

NOTES ON AMEDEMEMENTS IN PROVISIONS APPLICABLE TO DIRECTORS IN LAST TWO YEARS

In last two years, Ministry of Corporate Affairs (MCA) has made many amendments/changes in provisions relating to directors of the company under the Companies Act, 1956, by way of Notifications and Circulars on regular intervals. This article tries to compile all the amendments made during last two year relating to directors at one place which will help you to understand. The amendments made by MCA by way of Notifications and Circulars are given below in a simple terms.

STATEMENT SHOWING PARTICULARS OF EMPLOYEE [SECTION 217(2A)]

Section 217(2A) of the Companies Act, 1956 provides that the Directors' Report shall contain information in a statement about employees who are in receipt of remuneration of such sum as may be prescribed, per annum if employed in the whole of the last year or per month if employed for part of the year. The particulars required to be given in the statement to the Directors' Report shall be in accordance with Companies (Particulars of Employees) Rules, 1975. The salary limit of employees for the purpose of the above Rule has been raised by Notification GSR 289 (E) dated 31.03.2011 from Rs. 24 lakhs to Rs. 60 lakhs per annum in respect of employees employed throughout of the year or from Rs. 2 lakhs to Rs. 5 lakhs per month if employed for the part of the year.

MCA has clarified vide its Circular No. 23/2011, dated 03.05.2011 that increase in remuneration limit is applicable to all Directors' Report approved by the Board of Directors on or after 01.04.2011 irrespective of the accounting year, being approved by the Board.

PARTICIPATION BY DIRECTORS IN MEETING OF BOARD/COMMITTEE OF DIRECTORS THROUGH ELECTRONIC MODE

The Ministry of Corporate Affairs has been receiving representation from various Industry bodies to recognize participation by directors in meetings of Board/Committee of Directors under the Companies Act, 1956 through electronic mode. The MCA vide General Circular No. 28/2011 dated 20.05.2011 has clarified that directors of a company may participate in a meeting of Board/Committee of directors under the provisions of Companies Act, 1956 through electronic vote.

The said Circular has allowed paperless compliances by the Companies after considering section 2, 4, 5, 13 and 81 of the Information Technology Act, 2000 for legal validity of compliance under the Companies Act, 1956 through electronic mode.

Section 13 of the Information Technology Act, 2000, inter-alia provides time and place of dispatch of the notice in electronic mode, which may be applicable for the purpose of notice period provided in the Companies Act, 1956 through electronic mode. Therefore, the notice of the Board or Committee meetings may also be sent by way of email/electronically to the directors/members of the Committees.

Procedure for Holding Meeting Through Electronic Mode

For this purpose, the company shall also comply with the following requirements and procedures, in addition to the normal procedures required under the Companies Act, 1956 for holding meeting of Board/Committee of directors:

- (a) Electronic mode means video conference facility i.e. audio-visual electronic communication facility employed which enables all persons participating in that meeting to communicate concurrently with each other without an Intermediary, and to participate effectively in the meeting.
- (b) Every director of the company must attend the meeting of Board/Committee of directors personally of at least one meeting of financial year of the company.
- (c) The Chairman and Secretary of the company shall assume the following responsibilities:
 - (i) to safeguard the integrity of the meeting via video conferencing
 - (ii) to ensure proper video conference equipment/facilities.
 - (iii) to prepare the minutes of the meeting.
 - (iv) to ensure that no one other than the concern director or other authorized participants are attending the meeting through electronic mode.
 - (v) If a statement of a participant in the meeting via videoconferencing is interrupted or garbled, the Chairman or Secretary shall request for a repeat or reiteration, and if need be the Chairman or Secretary shall repeat what he heard the participant was saying for confirmation or correction.
- (d) The Notice of the meeting must inform directors regarding availability of participation through video conferencing, and provide necessary information to enable directors to access the availability facility of videoconferencing.

- (e) The notice of the meeting shall also seek confirmation from the director as to whether he will attend the meeting physically or through electronic mode and shall also contain the contact number/e-mail addresses of the Secretary/designated officer to whom the director shall confirm in this regard.
- (f) In the absence of any clarification from the director, it will be presumed that he will be physically attending the Board Meeting.
- (g) At the start of the scheduled meeting through electronic mode, a roll call shall be made by the Chairman/Secretary. Every director and authorised participant shall state, for the record, the following:-
 - (i) Full Name
 - (ii) Location
 - (iii) That he can completely and clearly see and communicate with each of other participants.
 - (iv) and will ensure that no one other than the concern director or authorised participant is attending the meeting through electronic mode.
- (h) Thereafter, the Chairman/Secretary shall confirm the participation of the directors in the meeting who are not physically present. After the roll call, the Chairman or Secretary may rectify the existence of a quorum.
- (i) A director that participating in a meeting through use of video conference shall be counted for the purpose of quorum. A roll call should also be made at the conclusion of the meeting or at re-commencement of the meeting after every break to ensure presence of quorum through the meeting.
- (j) The place where the Chairman/Secretary is sitting during the Board Meeting shall be taken as place of meeting in terms of section 288 of the Act and all recordings will be made at this place. The other statutory register, which are required to be placed in the Board meeting as per the provisions of the Act, shall be placed before the Chairman for compliance of the Act. The statutory register required to be signed by the other directors shall be deemed to have been signed by directors participating through electronic mode if they have given their consent to this effect in that meeting.
- (k) If a motion is objected to and there is a need to vote, the Chairman/Secretary should call the roll and note the vote of each director who should identify himself.

- (l) In the end of the meeting, Chairman of the meeting shall announce the summary of the decisions taken in that meeting in respect of each agenda item and names of the directors who have consented or dissented to those decisions. Video recording of that part of the meeting shall be preserved by the company for one year from the conclusion of that meeting.
- (m) In the minutes, Chairman shall also confirm the mode of attendance of every director of the company during last 3 meetings whether personally or through electronic mode.
- (n) Draft minutes of the meeting shall be circulated in soft copy not later than 7 days of the meeting for comments/confirmation to the directors who attended the meeting to dispel all doubts on matters taken up during the meeting. Thereafter, the minutes shall be entered in the minutes books as prescribed under section 193 of the Act. The minutes shall also disclose the particulars of the Directors who attended the meeting through electronic mode.

NON APPLICABILITY OF PROVISION OF SECTION 295

Section 295 put restrictions on a public company or a private company being a subsidiary of a public company intending to make any type of transaction with a director of the company or partner or relative of a director, etc. whether, directly or indirectly to make any loan, or to give any guarantee, to provide any security in connection with a loan made by any other person by, and it calls for obtaining the previous approval of Central Government.

Section 295 applies to the loan given by company directly or indirectly. As per clarification issued by the MCA vide General Circular No. 24/2011 dated 12.05.2011, when the beneficiary of the loan/guarantee/security is a Public Limited Company, approval of Central Government should only be sought if the provisions of sub-section (d) or (e) of section 295 of the Companies Act, 1956 are attracted and the application should also clearly bring out the fact in this regard.

SIMPLIFIED PROCEDURE FOR OBTAINING ONLINE APPROVAL OF CENTRAL GOVERNMENT UNDER SECTION 297

In the case of a company having paid up share capital of Rs. One crore or more, all contracts of the nature like (a) sale, purchase or supply of any goods or materials or service; (b) underwriting the subscription of any shares in or debentures of the company, other than the exempted contracts can be entered into only after they are approved by the Central Government under section 297.

The MCA by the General Circular No. 52/2011. Dated 25.07.2011 with intent to cut timelines in giving approval, has decided to simplify the procedures and to give approval online, if the

proposed contract has been approved by the shareholders by way of special resolution in general meeting. The application shall be made electronically in e-Form-24A along with prescribed fee.

1. According to new procedure, application will be made in a new e-Form-24A with the prescribed fee. The relevant information like terms of contract and details of Board resolutions and special resolutions shall be captured in the e-form. The e-form shall also be certified by the practicing professional who shall specifically certify the correctness of the information and declarations given by the company in the e-form.

3. The company while seeking approval of the directors and shareholders in their meetings shall specifically take approval to the effect that: --

(i) Proposed contract is competitive, at an arm's length, without conflict of interest and is not less advantageous to it as compared to similar contracts with other parties.

(ii) The company has not made any default in repayment of any of its debts (including public deposits) or debentures or interest payable thereon and has filed its up to date Balance Sheets and Annual Returns with the Registrar of Companies;

(iii) The proposed contract is falling within the provisions of section 297 of the Act and provisions of sections 198, 269, 309, 314 and 295 are not applicable in the proposed contract.

(iv) The company and its Directors have complied with the provisions of sections 173, 287, 299, 300, 301 and other applicable provisions of the Companies Act, 1956 with regard to the proposed contract.

4. The application will be processed online and approval of Central Government shall also be made available to the applicant company online on the basis of declarations made by the company and certifications by the professionals given in the e-form.

5. If any of the information or declaration given by the company or certificate given by the professional in the e-form is found to be wrong, then the applicant company, its Directors and professional shall be liable for penal action under section 297 and 628 of the Companies Act, 1956 in addition to penal action prescribed in regulations of the respective professional institutes.

6. The process of online approval of Central Government under section 297 of the Companies Act, 1956 is likely to be implemented with effect from 24th September, 2011.

INTIMATION TO REGISTRAR OF COMPANYS IN FORM-32 REGARDING PARTICULARS OF APPOINTMENT OF DIRECTORS

The Ministry of Corporate Affairs (MCA) vide General Circular 20/2011 dated 02.05.2011 has clarified that it is neither desirable nor possible for the Registrar to sit in judgement to ascertain the rightful claims of the Directors in case of a dispute and it is for the parties concerned to settle their disputes by approaching the court. In case conflicting documents are filed by the contesting group of Directors, Registrar may take the documents on record, if the same or otherwise in order by informing the parties concerned, (contesting group of directors), in writing, that the documents have been taken on records without prejudice to the rights of the parties to settle the dispute in the court of competent authority.

In order to cut timelines and bring more transparency in the working of office of Registrar of Companies, the Form-32 will also be taken on records under Straight Through Process (STP) mode i.e., the information given in the e-Form-32 is being taken on file maintained by the Registrar of Companies through electronic mode on the basis of statement of correctness given by the filing company and further verification by the practicing professional i.e., Chartered Accountants, Cost Accountants and Company Secretaries.

The above instructions are being hereby revised to the extent that all particulars filled by the companies in e-Form-32 are being placed on records of the Registrar of Companies through the STP process as filed by the company and verified by the practicing professional, without prejudice to the right of the parties to settle the dispute, if any, in court of competent jurisdiction.

PAYMENT OF COMMISSION TO NON-WHOLE TIME DIRECTORS OF THE COMPANY UNDER SECTION 309(4) (b) OF THE COMPANIES ACT, 1956

Section 309(4) provides that a director or directors who is or not managing or whole time directors may be paid remuneration periodically with the approval of the Central Government or may be paid commission, provided that the said remuneration shall not exceed 1% of the net profits if the company has a managing or whole time director and 3% in other case. The net profit shall be computed in terms of section 198, 349 and 350 of the Act. The MCA vide its General Circular no. 4/2011 dated 04.03.2011 has provided that a company shall not be required to obtain the approval of the Central Government for making payment of remuneration by way of commission to its non-whole time directors in addition to sitting fee, if the total commission to be paid does not exceed 1% of the net profit of the company if it has WTD or MD or 3% of the net profit of the company if it does not have MD or WTD.

APPLICABILITY OF SERVICE TAX ON COMMISSION PAYABLE TO NON-WHOLE TIME DIRECTORS- APPROVAL OF CENTRAL GOVERNMENT UNDER SECTION 309/310 OF THE COMPANIES ACT, 1956

The Finance Act, 2012 has introduced Service Tax which is applicable to anyone who provides a Service not covered under the negative/exempted list and if the value of annual revenue is more than Rs. 10 lakhs. The Non-Whole Time Directors of the company are presently not covered under the exempted list as such, the sitting fee/commission payable to them by the company liable to Service Tax.

If such Service Tax is paid by the company, it will be deemed to be a part of remuneration under section 198 of the Act and would accordingly increase the remuneration amount of such Non-Whole Time Directors. This remuneration could then exceed the limit of 1% of the profit under section 309(4) of the company when the company has Managing/Whole Time Directors/Manager or 3% of the profit under section 309(4) of the company if the company does not have a Managing/Whole Time Directors/Manager as the case may be. As per existing provisions of the Companies Act, 1956, this would require prior approval of the Central Government under section 309 and 310 of the Act.

It has now been decided that any company increase in remuneration of Non-Whole Time Director/Directors of the company solely on account of payment of service tax on commission payable to them by the company shall not require approval of the Central Government under section 309 and 310 of the Companies Act, 1956 even if it exceeds the limit of 1% or 3% of the profit under section 309(4) of the Company, as the case may be, in the financial year 2012-13.

NEW RULES ON DIRECTOR'S RELATIVE (OFFICE OR PLACE OF PROFIT) RULES, 2011

The MCA has issued a Notification No. G.S.R. 357(E) dated 02.05.2011: In exercise of the power conferred by clause (b) of sub-section (1) of Section 642, read with sub-section (1B) of section 314 of the Companies Act, 1956, the Central Government hereby makes the following Rules in supersession of the earlier Notification No. 89(E) dated 05.02.2003, namely:-

1. Short Title and Commencement:
 - (1) These rules may be called Director's Relative (Office or Place of Profit) Rules, 2011.
 - (2) They shall come into force on the date of their publication in the official gazette.
2. Applicability:

These rules shall apply to all companies registered under the Companies Act, 1956 except as provided in these rules.

3. Approval of the Central Government in case of Appointment of Relatives, etc. of Directors: No appointment for an office, or place of profit in a company shall take effect unless approved by the Central Government on an application, in respect of :-

- (a) Partner of firm or relative of a Director or Manager, or
- (b) Firm in which such Director, or Manager or relative of either is a partner; or
- (c) Private company of which such Director, or Member or relative of either is a Director or member, which carries a monthly remuneration exceeding, Rs. 2,50,000 p.m.
- (c) An individual who is a relative of a director, or Manager and is appointed as an Advisor or Consultant and paid remuneration including commission on periodical basis.

4. Selection of Relatives of Directors and Directors and Directors to Hold a Place of Office/Profit:-

- (a) The selection and appointment of a relative of a Director for holding office or place of profit in the company with the salary exceeding Rs. 250000 p.m. shall be approved by adopting the same procedure applicable to non-relatives and approved by Selection Committee.

Explanation: For the purpose of the sub-rule, in the case of listed public companies, the expression "Selection Committee" means a committee, consisting of at least three members, the majority of which shall be independent director and an outside expert.

Provided that in case of unlisted companies, Independent director are not necessary but outside expert should be their in the Selection Committee.

Provided further that in the case of private companies, Selection Committee is not necessary.

5. Procedure for Examination of Application: The application under rule 3 shall be examined with respect to the following, in addition to all other requirements under the Companies Act, 1956, 1956:-

- (a) In the case of Individual appointee, an undertaking from him that he/she will be in exclusive employment of the company and will not hold a place of profit in any other company.

(b) The monetary value of all allowances and perquisites and of total remuneration package (monthly/annually) proposed to be paid to the appointee and details of the services that will be rendered by him to the company.

(c) Details of shareholding pattern particularly the shareholding of the directors along with his/her/their relatives, the public holding, the institutional holding (each institution separately) and the quantum of dividend paid by the company during the last three preceding financial years.

(d) Details of educational qualification/experience, pay scale, allowances and other benefits of similarly placed executives.

(e) In case of the appointment of a relative, an undertaking from the Director/Secretary of the Company that the similarly placed employees are getting the comparable salary.

(f) List and particulars of the employees who are in receipt of remuneration of Rs. 250000 or more per month.

(g) The total number of relatives of all the Directors either appointed as Manager/Whole time Director, Manager or in any other position in the company, the total remuneration paid to all of them all together as a percentage of profit as calculated for the purpose of section 198 of the Companies Act, 1956.

CHANGES IN SECTION II OF PART II OF SCHEDULE XIII OF THE COMPANIES ACT, 1956

There are following amendments made by the MCA in Schedule XIII of the Companies Act, 1956:-

1. Earlier the proviso of sub paragraph (C) of section II of Part II of Schedule XIII of the Companies Act, 1956 says that a company having negative effective capital shall be required to comply the conditions specified in sub-paragraph in addition to take prior approval of Central Government for payment of remuneration on the as given therein.

The MCA vide its Notification No GSR 70 (E), dates 08.02.2011 has provided that prior approval of the Central Government is required for payment of remuneration as per scale given in sub paragraph (C) of section II of Part II of Schedule XIII of the Companies Act, 1956, if the company is listed company or subsidiary of a listed company.

2. The MCA vide its Notification No GSR 396(E), dates 23.05.2011 has inserted a further proviso in section II of Part II of Schedule XIII of the Companies Act, 1956 after fourth proviso and further vide its Notification No GSR 534(E), dates 14.07.2011, Ministry has substituted fourth proviso as third proviso which will be read as under:

“Provided further that approval of the Central Government is not required for a subsidiary of a listed company, if-

- (i) the Remuneration Committee and Board of Director of the Holding company give their consent for the amount of remuneration of the applicant and for the said amount to be deemed as remuneration paid by the Holding company for the purpose of section 198 of the Companies Act, 1956; and
- (ii) a special resolution has been passed at the general meeting of the company for payment of remuneration of the applicant and;
- (iii) the remuneration of the applicant is deemed to be remuneration paid by holding company and;
- (iv) all the members of the subsidiary are bodies corporate.

Provided that a listed company or a subsidiary of a listed company shall not require Central Government approval for the payment of remuneration to its managerial personnel, if the remuneration is fixed by the Board of Industrial and Financial Reconstitution.”

In Sub-paragraph (C) in section II of Part II of Schedule XIII of the Companies Act, 1956, after fourth proviso, the following proviso shall be inserted, namely:-

“Provided that no approval of the Central Government is required if the managerial person is not having any interest in the capital of the company or its holding company, directly or indirectly or through any other statutory structures and not having any direct or indirect interest or related to the directors or promoters of the company or its holding company at any time during last two years before or on the date of appointment and is having a graduate level qualification with expert and specialized knowledge in the field of this profession.”

3. Meaning of Remuneration Committee as explained under Explanation IV to the Section II of Part II has been substituted by Notification No GSR 70 (E), dates 08.02.2011, namely:-

For the purpose of this section, “Remuneration Committee” means:

- (i) In respect of a listed company, a committee which consists of at least three non-executive independent directors including nominee director or nominee directors, if any; and
- (ii) In respect of any other company, a Remuneration Committee of directors.

3. Meaning of Statutory Structure has been inserted under Explanation VI to the Section II of Part II vide its Notification No GSR 534(E), dated 14.07.2011, namely:-

“For the purpose of Section II of this part, “Statutory Structure” means any entity which is entitled to hold shares in any company formed under any statute.”

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

Regards

CS Ajay Mishra

ajaygkp@gmail.com

csajaygkp@gmail.com