



# The Companies Act 2013

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## E-News Letter

APRIL ISSUE-2015

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**SECRETARIAL AUDIT** is introduced by recently enacted Companies Act, 2013. It Means Verification of Records to Check Compliance with the Provisions of Various laws by an Independent Professional to Ensure that Company has made relevant disclosures.

This Concept of Secretarial Audit was introduced to keep a check on the scams or fraud to ensure all compliances has been made with the provisions of law. Periodically examination of work is necessary to point out errors & mistakes and to make a robust compliance mechanism system in an organization.

Every company needs to comply hundreds of Laws, rules, regulations. These laws are complex and non-compliances would attract major risk to company. Periodically inspecting the records of company gives exact information whether, and if so, to what extent Company has complied with the laws applicable to the Company. Secretarial Audit gives comfort to the regulators, stakeholders and management that company has disciplined approach to evaluate and improve effectiveness of risk management, control, and governance processes.

### **OBJECTIVES OF SECRETARIAL AUDITOR:**

- ✓ **To Protect the Interest of Stakeholders like Employees, Customers etc.**
- ✓ **To Review various statutory Records, Books, Registers maintained under various Acts.**
- ✓ **To Review Meetings of Board and Shareholders.**
- ✓ **To Review Penalties imposed by various Authorities under Various Acts.**
- ✓ **To Ensure Transparency and Responsible Governance of the Organization.**

### **APPLICABILITY UNDER SECTION 204**

- ❖ Every listed company
- ❖ Every public company
  - Having a paid-up share capital of **Fifty Crore** rupees or more; or
  - Having a turnover of **Two Hundred Fifty Crore** rupees or more

“Turnover” means the aggregate value of the Realization of amount made from the sale, supply or distribution of goods or on account of services rendered, or both, by the company during a financial year. [Section 2(91)]

**Note: Secretarial Audit is also mandatory to a private company which is a subsidiary of a public company, and which falls under the prescribed class of companies.**

### **INDEPENDENT PROFESSIONAL TO BE APPOINTED:**

Only a member of the Institute of Company Secretaries of India holding certificate of practice (company secretary in practice) can conduct Secretarial Audit and furnish the Secretarial Audit Report to the Company. He is entitled to acquire all necessary information from officers of Company for the Performance of his duties.

Practicing Company Secretary gives a Secretarial Audit Report which shall be annexed to Board's Report which shall in the format of **Form MR-3**.

### **DUTIES OF SECRETARIAL AUDITOR**



- If during the period of Conduct of Audit, Practicing Company Secretary gathers sufficient reasons to believe that fraud is Conducted against the Company by the officers, then he shall report to the Central Government immediately but not later than 60 days of his knowledge with a copy to Board seeking their reply within 45 days in Form ADT-4.
- Board need to reply in writing to explain the steps taken against the fraud occurred..the auditor will forward his report and reply of the board with its comments to the central government within 15 days of reply received by the board.

## Scope of secretarial audit



A secretarial auditor has to check compliances by the company under the following laws and rules made there-under;

1. The Companies Act, 2013 (the Act) and the rules made there-under;
2. The Securities Contracts (Regulation) Act, 1956 ('SCRA') and the rules made there-under (The Depositories Act, 1996 and the Regulations and Bye-laws framed there-under;
3. Foreign Exchange Management Act, 1999 and the rules and regulations made there-under to the extent of Foreign Direct Investment, Overseas Direct Investment and External Commercial Borrowings;

The following Regulations and Guidelines prescribed under the Securities and Exchange Board of India Act, 1992 ('SEBI Act'):-

- The Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011;
  - The Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992;
  - . The Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009;
  - The Securities and Exchange Board of India (Employee Stock Option Scheme and Employee Stock Purchase Scheme) Guidelines, 1999;
  - The Securities and Exchange Board of India (Issue and Listing of Debt Securities) Regulations, 2008;
  - The Securities and Exchange Board of India (Registrars to an Issue and Share Transfer Agents) Regulations, 1993 regarding the Companies Act and dealing with client;
  - . The Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2009; and
  - The Securities and Exchange Board of India (Buyback of Securities) Regulations, 1998;
4. Secretarial Standards issued by The Institute of Company Secretaries of India.
  5. The Listing Agreements entered into by the Company with Stock Exchange(s), if applicable;
  6. Other laws as may be applicable specifically to the company.

Thus the scope of Secretarial audit is not limited to the corporate laws applicable to company but it extent to all laws applicable to Company.



## **PUNISHMENT FOR NON-COMPLIANCE**

- Section 204(4) of the Companies Act provides that if a Company or any officer of the Company or the Company Secretary in practice, contravenes the provisions of Section 204 of the Act, the Company, every officer of the Company or the Company Secretary in practice, who is in default, shall be Punishable with fine which shall not be less than 1 lakh Rupees but may be extend to 5 lakh rupees.
- Section 143(15) of the Companies Act, 2013, if a Secretarial Auditor , has reason to believe that an offence involving fraud is being or has been committed against the Company by officers or employees of the Company, he shall immediately report the matter to the Central Government within such time and in such manner as prescribed. If failure occurs then fine will be imposed of not less than one lakh Rupees which may extend to twenty five lakh Rupees.

## **CONCLUSION**

Secretarial Audit act as a pre-emptive check to ensure that the Board processes and compliance mechanisms of the Co. are robust thereby generating confidence amongst the shareholders, the creditors and other stakeholders in the Co., besides instilling self regulation and professional discipline in companies. While conducting secretarial audit our professional duties is just not limited to the adherence of laws but also to observer the ethical standard too

## **Circulars**

### **A) General Circular No. 6/2015 clarification under sub-section (7) of section 186 of the Companies Act, 2013 of the Companies Act, 2013**

**Dated 9<sup>th</sup> April 2015**

**Subject: Clarification under Sub-Section (7) Of Section 186 of the Companies Act, 2013**

1. Attention of this Ministry has been drawn to General Circular No 06/2013 dated 14.03.2013 vide which it was clarified that in cases where the effective yield (effective rate of return) on tax free bonds is greater than the yield on prevailing bank rate, there was no violation of Section 372A(31 of Companies Act, 1956. Stakeholders have requested for similar clarification w.r.t. corresponding section 186(7) of the Companies Act' 2013'
2. It is hereby clarified that in cases where the effective yield (effective rate of return) on tax free bonds is greater than the prevailing yield of one year, three year, five year or ten year- Government Security closest to the tenor of the loan, there is no violation of sub-section (7) of section 186 of the Companies Act, 2013.

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3. This issue with the approval of Competent Authority.

### **B) General Circular No. 7/2015 - Clarification with regard to payment for period**

Dated 10<sup>th</sup> April 2015

**Subject: Remuneration to Managerial Person under Schedule (XIII) Of the Companies Act, 1956 - Clarification With Regard To Payment for Period**

1. Stakeholders have drawn attention to the Provisions of Schedule XIII (sixth proviso to Para (C) of Section II of Part II) of the Companies Act, 1956 (Earlier Act) and as clarified vide Circular number 14/11/2012-CL-VII dated 16th August, 2012, which allowed listed companies and their subsidiaries to pay remuneration, without approval of Central Government, in excess of limits specified in Para II Para (C) of such Schedule if the managerial person met the conditions specified therein. Stakeholders have expressed that since similar provisions are not available in the Schedule V of the Companies Act, 2013, there is a need for a clarification that a managerial person appointed in accordance with such provision of Schedule XIII of Earlier Act may receive relevant remuneration for the period as approved by the company in accordance with such provisions of Earlier Act.
2. The matter has been examined in the light of earlier clarifications on transitional matters issued by the Ministry. It is clarified that a managerial person referred to in Para 1 above may continue to receive remuneration for his remaining term in accordance with terms and conditions approved by company as per relevant provisions of Schedule XIII of earlier Act even if the part of his/her tenure falls after 1st April, 2014.
3. This issues with the approval of the competent authority



### **A) The Companies (Auditor Report), 2015**

Dated 10<sup>th</sup> April 2015

In exercise of the powers conferred by sub-section (11) of section 143 of the Companies Act, 2013 (18 of 2013 ) and in supersession of the Companies (Auditor's Report) Order, 2003, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R. 480 (E), dated the 12th June, 2003, except as respects things done or omitted to be done before such supersession, the Central Government, after consultation with the Institute of Chartered Accountants of India. Constituted under the Chartered Accountants Act, 1949 (38 of 1949), hereby makes the following Order, namely:-

- 1) Short title, application and commencement. - (1) this order may be called the Companies (Auditor's Report) Order, 2015.
- 2) It shall apply to every company including a foreign company as defined in clause (42) of section 2 of the Companies Act, 2013 (18 of 2013) [hereinafter referred to as the Companies Act, except –
  - I. A banking company as defined in clause (c) of section 5 of the Banking Regulation Act, 1949 (10 of 1949);
  - II. An insurance company as defined under the Insurance Act, 1938 (4 of 1938);
  - III. A company licensed to operate under section 8 of the Companies Act;

- IV. a One Person Company as defined under clause (62) of section 2 of the Companies Act and a small company as defined under clause (85) of section 2 of the Companies Act; and
- V. a private limited company with a paid up capital and reserves not more than rupees fifty lakh and which does not have loan outstanding exceeding rupees twenty five lakh from any bank or financial institution and does not have a turnover exceeding rupees five crore at any point of time during the financial year.

It shall come into force on the date of its publication in the Official Gazette.

3) Auditor's report to contain matters specified in paragraphs 3 and 4. - Every report made by the auditor under section 143 of the Companies Act, on the accounts of every company examined by him to which this Order applies for the financial year commencing on or after 1st April, 2014, shall contain the matters specified in paragraphs 3 and 4.

4) Matters to be included in the auditor's report. - The auditor's report on the account of a company to which this Order applies shall include a statement on the following matters, namely:-

(i) (a) whether the company is maintaining proper records showing full particulars, including quantitative details and situation of fixed assets;

(b) Whether these fixed assets have been physically verified by the management at reasonable intervals; whether any material discrepancies were noticed on such verification and if so, whether the same have been properly dealt with in the books of account;

(ii)(a) Whether physical verification of inventory has been conducted at reasonable intervals by the management;

(b) Are the procedures of physical verification of inventory followed by the management reasonable and adequate in relation to the size of the company and the nature of its business? If not, the inadequacies in such procedures should be reported;

(c) Whether the company is maintaining proper records of inventory and whether any material discrepancies were noticed on physical verification and if so, whether the same have been properly dealt with in the books of account;

(iii) Whether the company has granted any loans, secured or unsecured to companies, firms or other parties covered in the register maintained under section 189 of the Companies Act. If so, (a) whether receipt of the principal amount and interest are also regular; and (b) if overdue amount is more than rupees one lakh, whether reasonable steps have been taken by the company for recovery of the principal and interest;

(iv) Is there an adequate internal control system commensurate with the size of the company and the nature of its business, for the purchase of inventory and fixed assets and for the sale of goods and services? Whether there is a continuing failure to correct major weaknesses in internal control system.

(v) in case the company has accepted deposits, whether the directives issued by the Reserve Bank of India and the provisions of sections 73 to 76 or any other relevant provisions of the Companies Act and the rules framed there under, where applicable, have been complied with? If not, the nature of contraventions should be stated; If an order has been passed by Company Law Board or National Company Law Tribunal or Reserve Bank of India or any court or any other tribunal, whether the same has been complied with or not?

(vi) Where maintenance of cost records has been specified by the Central Government under sub-section (l) of section 148 of the Companies Act, whether such accounts and records have been made and maintained:

(vii) (a) is the company regular in depositing undisputed statutory dues including provident fund, employees' state insurance, income-tax, sales-tax, wealth tax, service tax, duty of customs, duty of excise, value added tax cess and any other statutory dues with the appropriate authorities and if not, the extent of the arrears of outstanding statutory dues as at the last day of the financial year concerned for a period of more than six months from the date they became payable, shall be indicated by the auditor.

(b) in case dues of income tax or sales tax or wealth tax or service tax or duty of customs or duty of excise or value added tax or cess have not been deposited on account of any dispute, then the amounts involved and the forum where dispute is pending shall be mentioned. (A mere representation to the concerned Department shall not constitute a dispute).

(c) whether the amount required to be transferred to investor education and protection fund in accordance with the relevant provisions of the Companies Act, 1956 (1 of 1956) and rules made there under has been transferred to such fund within time.

(viii) whether in case of a company which has been registered for a period not less than five years, its accumulated losses at the end of the financial year are not less than fifty per cent of its net worth and whether it has incurred cash losses in such financial year and in the immediately preceding financial year;

(ix) Whether the company has defaulted in repayment of dues to a financial institution or bank or debenture holders? if yes, the period and amount of default to be reported:

(x) whether the company has given any guarantee for loans taken by others from bank or financial institutions, the terms and conditions whereof are prejudicial to the interest of the company;

(xi) Whether term loans were applied for the purpose for which the loans were obtained;

(xii) whether any fraud on or by the company has been noticed or reported during the year; If yes, the nature and the amount involved is to be indicated.

5) - Reasons to be stated for unfavorable or qualified answers.-

- a) Where, in the auditor's report, the answer to any of the questions referred to in paragraph 3 is unfavorable or qualified, the auditor's report shall also state the reasons for such unfavorable or qualified answer, as the case may be.
- b) Where the auditor is unable to express any opinion in answer to a particular question, his report shall indicate such fact together with the reasons why it is not possible for him to give an answer to such question

- The Companies (Acceptance of Deposits) Amendment Rules, 2015;



- **Procedure for Buy Back of Securities;**
- **Delegation of powers to RD u/s94(5) read with section 458 of The Companies act,2013;**
- **Guidelines for issuing secretarial audit issued by ICSI;**
- **Appointment of ROC as an Adjudicating Officers with jurisdiction and their appellate authorities u/s 454 of The Companies Act, 2013;**
- **Listing Agreement Compliance;**
- **Procedure to Issue and Redemption of Preference Shares;**
- **Procedure relating to Incorporation of Companies;**
- **The Companies( Management and Administration ) Amendment Rules, 2015;**
- **The Companies (Meeting of Boards and their Powers) Amendment Rules,2015;**
- **Appointment and Qualification of Directors;**
- **Procedure for Appointment of Managerial Personnel;**
- **Alteration in Memorandum and Articles of a company;**
- **Procedure for Voting under The Companies Act ,2013;**
- **Notified Secretarial Standards;**

### **Editors Column**

An Initiative by [www.thecompaniesact2013.com](http://www.thecompaniesact2013.com)

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