

## **Salient Features of the Companies (Amendment) Act, 1988**

G.K. KAPOOR\*

**The Companies (Amendment) Act, 1988 has introduced a number of amendments of far reaching effects. The author lists the important amendments and explains them. Students as well as professionals would find the article as a comprehensive compendium for ready reference.**

The *Companies (Amendment) Act, 1988* was finally passed by both Houses of the Parliament and it received the Presidential assent in May, 1988. The Act has been made operative from June 15, 1988 except Schedule XIV which was declared to have retrospective effect from April 2, 1987. However, at the time of writing of this article certain provisions were not given effect to, particularly those relating to: (1) the constitution of an independent Company Law Board and the consequent provisions transferring certain powers from the Central Government and Courts to such a Board; (2) the prescription of limits (in certain cases only, eg., under Sections 370 and 372); (3) the prescription of necessary fee or charges; (eg., under Sections 111, 130 and 610); and (4) prescription of necessary formats (e.g., under Sections 56 and 219).

The following are the Sections which were not made operative by the notification of June 10, 1988: Sections 5, 10E, 10F, 56A, 111, 113(3), 130, 155, 156, 217(1)(e), 219, 235, 236, 237, 241, 245, 247, 248, 250, 251, 70, 372, 383A, 610, 621A, 634A, 635, 637 637A, 640A and 640B. The following sections have been made operative from 15th July, 1988 vide

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\*The author is Former Deputy Director (Studies), Institute of Chartered Accountants of India and presently he is at Shaheed Bhagat Singh College, Delhi University.

its notification dated 13.7.1988 : Section 5, Section 610, Section 637A, and Sections 118, 144, 163 & 196 (in so far as they relate to prescriptions of fees)

Relatively more important amendments are discussed below in order of Section numbers.

### **Definition of Secretary**

#### ***Section 2 (45) & 2 (45A)***

The definition of the term 'Secretary' has been amended to mean a Company Secretary within the meaning of Section 2(1)(c) of the *Company Secretaries Act 1980* and shall include any other individual possessing the prescribed qualifications and appointed to perform the duties which may be performed by a Secretary under this Act and any other ministerial and administrative duties.

Section 2(45A) defines the concept of 'Secretary in whole time practice' to mean a Secretary who shall be deemed to be in practice within the meaning of Section 2(2) of the *Company Secretaries Act, 1980* and who is not in full time employment.

### **Officer in Default**

#### ***Section 5***

The expression 'Officer in Default' has been now defined to mean all the following officers of the company :

- (a) Managing Director or Managing Directors;
- (b) Whole-time Director or whole-time Directors;
- (c) Manager;
- (d) Secretary;
- (e) Any person in accordance with whose directions or instructions the Board of Directors of the company is accustomed to act;
- (f) Any person charged by the Board with the responsibility of complying with that provisions provided that the person so charged has given his consent in this behalf to the Board;
- (g) Where any company does not have any of the officers specified in clauses (a) to (c), any Director or Directors who may be specified by the Board in this behalf or where no Director is so specified, all the Directors:

However, where the Board exercises any power under clause (f) or clause (g), 'it shall, within thirty days of the exercise of such powers, file with the Registrar a return in the prescribed form'.



The changed definition of 'officer who is in default' has omitted the words 'who is knowingly guilty of the default' and the words 'who knowingly or wilfully authorises or permits such default', which, according to some experts, means that the presence of guilty mind in the commission of an offence or the concept of 'mens-rea' needs not be imputed while prosecuting the official specified in the amended Section 5. Others, however, feel that the Government's intention is not—cannot be—to take away the right of a person to seek exoneration in situations where he/she is not really guilty.

Further, apprehension is being expressed in certain quarters that under pressure a person may give his consent to take responsibility contemplated under clause (f) of the amended sections. This could have been upheld as correct in terms of the original Bill, but in view of the use of the word 'all' to qualify the list of persons who shall constitute officers in default, the suggested apprehension does not seem to have much ground.

### **Company Law Board**

#### *Section 10E and 10F*

These sections contemplate the constitution of an independent Board to be called the Board of Company Law Administration with its powers scattered over a number of provisions of the Companies Act. In fact, some of the powers which earlier vested with the Central Government or the Court shall now vest in this Board. The following are the Sections under which the stated substitution has been done or certain additional powers have been conferred on the Board: Sections 58A, 80A, 111, 113, 235, 236, 237, 241, 248, 250, 251, 269, 408, 610, 621A and 640A.

The members of the Board shall be appointed by the Central Government and shall have qualifications to be, once again, prescribed by the Government.

### **Signing the Declaration**

#### *Section 33*

Under this Section, for signing the declaration, 'a chartered accountant in whole-time practice in India' has been substituted for 'a chartered accountant practising in India' and the expression is defined to mean a chartered accountant who is not in full time employment. Besides, a Secretary who has been engaged in the formation of a company has also been empowered to sign the declaration.

### **Deemed Public Company**

#### *Section 43A*

Significant amendments have been made in this section:



### *Section 43(1)*

A private company shall, by virtue of 25 percent or more of its paid-up share capital being held by other body corporate or bodies corporate, be deemed as a public company only if the body corporate so holding is a 'public company' or a 'deemed public company'. In other words, if 25 percent or more of the paid-up share capital is held by a private company or a foreign company, it shall not be deemed so. Besides, as per the already existing provision, where the specified percentage is held by a banking company as a trustee or executor for any individual or individuals, the private company shall not be deemed as public company. The general exceptions as contained in Section 43(6) and 43(7) have also been withdrawn by deleting these sub-sections. This has been rightly done to prevent their misuse.

### *Section 43A(1A)*

The limit of rupees one crore under the turnover criterion has been substituted by the words 'to be prescribed by the Central Government' and the Central Government has prescribed this limit as five crores vide notification dated June 10.

### *Section 43A (1B)*

Besides the aforesaid criterion, a private company shall also be deemed as a public company where it holds 25% or more of the paid-up capital of a public company. This is as per the existing provision of Section 43A(1B).

### *Section 43A (1C)*

This section is a new addition and contemplates a new criterion for accepting deposits by an advertisement or or renewing such deposits for deeming a private company as public company.

Thus the position under Section 43A may be summarised as follows :

A private company shall be deemed as a public company in the following cases :

- (a) Where it invites public deposits through an advertisement;
- (b) It holds 25% or more of the paid up share capital of a public company;
- (c) It has public company(ies) or deemed public company(ies) as its shareholders holding 25% or more of its paid-up share capital;
- (d) Its average annual turnover for the previous three consecutive financial years is rupees five crores or more.

### **Prospectus**

### *Section 56*

This section requires a company to deliver a document containing salient features of a

prospectus, in place of prospectus along with the application form. However, the company shall have to provide a copy of the prospectus to anyone who may so demand.

### **Repayment of Deposits**

#### **Section 58A**

Sub-section (9) has been added to safeguard the interest of the depositors in view of the failure of certain companies to meet their obligation as per the terms and conditions of deposits.

The Company Law Board may in such cases of failure, either on its or on an application by the depositor, direct the company to pay the deposit within the specified time and subject to the specified conditions.

### **Listing of Public Issues**

#### **Section 73**

This section makes listing of all public issues of shares or debentures compulsory and where the permission has not been applied for or refused, the money must be repaid within eight days. Failure to pay within eight days will make the company and every Director in default to repay with interest @ 4% to 15% (to be prescribed depending on the delay).

### **Issue of Irredeemable Preference Shares**

#### **Section 80**

Section 80 now prohibits issue of irredeemable preference shares or preference shares redeemable beyond ten years.

### **Time Limit to Redeem Irredeemable Preference Shares**

#### **Section 80A**

This newly introduced section requires companies to redeem irredeemable preference shares, if any, within five years. The shares may be redeemed even by issue of redeemable preference shares. In case of failure, penal consequences include fine upto Rs. 1,000 for every day during which default continues. Further, no dividends or transfer of profits to reserves shall be permitted (Section 205).

### **Currency of Transfer Forms**

#### **Section 108**

The currency of transfer forms has been extended from two months to twelve months.



## **Omitted Sections**

### **Section 108**

These sections have been omitted since these were transferred to MRTTP Act in 1984.

## **Refusal to Register Transfer**

### **Section 111**

In case of refusal to register a transfer, an appeal can be made to the Company Law Board within two months from the date of receipt of the notice of such refusal. Company Law Board has been empowered to even award compensation as an alternate remedy.

## **Registration of Charges**

### **Section 125**

A charge may now be registered within 30 days (in place of seven days) after the expiry of the initial period of 30 days on payment of additional fee.

## **Demand for Poll**

### **Section 179**

The amendment now provides that a demand for poll can only be made by shareholders having some minimum interest : not less than 1/10th of total voting power; or paid-up value of shares held not less than Rs. 50,000.

## **Delinking of Depreciation under Companies Act and Income Tax Act**

### **Section 205**

The omission of the words 'the *Indian Income Tax Act 1922* or the rules made there-under' from Section 205(2)(d) and 350 shall have the effect of permitting companies to provide depreciation as per Schedule XIV appended to the Act. Since the rates under Schedule XIV are much lower than under Income-tax Act, larger book profits will be available to companies.

## **Unclaimed Dividends**

### **Section 205A**

The total amount of dividend remaining unclaimed or unpaid within 42 days of declaration must be deposited in the unpaid dividends account.

## **Books of Accounts**

### **Section 209**

Section 209(3) now makes it obligatory on companies to maintain accounts on accrual basis and according to double entry system of accounting.

## **Report of Board of Directors**

### **Section 217**

The amended section requires the report of the Board of Directors to contain information relating to conservation of energy, technology absorption, foreign exchange earnings and outgo, in such manner as may be prescribed.

Further, sub-section 2A and the subsequent notification issued thereunder now require information about only those employees whose salary is Rs. 6,000 per month of Rs. 72,000 per year, or more.

## **Abridged Version of Balance-sheet and P&L Account**

### **Section 219**

Section 219, as amended, gives a choice to the listed companies either to send detailed accounts to its shareholders or a statement containing only the salient features, to be prescribed later.

However, even after a company sending the salient features of accounts to its shareholders, it is obliged to send a copy of detailed accounts free of cost to a shareholder in case he demands for the same within 21 days before the meeting.

The accounts and documents need not be sent to debentureholders unless specifically demanded. However, these shall be required to be sent to the trustees of the debentureholders.

## **Adoption of Accounts**

### **Section 220**

If the accounts are not adopted in any annual general meeting or the meeting is adjourned without adopting the accounts, it will be obligatory to report the reasons for the same to the Registrar.

## **Appointment of Auditors**

### **Section 224 (1B)**

The amended section prohibits the appointment of any person who is in full time employment elsewhere. Similarly, for counting the number of audits per partner in the case of a firm of auditors, a partner who is in full time employment elsewhere is not to be counted.

## **Compulsory Appointment of Managing/Wholetime Director or Manager**

### **Section 269**

- (1) The amendment in this section and the notification issued thereunder now provide that every public limited company or subsidiary of a public limited company



having a paid-up capital of rupees one crore or more must have a Managing Director or wholetime Director or Manager.

(2) For appointment of a Managing Director/wholetime Director or a Manager, approval of the Central Government will not be necessary if the following conditions are satisfied :

- (a) He had not been sentenced to imprisonment for any period or to a fine exceeding one thousand rupees for conviction of an offence under the fourteen Acts mentioned in Schedule XIII.
- (b) He had not been detained for any period under the *Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974*;
- (c) He has completed the age of 30 years but has not attained the age of 65 years;
- (d) He is not a Managing Director or wholetime Director or Manager or in any way in wholetime employment elsewhere;
- (e) He is a citizen of India and is a resident in India;
- (f) The Company had not suffered loss or had inadequacy of profits preceding financial year immediate to the financial year in which appointment is made or in any of the three financial years in the four financial years immediately preceding.

(3) In case any of the conditions are not complied with, an application must be made to the Central Government within 90 days of appointment. If the appointment is not approved by the Central Government, the appointee shall vacate the office immediately on communication of the decision by the Central Government. If the Central Government has once given its approval to the appointment of a person convicted or detained in paras (a) or (b) above, no subsequent approval on those grounds would be required.

### **Ceiling for Appointment of Relatives of Directors**

#### **Section 314**

This section is amended to omit the absolute monetary ceiling of monthly remuneration of Rs. 500 and Rs. 3,000 and the words 'to be prescribed by the Central Government' have been substituted. The Government by its notification of June 10, 1988 has provided as follows :



**Table 1 Rates of Managerial Remuneration**

Effective capital	Maximum monthly salary	Maximum annual commission in addition to salary subject to a ceiling of 1% of profits and 50% of salary	Maximum annual commission where salary is not paid
Rs.	Rs.	Rs.	Rs.
Less than 20 lakhs	6,000	36,000	1,08,000
20 lakhs or more but less than 50 lakhs	7,500	45,000	1,35,000
50 lakhs or more but less than 100 lakhs	9,000	54,000	1,62,000
100 lakhs or more but less than 300 lakhs	11,000	66,000	1,98,000
300 lakhs or more but less than 500 lakhs	13,000	78,000	2,34,000
500 lakhs or more	15,000	90,000	2,70,000

- (1) The total monthly remuneration for the purposes of clause (b) of sub-section (1) of Section 314, shall be not less than rupees three thousand or more; and
- (2) The total monthly remuneration, for the purposes of sub-section (1B) of Section 314, shall be not less than rupees six thousand.

### **Managerial Remuneration**

#### **Sections 310, 311 & Schedule XIV**

Salary (including Dearness Allowance) and commission can be calculated on the basis of effective capital which includes paid-up share capital, reserves and surplus (including capital reserve, revaluation reserve, debenture redemption reserve), long-term loans and deposits as reduced by investments, accumulated losses and preliminary expenses not written off. Schedule XIII gives the rates in Table 1 of remuneration that may be payable as per the effective capital of the company :

#### **Perquisites**

In addition to salary and commission as above, perquisites like housing, medical reimbursement, leave travel concession, club fee etc., may also be allowed to managerial personnel equal to annual salary of Rs. 1.35 lakhs per annum whichever is less in case the

position has been posted at Delhi, Bombay, Calcutta or Madras and in other cases Rs. 1.15 lakhs per annum. Perquisites have been classified into three categories and the new Schedule XIII clearly specifies the limits of the value of perquisites.

### *Increase in Managerial Remuneration*

Sections 310 and 311 have been amended to the effect: (a) that for any increase in the remuneration, Central Government approval shall not be required so long as the increase is within the prescribed ceilings provided under Schedule XIII. Under Section 310 the sitting fee payable to a Director for each meeting of the Board of Directors or a committee thereof shall not exceed the following limits given in Table 2 vide Notification No. GSR No. 694(E) dated June 10, 1988 :

**Table 2 Sitting Fee Payable to Directors**

Companies having paid up share capital	Maximum sitting fee Rs.
Upto Rs. 50 lakhs	250
More than Rs. 50 lakhs and upto Rs. 5 crores	500
More than Rs. 5 crores and upto Rs. 10 crores	750
Above Rs. 10 crores	1,000

### **Depreciation Method**

#### *Section 350*

Amendment to Section 350 has raised a controversy about depreciation method to be adopted for purposes of calculating managerial remuneration. The substitution of the expression "at the rate specified in Schedule XIV" in place of "at the rate specified for the assets by the *Indian Income-tax Act, 1922* and the rules made thereunder" and the option between SLM and WDV rates suggested under Schedule XIV have created an impression that SLM rates of Schedule XIV may be applied to the WDV as at the end of the previous financial year. Since the concept of WDV is inconsistent with the SLM, such an inference does not sound very logical. However, the Institute is approaching the Department of Company Affairs for issuing necessary clarification on this point and other related issues.