Welcome provisions in the Companies Act 2013

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Some crucial and basic definitions and provisions in the Companies Act, 1956 are ambiguous and unclear. Earlier attempts to clarify the exact legal position were found inadequate. Now, in the Companies Act, 2013 sufficient steps have been taken to remove such anomalies and ambiguities and provide clarity. This article makes a summary of the welcome changes made in the 2013 Act.

Introduction

1. After various attempts, the first of which commenced in the year 1993, the Government achieved success in the year 2013 in legislating a new Companies Act, which received the assent of the President of India on 29thAugust, 2013 and has been christened as Companies Act, 2013 ('2013 Act'). Some crucial definitions and provisions in the Companies Act, 1956 ('1956 Act') are ambiguous and unclear. Attempts were made by the DCA (now 'MCA') to clarify the exact legal position through circulars, opinions, notifications, etc. Now, in the 2013 Act, sufficient steps have been taken to remove such anomalies and ambiguities.

Director

2. 'Director', has been defined in the 1956 Act and includes any person occupying the position of director, by whatever name called. The definition has expressions 'include' and 'by whatever name called'. It means that any person who is not appointed or designated as director may be regarded as director and that a director need not be a person who sits on the Board but can also be a person, who directs, superintends the affairs of the company. As per the 1956 Act, any person who has substantive powers (but not appointed as director) can be a director. In the 2013 Act, the director is defined in clause (34) of section 2 to mean a director appointed to the Board of a company. Therefore, being a part of the Board of directors of the company is a prerequisite for a person to be director. This is a welcome change because in the 2013 Act, significant duties, responsibilities and liabilities have been casted on the directors of company. Therefore, specifically saying that "This person is a director" has now become important under the 2013 Act.

Member

3. 'Member' has been defined in sub-section (3) of section 41 of the 1956 Act as "Every person holding equity share capital of company and whose name is entered as beneficial owner in the records of the depository shall be deemed to be a member of the concerned company". So, there was a confusion that if a person holds preference shares and his name is entered as beneficial owner in the depository records, whether he will be a member or not. And if the preference shareholder is a member of the company, then why is section 41(3) drafted in such a way ? The confusion has been done away by defining 'member' in sub-clause (iii) of clause (55) of section 2 of the 2013 Act as "Every person holding shares of the company and whose name is entered as a beneficial owner in the records of a depository". The word 'equity' from the definition of 1956 Act has been deleted. And now, it is clear that any person holding shares (equity or preference) and whose name is entered as a beneficial owner in the records of a depository would be a member – This is one of the 3 criteria.

Whole-time director

4. 'Whole-time director' ('WTD') is defined in an Explanation to section 269 of the 1956 Act and includes a director in the whole-time employment of the company. Section 269 of the 1956 Act is applicable only to public company or a private company which is a subsidiary of public company ; having prescribed paid-up share capital. WTD is not defined for private company. In the 2013 Act, WTD has been defined in clause (94) of section 2 and includes a director in the whole-time employment of the company". The definition is now applicable to all companies unlike the 1956 Act.

Bonus shares

5. 'Bonus shares' was not defined in the 1956 Act. Only references of bonus shares are made in clause (a) of sub-section (2) of section 78 which relates to application of securities premium account and proviso to section 205(3) which related to dividend and regulations 96 and 97 of Schedule I of the Table A. Due to the ambiguous position regarding the issue of bonus shares, there were conflicting opinions in the past regarding the utilisation of revaluation reserves (created out by revaluation of fixed assets) for issue of bonus shares. Now, in section 63 of the 2013 Act, 'Issue of bonus shares' has been defined along with the sources from which fully paid bonus shares can be issued and specifically stated in that "no issue of bonus shares shall be made by capitalising reserves created by the revaluation of assets". It is now clearly stated that revaluation reserves cannot be used for issuing bonus shares. Further, the bonus issue is subject to six conditions as mentioned in sub-section (2) of section 63. The six conditions are similar to conditions and restrictions as mentioned in Chapter IX of the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 relating to 'bonus issue'.

Reopening of books of accounts

6. As per 1956 the Act, there is no provision relating to re-opening/revising of annual accounts of the company. In 1977, DCA had opined that a company could not reopen and revise their accounts after their adoption at the annual general meeting ('AGM'). In 1987, there was a partial modification stating that a company can revise the balance sheet only for meeting technical requirements of the tax laws. However, the term 'technical requirements of the tax laws' was not defined. Therefore, the position relating to 'reopening of the book of accounts' was found ambiguous and unclear. Section 130 of the 2013 Act relates to "re-opening of accounts on court's or Tribunal's orders". A company can reopen and recast its financial statements only after making an application to Central Government, the income-tax authorities, SEBI and other

statutory regulatory bodies or authority or any person concerned and an order is made by a court of competent jurisdiction or the National Company Law Tribunal ('NCLT'). Further, such re-opening is subject to satisfaction of any one of the following conditions :

- The relevant earlier accounts were prepared in a fraudulent manner.
- The affairs of the company were mismanaged during the relevant period, casting a doubt on the reliability of financial statements.

Therefore, even though the reopening of accounts under the 2013 Act seems to be a cumbersome process and would be limited only for the two reasons mentioned in section 130 of the 2013 Act, we can say that at least there is a provision for reopening of books of account and the ambiguous concept of "Technical requirements of the tax laws" now stands clarified to an extent.

Additional director

7. The provision regarding appointment of additional director was contained in section 260 of the 1956 Act. The additional director can be appointed if provided in the articles of association of the company and that such additional director shall hold office only up to the date of the next AGM of the company. The question that arose was what if the AGM was not held ? In Krishnprasad Pilani v. Colaba Land & Mills Co. Ltd [1959] 29 Comp Cas 273 (Bom.), it was held that the tenure of the additional director automatically comes to an end at AGM. He ceases to be a director either on the day on which the next AGM is actually held or on the last day on which the AGM should have been as per the statutory period laid down in section 166 (read with section 210) and cannot continue to hold thereafter. Sub-section (1) of section 161 of 2013 Act relates to appointment of additional director and states that the articles of association of a company may confer on its Board of directors the power to appoint an additional director at any time who shall hold office up to the date of the next AGM or the last date on which the AGM should have been held, whichever is earlier. Therefore, according to the 2013 Act the tenure of the additional director is clearly determined rather than supported by way of judgment.

Alternate director

8. Appointment of alternate director was provided in section 313 of 1956 Act. The section stated that absence of original director for a period of not less than three months from the State in which Board meetings are ordinarily held will be the reason for appointment of an alternate director. Following were the ambiguities in the provision :

- The terms 'State' and 'Board meetings are ordinarily held' were not defined in section 313 ?
- Can an alternate director be appointed for two original directors ?
- If answer to above point is yes, whether to consider such alternate director twice for the purpose of quorum ?
- If answer to above point is yes, how will the votes be counted ?

Sub-section (2) of section 161 of the 2013 Act; makes it clear that an alternate director may be appointed for a director (i.e., original) during his absence for a period of not less than three months from India. So, the phrase "his absence for a period of not less than three months from the State in which meetings of the Board are ordinarily held" has been done away with. Sub-section (2) of section 161 further makes it clear that a person cannot be appointed as alternate director for more than one director in the company. Therefore, all ambiguities (as mentioned above) have been resolved by having a clear provision in sub-section (2).

Resolution by circulation

9. The provisions relating to passing of resolution by circulation was provided in section 289 of the 1956 Act. As per the provisions, the draft resolution together with requisite papers are required to be sent to all the directors or committee members in India at their usual address in India. Section 289 does not contemplate the noting of the circular resolution in the minutes of subsequent meeting. It is done as a good corporate secretarial practice by companies. As per sub-section (1)of section 175 of the 2013 Act ; the company may send the draft resolution along with necessary paper to all directors and committee members at –

(i) their addresses registered with the company in India by hand delivery ;or

(ii) their addresses registered with the company in India by post ; or

(iii) their addresses registered with the company in India by courier ; or

(iv) through such electronic means.

Therefore, four modes on sending the draft resolution and relevant papers have been provided for and the same shall be sent to all the directors of the company (and not the directors in India). Further, it has now become mandatory (because of the word 'shall' in sub-section (2) of section 175 to note the circular resolution that has been passed, in the minutes of subsequent Board meeting or committee meeting, as the case may be.

Conclusion

10. The 2013 Act has taken into consideration the anomalies/absurdities in the definitions of 1956 Act and has been drafted accordingly to address many of them. The revised definitions are well-defined that one need not wait for the MCA to issue any circulars, opinions, notifications or for any court judgment. The revisions covered above are just a few to mention. There are many similar revisions/additions in the 2013 Act which are worth welcoming and will simplify the day-to-day working of companies in India.