

COMPANIES ACT, 2013

**APPOINTMENT AND
REMUNERATION
OF
KEY MANAGERIAL
PERSONNEL**



**THE INSTITUTE OF
Company Secretaries of India**
IN PURSUIT OF PROFESSIONAL EXCELLENCE
Statutory body under an Act of Parliament

APPOINTMENT AND REMUNERATION OF KEY MANAGERIAL PERSONNEL

Introduction

The executive management of a company is responsible for the day to day management of a company. The companies Act, 2013 has used the term key management personnel to define the executive management. The key management personnel are the point of first contact between the company and its stakeholders. While the Board of Directors are responsible for providing the oversight, it is the key management personnel who are responsible for not just laying down the strategies as well as its implementation.

Chapter XIII of the Companies Act, 2013 read with Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 deal with the legal and procedural aspects of appointment of Key Managerial Personnel including Managing Director, Whole-time Director or Manager, managerial remuneration, secretarial audit etc.

Key Managerial Personnel

The Companies Act, 2013 has for the first time recognized the concept of Key Managerial Personnel. As per section 2(51) “key managerial personnel”, in relation to a company, means—

- (i) the Chief Executive Officer or the managing director or the manager;
- (ii) the company secretary;
- (iii) the whole-time director;
- (iv) the Chief Financial Officer; and
- (v) such other officer as may be prescribed.

Managing Director

Section 2(54) of the Companies Act, 2013, defines ‘managing director’. It stipulates that a “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.

The explanation to section 2(54) excludes administrative acts of a routine nature when so authorised by the Board such as the power to affix the common seal of the company to any document or to draw and endorse any cheque on the account of the company in any bank or to draw and endorse any negotiable instrument or to sign any certificate of share or to direct registration of transfer of any share, from the substantial powers of management.

Whole Time Director

Section 2 (94) of the Companies Act, 2013 defines “whole-time director” as a director in the whole-time employment of the company.

Manager

Section 2(53) of the Companies Act, 2013 defines “manager” as 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.

Chief Executive Officer & Chief Financial Officer

Section 2(18)/(19) of the Companies Act, 2013 defined “Chief Executive Officer”/ “Chief Financial Officer” as an officer of a company, who has been designated as such by it;

Company Secretary

Section 2(24) of the Companies Act, 2013 defines “company secretary” or “secretary” means a company secretary as defined in clause (c) of sub-section (1) of section 2 of the Company Secretaries Act, 1980 who is appointed by a company to perform the functions of a company secretary under this Act;

Appointment of Managing Director, Whole-Time Director or Manager

Section 196 of the Companies Act, 2013 provides that no company shall appoint or employ at the same time a Managing Director and a Manager. Further, a company shall not appoint or reappoint any person

as its Managing Director, Whole Time Director or manager for a term exceeding five years at a time and no reappointment shall be made earlier than one year before the expiry of his term.

Section 196(4) of the Companies Act, 2013 provides that subject to the provisions of section 197 and Schedule V, a managing director, whole-time director or manager shall be appointed and the terms and conditions of such appointment and remuneration payable be approved by the Board of Directors at a meeting which shall be subject to approval by a resolution at the next general meeting of the company and by the Central Government in case such appointment is at variance to the conditions specified in Schedule V. Approval of the Central Government is not necessary if the appointment is made in accordance with the conditions specified in Schedule V to the Act.

Therefore, the appointment of a managing director or whole-time director or manager and the terms and conditions of such appointment and remuneration payable thereon must be first approved by the Board of directors at a meeting and then by an ordinary resolution passed at a general meeting of the company.

A notice convening Board or general meeting for considering such appointment shall include the terms and conditions of such appointment, remuneration payable and such other matters including interest, of a director or directors in such appointments, if any.

A return in the prescribed form viz. MR.1 is required to be filed with Registrar within 60 days from the date of such appointment.

Section 196(5) provides that subject to the provisions of this Act, where an appointment of a managing director, whole-time director or manager is not approved by the company at a general meeting, any act done by him before such approval shall not be deemed to be invalid.

Appointment with the Approval of Central Government

In case the provisions of Schedule V of the Companies Act, 2013 are not fulfilled by company, an application seeking approval to the appointment of a managing director (Whole-time director or manager) shall be made to the Central Government, in e-Form No. MR.2.

As per section 200, the Central Government or a company may, while according its approval under section 196, to any appointment of a managing director, whole-time director or manager, the Central Government or the company shall have regard to—

- (a) the financial position of the company;

- (b) the remuneration or commission drawn by the individual concerned in any other capacity;
- (c) the remuneration or commission drawn by him from any other company;
- (d) professional qualifications and experience of the individual concerned;
- (e) such other matters as may be prescribed.

As per Rule 6 for the purposes of item (e) of section 200, the Central Government or the company shall have regard to the following matters while granting approval to the appointment of managing director under section 196:

- (1) Financial and operating performance of the company during the three preceding financial years.
- (2) Relationship between remuneration and performance.
- (3) The principle of proportionality of remuneration within the company, ideally by a rating methodology which compares the remuneration of directors to that of other executive directors on the board and employees or executives of the company.
- (4) Whether remuneration policy for directors differs from remuneration policy for other employees and if so, an explanation for the difference.
- (5) The securities held by the director, including options and details of the shares pledged as at the end of the preceding financial year.

Disqualifications

Section 196(3) of the Act makes a specific prohibitory provision with regard to the appointment of managing director, whole time director or manager. The section lays down that no company shall appoint or continue the employment of any person as its managing director, whole time director or manager who—

- (a) is below the age of twenty-one years or has attained the age of seventy years:

Provided that appointment of a person who has attained the age of seventy years may be made by passing a special resolution in which case the explanatory statement annexed to the notice

for such motion shall indicate the justification for appointing such person;

- (b) is an undischarged insolvent or has at anytime been adjudged as an insolvent;
- (c) has at any time suspended payment to his creditors, or makes, or has at any time made, a composition with them; or
- (d) has at any time been, convicted by a court of an offence and sentenced for a period of more than six months.

Apart from this, Part I of Schedule V contains five conditions which must be satisfied by a person to be eligible for appointment as managing director, whole-time director or manager without the approval of the Central Government. These conditions are as below:

- (a) he had not been sentenced to imprisonment for any period, or to a fine exceeding one thousand rupees, for the conviction of an offence under any of the following Acts, namely:-
 - (i) the Indian Stamp Act, 1899,
 - (ii) the Central Excise Act, 1944,
 - (iii) the Industries (Development and Regulation) Act, 1951,
 - (iv) the Prevention of Food Adulteration Act, 1954 ,
 - (v) the Essential Commodities Act, 1955,
 - (vi) the Companies Act, 2013,
 - (vii) the Securities Contracts (Regulation) Act, 1956,
 - (viii) the Wealth-tax Act, 1957,
 - (ix) the Income-tax Act, 1961,
 - (x) the Customs Act, 1962,
 - (xi) the Competition Act, 2002,
 - (xii) the Foreign Exchange Management Act, 1999,
 - (xiii) the Sick Industrial Companies (Special Provisions) Act, 1985,
 - (xiv) the Securities and Exchange Board of India Act, 1992,
 - (xv) the Foreign Trade (Development and Regulation) Act, 1992;
 - (xvi) the Prevention of Money Laundering Act, 2002;

- (b) he had not been detained for any period under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974;

Provided that where the Central Government has given its approval to the appointment of a person convicted or detained under sub-paragraph (a) or sub-paragraph (b), as the case may be, no further approval of the Central Government shall be necessary for the subsequent appointment of that person if he had not been so convicted or detained subsequent to such approval;

- (c) he has completed the age of 21 years and has not attained the age of 70 years:

Provided that where he has attained the age of 70 years; and where his appointment is approved by a special resolution passed by the company in general meeting, no further approval of the Central Government shall be necessary for such appointment;

- (d) where he is a managerial person in more than one company, he draws remuneration from one or more companies subject to the ceiling provided in section V of Part II;

- (e) he is resident in India.

Explanation : For the purpose of above, resident in India includes a person who has been staying in India for a continuous period of not less than twelve months immediately preceding the date of his appointment as a managerial person and who has come to stay in India:

(i) for taking up employment in India, or

(ii) for carrying on a business or vocation in India.

But this condition shall not be applicable to the companies in Special Economic Zones, as may be notified by Department of Commerce from time to time.

However, a person, being a non-resident in India, shall enter India only after obtaining a proper Employment Visa from the concerned Indian mission abroad. For this purpose, such person shall be required to furnish, alongwith the visa application form, profile of the company, the principal employer and the terms and conditions of such person's appointment.

Reappointment of Managing Director

Under sections 196 and 203 of the Companies Act, 2013, appointment includes reappointment. Reappointment of a managing

director of a company must be taken for consideration before the expiry of his term of office. If the reappointment of the managing director is approved and if it is not in accordance with the conditions specified in Schedule V then the approval of the Central Government must be obtained for such reappointment. Rest of the provisions for reappointment of a managing director are same as in the case of appointment of a managing director.

Appointment of Key Managerial Personnel

Section 203 of the Companies Act, 2013 read with Rule 8 mandates the appointment of Key Managerial Personnel and makes it obligatory for a listed company and every other public company having a paid-up share capital of rupees ten crores or more, to appoint following whole-time key managerial personnel:

- (i) managing director, or Chief Executive Officer or manager and in their absence, a whole-time director;
- (ii) company secretary; and
- (iii) Chief Financial Officer:

Every whole-time key managerial personnel of a company shall be appointed by means of a resolution of the Board containing the terms and conditions of the appointment including the remuneration.

An individual shall not be appointed or reappointed as the chairperson of the company, as well as the managing director or Chief Executive Officer of the company at the same time unless the articles of such a company provide otherwise; or the company does not carry multiple businesses. However, such class of companies engaged in multiple businesses and which has appointed one or more Chief Executive Officers for each such business as may be notified by the Central Government are exempted from the above.

A whole-time key managerial personnel shall not hold office in more than one company except in its subsidiary company at the same time. However, he can hold such other directorship with the permission of the Board.

A whole-time key managerial personnel holding office in more than one company at the same time, shall, within a period of six months from such commencement, choose one company, in which he wishes to continue to hold the office of key managerial personnel.

A company may appoint or employ a person as its managing director, if he is the managing director or manager of one, and of not

more than one, other company and such appointment or employment is 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.

If the office of any whole-time key managerial personnel is vacated, the resulting vacancy shall be filled-up by the Board at a meeting of the Board within a period of six months from the date of such vacancy.

Functions of Company Secretary

According to Section 205 the functions of the company secretary shall include,—

- (a) to report to the Board about compliance with the provisions of this Act, the rules made thereunder and other laws applicable to the company;
- (b) to ensure that the company complies with the applicable secretarial standards;
- (c) to discharge such other duties as may be prescribed.

Explanation.—For the purpose of this section, the expression “secretarial standards” means secretarial standards issued by the Institute of Company Secretaries of India constituted under section 3 of the Company Secretaries Act, 1980 and approved by the Central Government.

For the purposes of clause (c) of sub-section (1) of section 205, the Central Government has prescribed that the duties of Company Secretary shall also include—

- (1) to provide to the directors of the company, collectively and individually, such guidance as they may require, with regard to their duties, responsibilities and powers;
- (2) to facilitate the convening of meetings and attend Board, committee and general meetings, and maintain the minutes of these meetings;
- (3) to obtain approvals from the Board, general meetings, the Government and such other authorities as required under the provisions of the Act;
- (4) to represent before various regulators, Tribunal and other authorities under the Act in connection with discharge of various functions under the Act;

- (5) to assist the Board in the conduct of the affairs of the company;
- (6) to assist and advise the Board in ensuring good corporate governance and in complying with the corporate governance requirements and best practices; and
- (7) to discharge such other duties as may be assigned by the Board from time to time;
- (8) such other duties as have been prescribed under the Act and Rules.

Section 205(2) provides that provisions contained in section 204 and section 205 shall not affect the duties and functions of the Board of Directors, chairperson of the company, managing director or whole-time director under this Act, or any other law for the time being in force.

MANAGERIAL REMUNERATION

Just as profits drive business, incentives drive the managers of business. Not surprisingly then, in a fiercely competitive corporate environment, managerial remuneration is an important piece in the management puzzle. While it is important to incentivize the workforce performing the challenging role of managing companies, it is equally important not to go overboard with the perks and the pay. In India, to keep a check on unnecessary profit squandering by companies and, at the same time, to ensure adequate and reasonable compensation to managerial personnel, the law intervenes to do the balancing act.

Remuneration to Managerial Personnel

Section 197 of the Companies Act, 2013 prescribed the maximum ceiling for payment of managerial remuneration by a public company to its managing director whole-time director and manager which shall not exceed 11% of the net profit of the company in that financial year computed in accordance with section 198 except that the remuneration of the directors shall not be deducted from the gross profits.

Further, the company in general meeting may, with the approval of the Central Government, authorise the payment of remuneration exceeding 11% of the net profits of the company, subject to the provisions of Schedule V.

The net profits for the purposes of this section shall be computed in the manner referred to in section 198.

The remuneration payable to any one managing director or whole-time director or manager shall not exceed 5% of the net profits of the company and if there are more than one such director remuneration shall not exceed 10% of the net profits to all such directors and manager taken together.

Except with the approval of the company in general meeting, the remuneration payable to directors who are neither managing directors nor whole-time directors shall not exceed,—

- 1% of the net profits of the company, if there is a managing or whole-time director or manager;
- 3% of the net profits in any other case.

The percentages aforesaid shall be exclusive of any fees payable to directors for attending the meeting of the board/committees or for such other purposes as decided by the board.

Remuneration by a Company having no Profit or Inadequate Profit

If, in any financial year, a company has no profits or its profits are inadequate, the company shall not pay to its directors, including managing or whole time director or manager, any remuneration exclusive of any fees payable to directors except in accordance with the provisions of Schedule V and if it is not able to comply with Schedule V, with the previous approval of the Central Government.

In cases, where Schedule V is applicable on grounds of no profits or inadequate profits, any provision relating to the remuneration of any director which purports to increase or has the effect of increasing the amount thereof, shall not have any effect unless such increase is in accordance with the conditions specified in that Schedule and if such conditions are not being complied, the approval of the Central Government had been obtained.

Remuneration to Directors in other Capacity [Section 197(4)]

The remuneration payable to the directors including managing or whole-time director or manager shall be inclusive of the remuneration payable for the services rendered by him in any other capacity except the following:

- (a) the services rendered are of a professional nature; and
- (b) in the opinion of the Nomination and Remuneration

Committee (if applicable) or the Board of Directors in other cases, the director possesses the requisite qualification for the practice of the profession.

**Sitting Fees to Directors for Attending the Meetings
[Section 197(5)]**

A director may receive remuneration by way of fee for attending the Board/Committee meetings or for any other purpose as may be decided by the Board. Provided that the amount of such fees shall not exceed the amount as may be prescribed.

The Central Government through rules prescribed that the amount of sitting fees payable to a director for attending meetings of the Board or committees thereof may be such as may be decided by the Board of directors or the Remuneration Committee thereof which shall not exceed the sum of rupees 1 lakh per meeting of the Board or committee thereof.

The Board may decide different sitting fee payable to independent and non-independent directors other than whole-time directors.

Monthly Remuneration to Director or Manager

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. [Section 197 (6)]

An independent director shall not be entitled to any stock option and may receive remuneration by way of fees, reimbursement of expenses for participation in the Board and other meetings and profit related commission as may be approved by the members. [Section 197 (7)]

Any director who is in receipt of any commission from the company and who is a managing or whole-time director of the company shall not be disqualified from receiving any remuneration or commission from any holding company or subsidiary company of such company subject to its disclosure by the company in the Board's report. [Section 197 (14)]

Remuneration Drawn in Excess of Prescribed Limit

If any director draws or receives, directly or indirectly, by way of remuneration any such sums in excess of the limit prescribed or without the prior sanction of the Central Government, where it is required, he shall refund such sums to the company and until such sum is refunded, hold it in trust for the company. [Section 197(9)]

The company shall not waive the recovery of any sum refundable to it under sub-section 9 mentioned above, unless permitted by the Central Government. [Section 197 (10)]

Insurance Premium as Part of Remuneration

Where any insurance is taken by a company on behalf of its managing director, whole-time director, manager, Chief Executive Officer, Chief Financial Officer or Company Secretary for indemnifying any of them against any liability in respect of any negligence, default, misfeasance, breach of duty or breach of trust for which they may be guilty in relation to the company, the premium paid on such insurance shall not be treated as part of the remuneration payable to any such personnel.

However, if such person is proved to be guilty, the premium paid on such insurance shall be treated as part of the remuneration. [Section 197(13)]

Disclosure of Remuneration in Board Report [(Section 197 (14))]

Every listed company shall disclose in the Board's report, the ratio of the remuneration of each director to the median employee's remuneration and such other details as may be prescribed.

The central government through rules prescribed the following disclosure by a listed company in its Board's report:

- (i) the ratio of the remuneration of each director to the median remuneration of the employees of the company for the financial year;
- (ii) percentage increase in remuneration of each director and CEO in the financial year;
- (iii) percentage increase in the median remuneration of employees in the financial year;
- (iv) number of permanent employees on the rolls of company;
- (v) explanation on the relationship between average increase in remuneration and company performance;
- (vi) comparison of the remuneration of the Key Managerial Personnel against the performance of the company;
- (vii) variations in the market capitalisation of the company, price earnings ratio as at the closing date of the current financial

year and previous financial year and percentage increase over decrease in the market quotations of the shares of the company in comparison to the rate at which the company came out with the last public offer in case of listed companies, and in case of unlisted companies, the variations in the net worth of the company as at the close of the current financial year and previous financial year;

- (viii) average percentile increase already made in the salaries of employees other than the managerial personnel in the last financial year and its comparison with the percentile increase in the managerial remuneration and justification thereof and point out if there are any exceptional circumstances for increase in the managerial remuneration;
- (ix) comparison of the each remuneration of the Key Managerial Personnel against the performance of the company;
- (x) the key parameters for any variable component of remuneration availed by the directors;
- (xi) the ratio of the remuneration of the highest paid director to that of the employees who are not directors but receive remuneration in excess of the highest paid director during the year;
- (ix) affirmation that the remuneration is as per the remuneration policy of the company.

The board's report shall include a statement showing the name of every employee of the company who-

- (i) if employed throughout the financial year, was in receipt of remuneration for that year which, in the aggregate, was not less than sixty lakh rupees;
- (ii) if employed for a part of the financial year, was in receipt of remuneration for any part of that year, at a rate which, in the aggregate, was not less than five lakh rupees per month;
- (iii) if employed throughout the financial year or part thereof, was in receipt of remuneration in that year which, in the aggregate, or as the case may be, at a rate which, in the aggregate, is in excess of that drawn by the managing director or whole-time director or manager and holds by himself or along with his spouse and dependent children, not less than two percent of the equity shares of the company.

The above statement shall also indicate -

- (i) Designation of the employee;
- (ii) Remuneration received;
- (iii) Nature of employment, whether contractual or otherwise;
- (iv) Qualifications and experience of the employee;
- (v) Date of commencement of employment;
- (vi) The age of such employee;
- (vii) The last employment held by such employee before joining the company;
- (viii) The percentage of equity shares held by the employee in the company within the meaning of sub-clause (iii) of sub-rule (2) above; and
- (ix) Whether any such employee is a relative of any director or manager of the company and if so, name of such director.

The particulars of employees posted and working in a country outside India, not being directors or their relatives, drawing more than 60 lakh rupees per financial year or 5 lakh rupees per month, as the case may be, shall not be included in the above statement of the Board's report but such particulars shall be filed with the Registrar of Companies while filing the financial statement and Board Reports and such particulars shall be made available to any shareholder on a specific request made by him during the course of annual general meeting wherein financial statements for the relevant financial year are proposed to be adopted by shareholders.

Managerial Remuneration under Schedule V (Part II)

Section I : Remuneration by Companies having Profits

A company having profits in a financial year may pay remuneration to its managerial persons in accordance with Section 197.

Section II : Remuneration by Companies having no profits or inadequate profits without Central Government approval

Where in any financial year during the currency of tenure of a managerial person, a company has no profits or its profits are inadequate, it, may, without Central Government approval, pay

remuneration to the managerial person not exceeding the higher of the limits under (A) and (B) below:

(A):

<i>Where the effective capital is</i>	<i>Limit of yearly remuneration payable shall not exceed (Rs)</i>
Negative or less than 5 Crore	30 Lakhs
5 Crore and above but less than 100 Crore	42 Lakhs
100 Crore and above but less than 250 Crore	60 Lakhs
250 Crore and above	60 Lakhs plus 0.01% of the effective capital in excess of Rs. 250 Crore

If a special resolution is passed by the shareholders, the above limits shall be doubled.

Expalanation:- It is hereby clarified that for a period less than oneyear, the limits shall be pro-rated.

(B) In the case of managerial person who was not a shareholder, employee or a Director of the company at any time during the two years prior to his appointment as managerial person- 2.5% of the current relevant profit.

If a special resolution is passed by the shareholders, this limit shall be doubled.

The Schedule V (Part II) also prescribes certain conditions and additional disclosures to be made in the explanatory statement to the notice of the general meeting, where remuneration is required to be paid in accordance with Schedule V.

Remuneration in Special Circumstances (Section III)

Section III of Schedule V provides special circumstances under which companies having no profit or inadequate profit can pay remuneration to its managerial personnel in excess of amount provided in Section II of Schedule V above, without Central Government's approval.

Calculation of Net Profit for the purpose of Managerial Remuneration (Section 198)

Section 198 of the Companies Act, 2013 lays down the manner of

calculations of net profits of a company any financial year for purposes of Section 197. Sub- Section (2) specifies the sums for which credit shall be given and sub-section (3) specifies the sums for which credit shall not be given while calculating the net profit.

Similarly, sub-section (4)/(5) specifies the sums which shall be deducted/not deducted while calculating the net profit.

Recovery of Managerial Remuneration in certain cases (Section 199)

This is a new provision introduced in the new Act. It provides for recovery of remuneration including stock options received by the specified Managerial Personnel, where the benefits given to them are found to be in excess of what is reflected in the restated financial statements.

It states that without prejudice to any liability incurred under the provisions of this Act or any other law for the time being in force, where a company is required to re-state its financial statements due to fraud or non-compliance with any requirement under this Act and the rules made there under, the company shall recover from any past or present managing director or whole-time director or manager or Chief Executive Officer (by whatever name called) who, during the period for which the financial statements are required to be re-stated, received the remuneration (including stock option) in excess of what would have been payable to him as per restatement of financial statements.

Central Government or Company to Fix Remuneration Limit (Section 200)

In respect of cases where the company has inadequate or no profits, the Central Government or a company may fix the remuneration within the limits specified in the Act. While doing so, the Central Government or the company shall have regard to—

- (a) the financial position of the company;
- (b) the remuneration or commission drawn by the individual concerned in any other capacity;
- (c) the remuneration or commission drawn by him from any other company;
- (d) professional qualifications and experience of the individual concerned;
- (e) such other matters as may be prescribed.

As per Rule 13.4 for the purpose of item (e) of section 200, the Central Government or the company shall have regard to the following matters while granting approval:

- (1) Financial and operating performance of the company during the three preceding financial years.
- (2) Relationship between remuneration and performance.
- (3) The principle of proportionality of remuneration within the company, ideally by a rating methodology which compares the remuneration of directors to that of other executive directors on the board and employees or executives of the company.
- (4) Whether remuneration policy for directors differs from remuneration policy for other employees and if so, an explanation for the difference.
- (5) The securities held by the director, including options and details of the shares pledged as at the end of the preceding financial year.

Compensation for Loss of Office of Managing or Whole-time Director or Manager (Section 202)

No change has been made in this Section. It is a reproduction of the Section 318 of the Companies Act, 1956.

Section 202 provides that a company may make payment to a managing or whole-time director or manager, but not to any other director, by way of compensation for loss of office, or as consideration for retirement from office or in connection with such loss or retirement.

However, No payment shall be made in the following cases:—

- (a) where the director resigns from his office as a result of the reconstruction/amalgamation of the company and is appointed as the managing or whole-time director, manager or other officer of the reconstructed company/of resulting company from the amalgamation;
- (b) where the director resigns from his office otherwise than on the reconstruction/ amalgamation of the company;
- (c) where the office of the director is vacated due to disqualification;
- (d) where the company is being wound up due to the negligence or default of the director;

- (e) where the director has been guilty of fraud or breach of trust or gross negligence or mismanagement of the conduct of the affairs of the company or any subsidiary company or holding company; and
- (f) where the director has instigated, or has taken part directly or indirectly in bringing about, the termination of his office.

Any payment made to a managing or whole-time director or manager shall not exceed the remuneration which he would have earned if he had been in office for the remainder of his term or for three years, whichever is shorter, calculated on the basis of the average remuneration actually earned by him during a period of three years immediately preceding the date on which he ceased to hold office, or where he held the office for a lesser period than three years, during such period. (Sub-section 3)

Provided that no such payment shall be made to the director in the event of the commencement of the winding up of the company, whether before or at any time within twelve months after, the date on which he ceased to hold office, if the assets of the company on the winding up, after deducting the expenses thereof, are not sufficient to repay to the shareholders the share capital, including the premiums, if any, contributed by them.

However, Section 202 not prohibit the payment to a managing or whole-time director, or manager, of any remuneration for services rendered by him to the company in any other capacity. (Sub-section 4)

Application to Central Government

Section 201 of the Companies Act, 2013 provides that before any application is made by a company to the Central Government under any of the sections aforesaid, there shall be issued a general notice to the members indicating the nature of the application proposed to be made and 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 at least once in English in an English newspaper circulating in that district.

The copies of the notices, together with a certificate by the company as to the due publication thereof, shall be attached to the application.

The Central Government prescribed that every application made to the Central Government under the provisions of Chapter XIII shall be made in Form No. 13.2.

It further prescribed that the companies other than listed companies and subsidiary of a listed company may without Central Government approval pay remuneration to its managerial person in the event of no profit or inadequate profit beyond ceiling prescribed in section II, part II of Schedule V subject to complying with the following conditions:-

- (i) Payment of remuneration is approved by a resolution passed by the Board and, in the case of a company covered under sub-section (1) of section 178 also by the Nomination and Remuneration Committee, if any and while doing so record in writing clear reason and justification for payment of remuneration beyond the said limit;
- (ii) 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 before the date of appointment of such managerial person;
- (iii) Prior approval of shareholders by way of a special resolution at a general meeting of the company for payment of remuneration for a period not exceeding three years;
- (iv) A statement along-with a notice calling the general meeting referred to clause (iii) of sub-rule (2) above, shall contain the information as per sub clause (iv) of second proviso to clause (B) of section II of part-II of Schedule V of the Act including reasons and justification for payment of remuneration beyond the said limit.

Conclusion

The new Act has considerably liberalised the provisions concerning Managerial Remuneration, subject to adequate disclosures to the shareholders. The necessity of approaching Central Government for approval has been substantially dispensed with.

A synopsis of the modifications made is given below:

1. Now, no approval of the Central Government is required for making payment of salary to Non Executive Directors by way of monthly payment provided it is within the limits provided.
2. The re-appointment of a managerial person cannot be made earlier than one year before the expiry of their term instead of two years as per the existing provision of section 317 of the 1956 Act.

3. Any Director who is in receipt of any commission from the company and who is a Managing Director or Whole-time Director of the Company can also receive any remuneration or commission from any Holding Company or Subsidiary Company of such Company subject to its disclosure by the Company in the Board's Report. This is a departure from the provision in the Companies Act, 1956. Further the directors however cannot accept remuneration or commission from any other Company including Associate Companies.
4. Independent Directors may be paid different Sitting Fees compared to other directors. Independent Directors cannot receive stock options. They may receive remuneration only by way of sitting fees, or reimbursement of expenses for participation in the Board and other meetings or profit related commission as approved by the members of the company.
5. Every Listed Company will have to disclose in the Board's report the ratio of the remuneration of each Director to the median employee's remuneration and such other details as prescribed by the Central Government through the Rules. In view of the widespread debate in the country and abroad on the subject of excessive managerial pay, the purpose of bringing this provision appears to disclose to the shareholders the extent of pay comparison among employees and directors.
6. Premium paid on any insurance policy taken by a Company on behalf of its Managing Director, Whole-Time Director, Manager, Chief Executive Officer, Chief Financial Officer or Company Secretary for indemnifying any of them against any liability in respect of any negligence, default, misfeasance, breach of duty or breach of trust for which they may be guilty in relation to the Company, shall not be treated as part of the remuneration payable to them unless such personnel is proved to be guilty.
7. For remuneration payable to any Director in any other capacity, if such services are of professional nature, no approval of the Central Government is required, when the Nomination and Remuneration Committee or Board of Directors is of the opinion, that the person possesses the necessary qualification for practice of profession.
8. In case of Nil or inadequate profit, the conditions under which the Company can pay remuneration to managerial person has been changed.

SECRETARIAL AUDIT

Secretarial Audit is a compliance audit and it is a part of total compliance management in an organisation. The Secretarial Audit is an effective tool for corporate compliance management. It helps to detect non-compliance and to take corrective measures.

Secretarial Audit is a process to check compliance with the provisions of various laws and rules/ regulations/procedures, maintenance of books, records etc., by an independent professional to ensure that the company has complied with the legal and procedural requirements and also followed the due process. It is essentially a mechanism to monitor compliance with the requirements of stated laws.

Considering the increasing importance of Corporate Governance, **Section 204 of the Companies Act, 2013** mandates every listed company and such other class of prescribed companies to annex a Secretarial Audit Report, given by a company secretary in practice with its Board's report.

The Central Government through rules has prescribed such other class of companies as under-

- (a) every public company having a paid-up share capital of fifty crore rupees or more; or
- (b) every public company having a turnover of two hundred fifty crore rupees or more.

It shall be the duty of the company to give all assistance and facilities to the company secretary in practice, for auditing the secretarial and related records of the company.

The Board of Directors, in their report, shall explain in full any qualification or observation or other remarks made in the Secretarial Audit Report.

Secretarial Audit is an independent, objective assurance intended to add value and improve an organisation's operations. It helps to accomplish the organisation's objectives by bringing a systematic, disciplined approach to evaluate and improve effectiveness of risk management, control, and governance processes.

The Institute in bringing out a detailed Referencer on Secretarial Audit.
