsequent to order of conviction by a criminal court a person was appointed as the Managing Director of the company, it was held that the company had committed an infraction of mandatory prohibition contained in section 267. **[Rama Narang v Ramesh Narang (1995) 4 SCL 150 (SC)].**

Comment [a6]: Also included in my compilation of decided cases for CA/CS Final.

DISQUALIFICATION FOR A PERSON TO BE APPOINTED AS A MANAGER

Section 385 stipulates that a company shall not appoint or employ, or continue the appointment and employment of, any person as its manager who:—

- (i) is an undischarged insolvent, or has at any time within the preceding five years been adjudged an insolvent; or
- (ii) suspends, or has at any time within the preceding five years suspended payment to his creditors; or makes, or has at any time within the preceding five years made, a composition with them; or
- (iii) is, or has at any time within the preceding five years been, convicted by a court in India of an offence involving moral turpitude.

Section 385(2) vests with the Central Government the power to remove the disqualification incurred by any person by virtue of sections 385(1)(a) to 385(1)(c), either generally or in relation to any company or companies, specified in the notification issued in the Official Gazette.

Prohibition on appointment of both the managing director and manager at the same time (Section 197A)

A company shall not appoint or employ at the same time both a managing director and a manager. Section 197A makes prohibition on appointment or employment of certain different categories of managerial personnel at the same time. The prohibition is applied to both a public company and a private company.

Contravention of section 197A makes a company liable to penalty under section 629A and the appointment will be invalid.

Appointment of managing or whole-time director or manager of a public company without the approval of the Central Government

Appointment of a person as a managing or whole-time director or manager in accordance with the provisions of Schedule XIII of the Companies Act, 1956 can be made without obtaining the approval of the Central Government. Also, a return in the prescribed e-Form 25C shall be filed electronically with the concerned Registrar of Companies within ninety days from the date of appointment.

It is worth noting here that the term appointment includes re-appointment.

Precautions to be taken on appointment made under Schedule XIII

Before the Board of directors of a public company make appointment of a Managing Director, Whole-time Director or Manager, the company shall carry out certain preliminary checking as under:

- (a) That the person proposed to be appointed does not suffer any disqualification specified in sub-paragraphs (a) and (b) of Part I of Schedule XIII of the Act and where necessary the approval of the Central Government has been obtained.
- (b) That he fulfils the requirement of age or where necessary a special resolution will be passed by the company in general meeting as prescribed in paragraph (c) of Part I.
- (c) That the company has not made any default in repayment of any of its debts (including public deposits) or debentures or interest payable thereon for a continuous period of thirty days in the preceding financial year.
- (d) That in respect of a proposal covered by clause (B) of paragraph 1 of Part II Section II, the appointment will be made as per clause (B) and take the approval by a special resolution of shareholders at the general meeting of the company and in respect of clause (C) after the proposal has been approved by a special resolution by the company general meeting and further by the Central Government.

Post appointment actions to be taken by the company

Where the Board of directors makes the appointment of a managerial person, the company shall comply with the following post-appointment actions:—

- (i) File within 30 days of the appointment, the particulars in eForm 23 electronically with the Registrar as required under section 192 in respect of appointment of Managing Director or re-appointment or variation of the terms. This provision is not applicable to the appointment of Whole-time Director and Manager.
- (ii) Forward abstract of the appointment and remuneration to the members of the company within 21 days of the appointment under section 302 in respect of Managing Director, Whole-time Director or Manager.
- (iii) File return in the eForm 32 electronically with the Registrar in case the appointment is made for the first time, within 30 days of appointment.

- (iv) Inform the Stock Exchange about the appointment in case the shares are listed.
- (v) Even where an existing director is appointed Managing Director or Manager e-Form 32 shall be filed electronically with the Registrar within 30 days of further appointment, as there will be change in the position of the existing director.
- (vi) File eForm 25C electronically as explained above duly certified by the company secretary or chartered accountant or cost accountant in practice.
- (vii) Make entries in the registers of directors, manager and secretaries.

Appointment of an individual as a Managing Director who is already Managing Director or Manager of another company

A public company or a private company which is a subsidiary of a public company may appoint or employ a person as its managing director, if he is already the managing director or manager of one, and of not more than one, other company (including a private company which is not a subsidiary of a public company). The condition for appointment is that the appointment or employment is made or approved by a resolution passed at a meeting of the Board with the unanimous consent of all the directors present at the meeting and of which meeting the resolution to be moved thereat, specific notice has been given to all the directors then in India. [Section 316(2)]

In such case the provisions of section 190 shall apply as regards to the giving of special notice of the meeting and of resolution to be moved thereat in case. The notice must specifically mention the business to be transacted at the meeting and contain proposed resolution to be passed at the meeting.

The Central Government may, by order, permit any person to be appointed as a managing director of more than two companies, if the Central Government is satisfied that it is necessary that the companies should, for their proper working, function as a single unit and have a common managing director.

Drawal of remuneration from more than one company by a Managing Director of those companies

Part I of Schedule XIII of the Act, provides that a person can be managing director in more than one company, without the approval of the Central Government, provided he draws remuneration from one or more companies subject to the ceiling provided in Section III of Part II of Schedule XIII of the Act. Accordingly, subject to the provisions of Sections I and II, a managerial person shall draw remuneration from one or both companies, provided that the total remuneration drawn from the companies does not exceed the higher maximum limit admissible from any one of the companies of which he is a managerial person.

Whole-time director cannot be appointed in more than one company

Since whole-time director means a director of a company who is in whole-time employment with the company, therefore an individual cannot be appointed as a whole-time director of more than one company.

Section 316 not applicable to a private company

Section 316 does not apply to a private company. Hence, a person may be appointed as a managing director of more than two private companies and no permission of the Central Government is required to be obtained in this regard. **[DCA Notification No. GSR 577(E), dated 16-7-1985].**

Powers of the Central Government in case where the appointment is made without its approval, where it is required

The Central Government may form an opinion, either *suo motu* or on any information received by it, that any appointment under section 269(2) without its approval, has *prima facie* been made in contravention of the requirements of Schedule XIII. In such a case, it shall be competent for the Central Government to refer the matter to the Company Law Board **[Powers transferred to the Tribunal vide the Companies (Second Amendment) Act, 2002]** for decision. [Section 269(7)]

The Company Law Board/Tribunal shall, on receipt of a reference as above, issue a notice to the company, the managing or whole-time director or the manager, as the case may be, and the director or other officer responsible for complying with the requirements of Schedule XIII of the Act, to show cause as to why such appointment shall not be terminated and the penalties shall not be imposed. [Section 269(8)]

The Company Law Board/Tribunal shall give a reasonable opportunity of being heard to the company, the managing director or whole-time director or the manager or the officer who is in default, as the case may be. The Company Law Board/Tribunal, in contravention of the requirements of Schedule XIII shall make an order declaring that a contravention of the requirements of Schedule XIII has taken place.

Consequences of the orders of the Company Law Board/Tribunal

Section 269(10) enumerates the following consequences on making of an order by the Company Law Board/Tribunal under section 269(9):—

- (1) The company shall be liable to a fine which may extend to fifty thousand rupees;
- (2) Every officer of the company who is in default shall be liable to a fine of one lakh rupees; and
- (3) The appointment of the managing director or whole-time director or manager, as the case may be, shall be deemed to have come to an end and the person so appointed shall, in addition to being liable to pay a fine of one lakh rupees, refund to the company the entire amount of salaries, commissions and perquisites received or enjoyed by him between the date of his appointment and the passing of such order.

Penalty for non-compliance with the order of the Company Law Board/Tribunal

If a company contravenes the provisions as stated above or any direction given by the Company Law Board/Tribunal under section 269(10), every officer of the company who is in default and the managing director or whole-time director or the manager, as the case may be, shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to a fine which may extend to five hundred rupees for every day of default.

Validity of acts done by a person appointed in contravention of Schedule XIII of the Act

In such cases all acts done by a managing director or whole-time director or a manager, as the case may be, purporting to act in such capacity and whose appointment has been found to be in contravention of Schedule XIII of the Act, shall, if the acts so done are valid otherwise, be valid notwithstanding any order made by the Tribunal under section 269(9).

APPOINTMENT OF MANAGING DIRECTOR OR WHOLE-TIME DIRECTOR OR MANAGER WITH THE APPROVAL OF THE CENTRAL GOVERNMENT

A public company or a private company which is a subsidiary of a public company shall obtain the approval of the Central Government in order to appoint a managing director or whole-time director or manager when the said company is not complying with the requirements of Schedule XIII of the Act.

Time limit for making an application to the Central Government for its approval

Every application seeking approval to the appointment of a managing director or whole-time director or manager shall be made to the Central Government within a period of ninety days from the date of such appointment. The application shall be made in e-Form 25A electronically as prescribed in the Companies (Central Government's) General Rules and Forms, 1956.

Procedure to be followed for making an application before the Central Government

- (a) Publish a general notice to the members of the company indicating the nature of the application proposed to be made and that any person having any objection to the proposal should, if he desires, communicate his objection in writing duly substantiated to the Secretary, Ministry of Company Affairs, New Delhi, within 30 days of the publication of the notice. Such notice shall be published at least once in a newspaper in the principal language of the district in which the registered office of the company is situate and circulating in that district and at least once in English in an English newspaper circulating in that district. [Section 640B(2)]

- (b) Application in the e-Form 25A shall be made electronically to the Ministry of Company Affairs, Shashtri Bhawan, New Delhi with fees as per Companies (Fees on Application) Rules, 1999. The following documents shall be enclosed to Form 25A:—
- (i) Certified true copy of Memorandum and Articles of Association;
 - (ii) Certified true copies of the annual accounts together with directors' and auditor's report for the latest 5 financial years;
 - (iii) Certified copies of the resolutions of Board/General meeting including resolution under section 316(2), where applicable;
 - (iv) Certified true copies of newspaper clippings of notices published under section 640B in original.
- (c) Copy of application together with all enclosures shall be simultaneously forwarded to Registrar of Companies pursuant to rule 20A(i) of the Companies (Central Government's) General Rules and Forms, 1956.

Central Government may reject application submitted for approval

The Central Government may not accord its approval to an application made under section 269(3), if it is satisfied that—

- (a) the managing or whole-time director or the manager appointed is, in its opinion, not a fit and proper person to be appointed as such or such appointment is not in the public interest; or
- (b) the terms and conditions of the appointment of managing or whole-time director or the manager are not fair and reasonable.

The Central Government can also accord approval to the appointment of a managing director or whole-time director or manager which is not as per Schedule XIII of the Act, for a period lesser than the period for which the appointment is proposed to be made. [Section 269(5)]

Consequences in case if the appointment is not approved by the Central Government

If the appointment of a person as a managing or whole-time director or a manager is not approved by the Central Government under section 269(4), the person so appointed shall vacate his office as managing or whole-time director or manager, on the date on which the decision of the Central Government is communicated to the company.

In case of omission or failure to do as above, the appointee shall be punishable with fine which may extend to five thousand rupees for every day during which he omits or fails to vacate such office.

Action to be taken after receipt of Central Government approval

A Board meeting is to be called to consider the approval of the Central Government in case the terms approved by the Government are different from those mentioned in the application and take suitable action. In the case falling under sub-paragraph (A), (B), (C) of paragraph I of Section II the appointments will become effective only after receipt of approval of the Central Government.

The Company will arrange to file the particulars of the appointment with the Registrar in an eForm 23 electronically within 30 days of the appointment as soon as it was made and again after receipt of Central Government approval in case there is any variation and will also forward extracts of the terms and conditions to the members under section 302 within 21 days of the receipt of Government approval on the appointment.

TENURE FOR APPOINTMENT OF MANAGING DIRECTOR OR WHOLETIME DIRECTOR OR MANAGER

Managing Director not to be appointed for more than 5 years at a time

Section 317 provides that managing director is not to be appointed for more than five years at a time. The relevant provisions in this regard are as under:

It should be noted that in the case of the appointment made within the provisions of Schedule XIII - Part II, in section II(B) or (C) of the Companies Act, 1956, as amended by the Notification No. GSR 36(E), dated 16th January, 2002, the remuneration payable to the Managing Director or Whole-time Director or Manager cannot be approved for more than three years at a time.

Further re-appointment of managing director cannot be made for more than five years at a time

There is nothing in section 317(1) which prohibits the re-appointment, re-employment or the extension of the term of office, of any person by further periods not exceeding five years on each occasion. Proviso to section 317(3) states that any such re-appointment, re-employment or extension shall not be sanctioned earlier than two years from the date on which it is to come into force.

A private company may appoint its managing director for a longer period than five years

Section 317 shall not apply to a private company unless it is a subsidiary of a public company. This section shall also not apply to a wholly owned Government Company. Therefore, there are no restrictions on such company for the tenure of appointment of managing director, it may appoint for more than five years at a time without any restrictions.

Comment [a7]: Not apply to a purely private company.

Whole-time director may be appointed for a longer period than five years

Section 317 does not apply to the appointment of a whole-time director. Therefore, there are no restrictions on any types of company for the tenure of the appointment of their whole-time director, they may be appointed for more than five years at a time without any restrictions.

Managing or whole-time director cannot assign their office

Section 312 lays down that any assignment of office made by any director of a company shall be void. Since a managing or whole-time director is also a director of a company, he cannot assign his office.

VACATION OF THE OFFICE OF THE MANAGING DIRECTOR OR WHOLE-TIME DIRECTOR OR MANAGER

Comment [a8]: Very important provision.

Managing or whole-time director or manager cannot resign by merely giving a notice of resignation

A managing or whole-time director or manager cannot resign merely by giving a notice to this effect. They cannot freely resign and consider themselves relieved from the respective office. Acceptance of their resignation by the company is necessary for their resignation to be effective.

Since the Act does not provide anything in this regard, Articles of the company will have to be perused. Terms and conditions of the appointment of them generally also provide conditions for resignation.

Office of managing or whole-time director comes to an end with the cessation of office of director

An individual who is a managing or whole-time director must also be a director of the company. If an individual is appointed as an additional director and then he is appointed either as a managing or wholetime director then the latter office of managing or whole-time director will automatically come to an end at the next annual general meeting of the company. The office of managing or whole-time director will come to an end simultaneously with the cessation of office of director. If the company wishes to continue him as a managing or wholetime director then he will have to be re-appointed as a simple director in the next annual general meeting.

Approval of the Central Government not required for removal of a managerial personnel

Approval of the Central Government is required for appointment of a managerial person by a public company or a private company, which is a subsidiary of a public company and that too, when the appointment is not in accordance with Schedule XIII of the Act. However, approval of the Central Government is not required for removal of a managerial person by a company.

Comparison of managing director with whole-time director

The basic difference between a managing director and a whole-time director is that, a managing director cannot be appointed for more than five years at a time, but this is not applicable to a whole-time director. Further, an individual can be a managing director of two companies, but an individual cannot be a whole-time director of more than one company.

Office of managing or whole-time director or manager is not an office or place of profit

Section 314(1)(b) states that no partner or relative of a director, no firm in which a director, manager 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.

CLARIFICATION ISSUED BY THE DCA

On appointment of managerial personnel and payment of managerial remuneration in case of Companies having no profit or Inadequate profit-rationalization thereof. (Circular No. CL.VII, dated 27-12-2000)

1. Cases are coming to the DCA wherein public companies or private companies which are subsidiaries of public companies are submitting applications to the DCA for approval of the Central Government for appointment of and/or payment of remuneration to managerial personnel in excess of the limits prescribed in sections 269, 310, 311 and 387 and in terms of section 198(4) read with Schedule XIII to the Companies Act, 1956, which provides scales of remuneration (salary, dearness allowance, perquisites and any other allowance).

2. The scales of monthly remuneration prescribed in para 1 of Section II of Part II of Schedule XIII have since been revised *vide* Notification No. GSR 215(E), dated 23-2000. The revised scales are as under:—

Where the effective capital of the company is— Monthly remuneration payable shall not exceed (Rupees) —

(i) less than rupees 1 crore 75,000

- (ii) rupees 1 crore or more but less than rupees 5 crores 1,00,000
 - (iii) rupees 5 crores or more but less than rupees 25 crores 1,25,000
 - (iv) rupees 25 crores or more but less than rupees 100 crores 1,50,000
 - (v) rupees 100 crores or more 2,00,000 _____
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3. Where a particular company intends to pay a remuneration higher than that prescribed in the Companies Act read with the necessary Schedule, an application may be made to the Department of Company Affairs giving in detail the justification alongwith a copy of the resolution passed by the Board/general meeting as the case may be.

4. In order to reduce subjectivity and to bring in an element of greater transparency and objectivity, the company which submits an application for a remuneration which is higher than the prescribed limit must take into consideration the following factors (**detailed note** on each as applicable be furnished) and give a detailed justification. The application for increase in the remuneration should not be submitted in a mechanical way:—

- (i) Reasons for loss/inadequacy of profit.
- (ii) Steps taken to improve the performance of the company.
- (iii) Financial health/performance of the company as may be reflected by effective capital, net worth, turnover, profit/loss, dividend declared, etc.
- (iv) Nature of industry — high technology area, core sector, infrastructure field, etc.
- (v) Export performance and net foreign exchange earned.
- (vi) Performance of the company in socio-economic activities.
- (vii) General performance of industry in the relevant sector.
- (viii) Foreign investment and foreign collaborations.
- (ix) Expansion/Diversification/Modernisation/Technology upgradation.
- (x) Qualification, experience, period of association and contribution of the proposed appointee.
- (xi) Requirement of personal skill and challenges ahead.
- (xii) Past remuneration of the proposed appointee.
- (xiii) Creativity/innovativeness of the proposed appointee/company.

- (xiv) Recognition/Award obtained by the proposed appointee/company.
- (xv) The amount of remuneration proposed to be paid including salary, allowances, perquisites and whether it will have any effect on the overall financial health of the company.
- (xvi) Any other factors relevant to the proposal, which the company may like to bring to the notice of the Government justifying their proposal.

5. The applicant companies should therefore, hereafter also ensure that the prescribed forms are completely and properly filled in regard to all the details so that the applications submitted are complete and proper at the time of submission itself. This will result in quicker and faster disposal. In this regard a checklist is also enclosed to facilitate proper filing of the applications. It is hoped that with filing of complete application, disposal would be quicker.

CHECK LIST

Please ensure before submitting the application that the following information/documents have been furnished:—

- (i) Proper application fee in the manner provided *vide* GSR No. 501(E), dated 6-7-1999.
- (ii) Copies of public notices in English and in local newspaper in local language.
- (iii) Monetary value of each of the perquisites and allowances and total remuneration package (in the form of statement annexed) valued as per actual cost.
- (iv) Appropriate and clear resolution in support of the proposal.
- (v) In case of appointment as managerial personnel in two or more companies the manner in which compliance of section 316(2)/(4) has been made.
- (vi) Reasons for loss/inadequacy of profit, steps taken to improve the financial performance and future projections.
- (vii) Full and proper justification for proposed appointment/remuneration.

- (viii) The manner in which compliance of section 269(2) of the Companies Act was met at the time of appointment/reappointment of the managerial person where mid term increase in remuneration is proposed.
- (ix) Application for condonation of delay under section 637B along with justification and requisite application fee where the application was not submitted within 90 days of the date of appointment/re-appointment,
- (x) Monetary value of total remuneration in Rupees or Rupees equivalent drawn by the proposed appointee during last three years from the applicant company or any other company.
- (xi) Copy of the directors' report and the audited accounts of the company for each of the last five financial years of the company.
- (xii) Each column of the application is filled up.
- (xiii) Copies of FIPB approvals, in case of foreign collaboration/investment.
- (xiv) Each page of application and documents attached is authenticated under the seal of the applicant company.

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