

APPOINTMENT OF AUDITOR UNDER NEW COMPANIES BILL, 2013 (COMPANIES ACT)

The appointment of auditor under new Companies Bill, 2013 has made major changes in appointment procedure and tenure of appointment in comparison to the Companies Act, 1956. Section 224 to 233 of the Companies Act, 1956 and Chapter X covering Clause 139 to 148 of the new Companies Bill, 2013 (the new Companies Act) deal with audit and auditors of the Company. This article is based on this comparison between new and old procedure of appointment of auditor in company.

Appointment of First Auditor

As per section 224(5) of the Companies Act, 1956, the first auditor or auditors of a company shall be appointed by the Board of directors within one month of the date of registration of the company; and the auditor or auditors so appointed shall hold office until the conclusion of the first annual general meeting. If the Board of director fail to appoint first director then the shareholders has power to appoint first auditor any time at general meeting for the period starting from the date of registration until the conclusion of the first annual general meeting of the company. The time period under the Companies Act, 1956 has not specified that when shareholder will appoint its first auditor, if the Board fail to appoint first auditor within one months.

At the other hand, the shareholders has power to appoint first auditor in general meeting with in a period starting from the date of expiry of one month from the date of registration of the company till the date of issue of notice of AGM to the shareholder for conducting AGM, giving detail of appointment of first auditor in AGM.

Whereas, under sub-clause (6) of clause 139 to the new Companies Bill, 2013 says that the first auditor of a company, other than a Government company, shall be appointed by the Board of Directors within thirty days from the date of registration of the company and in the case of failure of the Board to appoint such auditor, it shall inform the members of the company, who shall within ninety days at an extraordinary general meeting appoint such auditor and such auditor shall hold office till the conclusion of the first annual general meeting.

The clause 139(6) under the Companies Bill, 2013 give an extra duty on Board that if it failed to appoint first auditor then it will inform to the members for calling extraordinary general meeting for appointment of auditor, but such clause not specified when the Board will intimate to shareholders for calling EGM, it may be any time before the end of 90 days from the date of AGM.

For Example:

XYZ Private Limited is incorporated on 01.05.2013 and its first AGM is on 31.12.2014, and then the Board has power to appoint first auditor before 01.06.2013, but it fails to appoint before that period, then he will give information to members for appointing first auditor on EGM till 30.09.2014.

The reason is that after getting information, the member will call EGM within 90 days for appointment of first auditor and that 90 days will always end before 90 days from the date of AGM, i.e. 31.12.2014. It means Board has power to give intimation to members for appointing first auditor on or before 30.09.2014.

Whereas sub-clause (7) of clause 139 to the new Companies Bill, 2013 says that in the case of a Government company or any other company owned or controlled, directly or indirectly, by the Central Government, or by any State Government, or Governments, or partly by the Central Government and partly by one or more State Governments, the first auditor shall be appointed by the Comptroller and Auditor-General of India (CAG) within sixty days from the date of registration of the company and in case the Comptroller and Auditor-General of India does not appoint such auditor within the said period, the Board of Directors of the company shall appoint such auditor within the next thirty days; and in the case of failure of the Board to appoint such auditor within the next thirty days, it shall inform the members of the company who shall appoint such auditor within the sixty days at an extraordinary general meeting, who shall hold office till the conclusion of the first annual general meeting.

In case of company mentioned in sub-clause (7), the power to appoint first auditor is with CAG within 60 days, if it fails, then Board of directors of such company will appoint first auditor and if Board of Directors failed to appoint within 30 days, then members of the company will appoint first auditor. In Government Companies or companies mentioned in clause (7) above have three categories of authority to appoint first auditor.

When we read sub-clause (6) and clause (7) of Clause 139, the power to appoint first auditor by members on the intimation of the Board, will be restricted in time period. The said limitation on member to call EGM is a new clause in Companies Bill 2013 in comparison to the old Companies Act, 1956.

Appointment of Auditor at Annual General Meeting

Section 224(1) of the Companies Act, 1956 states that every company shall, at each annual general meeting, appoint an auditor or auditors to hold office from the conclusion of that meeting until the conclusion of the next annual general meeting.

Whereas, clause 139(1) of the Companies Bill, 2013 says that every company shall, at the first annual general meeting, appoint an individual or a firm as an auditor who shall hold

office from the conclusion of that meeting till the conclusion of its sixth annual general meeting and thereafter till the conclusion of every sixth meeting and the manner and procedure of selection of auditors by the members of the company at such meeting shall be such as may be prescribed.

The new Companies Bill, 2013 has made mandatory to all existing company or company which is going to be registered after the commencement of this new Companies Act to appoint an auditor at its first Annual General Meeting an auditor for the period of five years. Its means your auditor appointed at first AGM will act as auditor for the long period of 5 years. The next auditor appointment option will be available to the company in 6th Annual General Meeting of every such company. This is new clause which was not in Companies Act, 1956.

Appointment of Auditor for listed or such class of Companies

Clause 139(2) of the Companies Bill, 2013 says that no listed company or a company belonging to such class or classes of companies as may be prescribed, shall appoint or re-appoint—

(a) an individual as auditor for more than one term of five consecutive years;

and

(b) an audit firm as auditor for more than two terms of five consecutive years:

Provided that—

(i) an individual auditor who has completed his term under clause (a) shall not be eligible for re-appointment as auditor in the same company for five years from the completion of his term;

(ii) an audit firm which has completed its term under clause (b), shall not be eligible for re-appointment as auditor in the same company for five years from the completion of such term:

Provided further that as on the date of appointment no audit firm having a common partner or partners to the other audit firm, whose tenure has expired in a company immediately preceding the financial year, shall be appointed as auditor of the same company for a period of five years.

If we read clause 139(2) it classify term of appointment for individual auditor and audit firm differently. In case of individual, the term of his/her appointment will be maximum for five years and there after he/she will be disqualified for next five years (it can be called as locking period), whereas if a firm is appointed as auditor in listed or such class of company, then it will be appoint for first five years and after the expiry of first five year it will appoint

for next five years. It means for audit firm there is no locking period. It can continue as audit of the company for 10 years. So an audit firm locking period will start after the completing of 10 years.

If we read first proviso of clause 139(2) of Companies Bill 2013, it says that no new audit firm which are going to be appointed on AGM after the expiry of term of old audit firm, have any partner or partners, who was the partner of old firm.

For Example:

M/s AMKS & Associates, was audit firm having four partners, i.e. Mr. A, Mr. M, Mr. K and Ms. S of XYZ Limited and the company going to appoint a new audit firm M/s LRK & Associates, in which Mr. K is common partner in both firms. In that case M/s LRK & Associates will not be eligible to appoint as audit firm in XYZ Limited in coming AGM on the basis of common partner. Such firm will be disqualified if any single partner is going to be appointed in next AGM after expiry of its tenure.

Second point in that proviso is that, the locking period of any partner is only one year. The proviso use the word “immediately preceding financial year”, it means any one or more partner may appoint in same company with new firm name after the expiry of one years. The proviso has given lock in period for partner or partners only for one years and for audit firm for five years. The said proviso can be explain by following example:

M/s AMKS & Associates, was audit firm having four partners, i.e. Mr. A, Mr. M, Mr. K and Ms. S was audit firm of XYZ Limited Company appointed at AGM hold in 2012 for the FY 2012-13 and the company going to appoint a new audit firm M/s LRT & Associates, in which no common partner of the earlier audit firms at AGM hold in 2013 for the FY 2013-14. Now at AGM hold in 2014 for the FY 2014-15, M/s KSB & Associates, an audit firm of Chartered Accountants having common partners (Mr. K and Ms. S) of M/s AMKS & Associates can be appointed in AGM.

Enforcement of Clause 139 (2)

The proviso of Clause 139 (2) says that:

“Provided also that every company, existing on or before the commencement of this Act which is required to comply with provisions of this sub-section, shall comply with the requirements of this sub-section within three years from the date of commencement of this Act.”

As per this proviso, every company, existing on or before the commencement of this Act, required to company the provision of sub clause (2) of clause 139 within 3 years from the applicability of new Companies Act. Accordingly, if M/s AMKS & Associates is an audit firm of XYZ Limited for last 10 years then they can take the benefit of 3 years to act as an auditor of that XYZ Limited. The grace period is three year to compliance of this sub clause. So a

company can take benefit to extend the tenure of existing auditor to retire it at the third year of the commencement of this new Act.

For Example, if M/s AMKS & Associates is continue as auditor on the commencement of new Companies Act (says in 2014) of XYZ Limited, then such auditor can continue as auditor in 2014 AGM and 2015 AGM and then in third year in 2016 AGM, the company can use the proviso of clause 139(2) and appoint new audit firm.

Intimation to Registrar of Companies

As per Companies Act, 1956, a company is required to give intimation of appointment to every auditor(s) so appointed within seven days of the appointment. The intimation may be given in form of a letter on the letter head of the company by a responsible officer of the company. Every auditor appointed under section 224(1) by a company in annual general meeting shall inform the Registrar in writing that he has accepted, or refused to accept the appointment. The information shall be given in e-Form 23B within a period of thirty days from the date of receipt of appointment letter.

Whereas, proviso of Clause 139(1) says that the company shall inform the auditor concerned of his or its appointment, and also file a notice of such appointment with the Registrar within fifteen days of the meeting in which the auditor is appointed.

As per Companies Act, 1956 the intimation of appointment to auditor within seven days of appointment is sufficient and not required to intimate ROC for such appointment. It is the responsibility of auditor to intimate the ROC about his appointment only. In new Bill, 2013 the burden to intimate the ROC about appointment is laid on company with in fifteen days of appointment in comparison to 30 days. So now the Company will intimate to both, the newly appointed auditor as well as concern ROC with in time frame.

*******Thank You*******

(NOTE: The above article is given for the limited purpose of bringing awareness about the subject matter for readers.)

Regards

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