

CS Premnarayan Tripathi

PRT & Associates, Company Secretaries



**DECODING
APPT. AND REMUNERATION OF
MANAGERIAL PERSONNEL**



SEC. 196: APPOINTMENT OF MANAGING DIRECTOR, WHOLE-TIME DIRECTOR OR MANAGER

(1) No company shall appoint or employ at the same time a managing director and a manager.

- Why this provision??

2(54) "**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.

2(53) "**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;



- Whether more than 1 MD can be appointed in same company??
- Whether more than 1 Manager can be appointed in same company??
- What if a Director is entrusted with substantial power of management but not Appointed as MD?



(94) "**whole-time director**" includes a director in the whole-time employment of the company;

- Is it possible to appoint a Director as WTD but not in whole-time-employment??

As per Companies (Specification of Definitions Details) Rules, 2014:

(k) "**Executive Director**" means a whole time director as defined in clause (94) of section 2 of the Act;



“Managerial Person” is inferred in Schedule V (Part I) of the Act. It means MD/WTD/Manager.

(2) Term: upto 5 years

3) Minimum age: 21 years

Maximum: 70 years

If > 70 years, can be appointed by:

a. Special Resolution



b. Ordinary Resolution + **approval of Central Govt.**

- If an individual is appointed as MD/WTD/Manager at the age of 68 for 5 years, is it a valid appointment?
- Whether he can continue as director for 5 years?

For application to Central Govt., Sec. 201 of the Act prescribes Form MR 2

All above 3 sub-sections are applicable to All Companies. (However, sub-section 2 is not applicable to Govt. Co.)



(4) Appt. is subject to provisions of sec. 197 and Schedule V,

Terms and conditions of **appointment and remuneration** – Board Approval at a meeting

Subject to **Shareholders' approval at Next General Meeting**

- Whether circular resolution of Board can be passed for appointment of such managerial personnel?
- Whether MD/WTD/Manager appointed will hold office till next AGM??
- Is it necessary to call General Meeting for approval of appt.??



Approval of Central Govt. is required only if conditions of Part I of Schedule V are not fulfilled.

Filing of Return of Appt. of MD/WTD/Manager: MR 1

Part III of Sch. V:

2. The auditor or the CS of the co. or where the company is not required to appointed a CS, a PCS shall certify that the requirement of this Schedule have been complied with and ***such certificate shall be incorporated in the return filed with the Registrar under sub-section (4) of section 196.***

Earlier it was required to be filed for CEO, CFO and CS too... it's deleted from June, 2016.

(5) If appointment of MD/WTD/Manager - NOT approved at general meeting, any act done by him before such approval shall not be invalid.

Sub-section (4) and (5) are not applicable to Pvt. Cos. after June, 2015 exemption notification



Sec. 197: Overall Maximum Managerial Remuneration and Managerial Remuneration in Case of Absence or Inadequacy of Profits

- Entire section is not applicable to Private Cos.
- Remuneration of managerial personnel and all other directors

Meaning of 'Remuneration';

2(78): "Remuneration" means any money or its equivalent given or passed to any person for services rendered by him and includes perquisites as defined under the Income-tax Act, 1961.

It's not confined to only salary, commission on net profit, sitting fees or any other fees, perquisites etc.



(1) Total managerial remuneration **payable by a public company**, to its directors, including MD/WTD/Manager in respect of any financial year shall not exceed 11% of Net Profits of the Co. **for that financial year** computed as per sec. 198

- Remuneration to be paid for FY 2020-21 should not exceed 11% NP of FY 2020-21 itself and not of 2019-20

1st Proviso: for payment >11% of NP - Approval in general meeting, subject to the provisions of Schedule V

2nd Proviso: **Prior Approval** in general meeting – **Special Resolution;**

- 1 MD/WTD/Manager, >5% OR if more than 1 such director > 10%
- Remuneration to NEDs including IDs, >1% if there is an MD/WTD/Manager and >3% in other cases



3rd Proviso: Prior approval of Bank/PFIs/NCD holders/Other Secured Creditors required, if the Co. has defaulted in payment of dues

(2) The percentages aforesaid (11%/5%/1%/3%) shall be exclusive of any fees payable to directors under sub-section (5).

- **Sitting Fees are excluded in calculation of percentage of NP**



(3) *Notwithstanding anything contained in sub-sections (1) and (2)*, but subject to the provisions of Sch. V, if, in any FY, a company has no profits or its profits are inadequate, the company shall not pay to its directors, including any MD/WTD/Manager, by way of remuneration any sum exclusive of any fees payable to directors under sec.197(5).

- ✓ **Non-obstante clause** – overriding effect on sub-sections (1) and (2)
- ✓ **No Profit OR Inadequacy of Profit** (of that financial year and not of previous year)
- ✓ **Sitting fees are excluded**
- ✓ **Subject to Schedule V (Part II – Remuneration)**



Schedule V

- ✓ Part I : **Appointment** (conditions to be fulfilled)
- ✓ Part II: **Remuneration**
 - Sec. I: Cos. having profits
 - Sec. II: No profit or inadequacy of profits
 - Sec. III: No profit or inadequacy of profits (special circumstances)
 - Sec. IV: Perquisites not included in managerial remuneration
 - Sec. V: Remuneration payable to a managerial person in two companies
- ✓ Part III: approval in general meeting + compliance certificate
- ✓ Part IV: Central Govt. may exempt any class of cos.



(4) Determination of Remuneration – as per AOA/Ordinary Resolution/Special Resolution.

While determining remuneration, payments for services rendered in following capacity are excluded;

- Services rendered are of a Professional Nature; **and**
- In the opinion of NRC/BOD, directors possess requisite qualification for practice of the profession

Both the above conditions must be fulfilled for getting exclusion.



(5) **Sitting Fees:**

A director may receive remuneration by way of **fee for attending meetings of the Board or Committee** thereof or *for any other purpose whatsoever as may be decided by the Board...*

Maximum Rs.1 Lac per meeting

- Whether sitting fees can be paid to IDs for attending separate meeting of Independent Directors (as required to be held under the Act)?
- Can sitting fees be increased with approval of Shareholders in General Meeting?
- Can sitting fees be paid to directors for meetings held through VC/OAVM?
- Can sitting fee be paid to MD/WTD?
- Can sitting fee be paid if meeting was convened but not held due to absence of quorum?



(6) A **director** or manager may be paid remuneration either by way of a **monthly payment** or at a **specified percentage of the net profits** of the company or partly by one way and partly by the other.

The word 'director' is used. Hence, it encompasses all directors i.e. MD/WTD, NEDs and IDs.

Section 13 of the General Clauses Act, 1897 provides that in all central Acts and Regulations, unless there is anything repugnant to the subject or context, ***the words used in singular shall include the plural and vice versa.***

Though the notes on clauses to the Companies Bill, 2011, *inter alia*, explained as under:

'Managerial personnel can be paid either by way of monthly payment or at a specified percentage of net profits or partly by monthly payment and partly by the percentage of net profits.'



However, sub-section 6, doesn't confine its applicability only to 'Managerial personnel' and uses the term '**Director**' instead. As the term 'Director' is defined under the Act, no external tools of interpretation including notes on clauses to the Companies Bill, is required to be used.

Further, despite various amendments in section 197 since year 2014, the definition of 'Director' is kept unchanged. Therefore, it can be inferred that the word is used very cautiously and purposefully and not inadvertently.

Further, meaning of the term 'monthly payment' used in sub-section 6 should not be restricted to 'salary' only which is generally paid to employees or MD/WTD. It should be used widely and more particularly by apportioning any yearly payment to a director in 12 (equal) parts.

In backdrop of above, payment of remuneration to NEDs including IDs can be made by way of 'fixed payment' in addition to sitting fees paid under sub-section 5.



(9): Liability to refund excess remuneration drawn

If **any director** draws or receives, directly or indirectly, by way of remuneration any such sums **in excess of the limit prescribed by this section or without approval required under this section**, he shall refund such sums to the company, within two years or such lesser period as may be allowed by the company, and until such sum is refunded, hold it in trust for the company.

- To be refund within 2 years of lesser period as may be allowed by the Co.
- Drawing remuneration in excess of provisions of sec. 197 is an offence??
- Net Profits are computed at the end of Financial Year
- Whether Manager is required to refund excess remuneration??



(10): Waiver of Refund requirements

The company shall not waive the recovery of any sum refundable to it under sub-section (9) unless approved by the company **by special resolution** within two years from the date the sum becomes refundable

- If default in payment of Banks/PFIs/NCDs/Other Secured Creditors – prior approval required
- in view of Companies (Amendment) Act, 2017 w.e.f. 12th September, 2018, the prescribed limit of 11% in sub-section (1) has been diluted to a great extent



(11): Increase in remuneration – inadequacy or no profits

This provision applies to a company in which the profits are inadequate or it has no profits.

It applied only in relation to remuneration of Managerial Personnel.

- For increasing remuneration of NEDs (including IDs), this sub-section will not attract
- increase in remuneration must be in accordance with the provisions of Sch. V
- Prior to Companies (Amendment) Act, 2017, there was a provision for obtaining approval of Central Govt. for such increase.



(14): Remuneration from Holding / Subsidiary Company

This provision allows receiving remuneration or commission from any Holding Company or Subsidiary Company (subject to disclosures in Board's Report)

- This sub-section applies only to MD or WTD
- Part V of Schedule V also allows that a managerial person may draw remuneration from one or both cos. provided 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.



(15): Penal Consequences for default in compliance

- Default by any person - Penalty of Rs.1 Lac
- Default by Company - Penalty of Rs.5 Lacs
- Penal consequences are not very stringent
- Case: If a company pays remuneration to its directors in following manner;
 - In excess of 11% of NP without obtaining approval of shareholders,
 - It has defaulted in payment of dues of Bank, but didn't obtained prior approval,
 - It has appointed managerial personnel who is not eligible under Part I of Sch. V,
 - It pays sitting fees of Rs.2 Lac per meeting to its directors,
 - It has waved excess remuneration paid to its directors without approval of shareholders, and
 - It has given required disclosures in Board's Report

Whether the Company will liable to penlty of R. 5 Lacs only??



(16): Report by Auditors

- The auditor of the company shall, in his report under section 143, make a statement as to whether the remuneration paid by the company to its directors is in accordance with the provisions of this section, whether remuneration paid to any director is in excess of the limit laid down under this section and give such other details as may be prescribed
- Whether Remuneration paid to directors is in accordance with the Act?
- Whether any director has received remuneration in excess of limit



THANKS

