

Volume - 1 (November, 2010)



KNOWLEDGE CONNECT

A monthly newsletter by *R & A Associates,
Company Secretaries*



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<http://www.rna-cs.com>

Partners' Column

Dear All,

A wise man once said: 'The difficult things of the world were once easy. The great things of life were once small.' Indeed, a journey of a thousand miles always begins with one small step.

Today when I look at R&A - the buzzing office in the heart of the city, the enthusiasm of the staff, and of course, the increasing business opportunities - this truism strikes me in the face. My mind travels back in time, to that day fourteen years ago, when I along with Raghu Babu formed R & A to fulfill my dream of creating a successful organization of Company Secretaries in lines with the big four firm of Chartered Accountants.

When we started this company, it was a small, humble venture, but slowly and steadily we have grown and now after thirteen years we have become a grand one-shop solution that all corporates would desire; a company that provides with unparalleled expertise all legal services that a corporate would ever require. It fills me with

warmth to have in this company a team of hard-working professionals who make sure that we maintain and live up to our two top priorities: the quality of our services, and their timely delivery. Undoubtedly, it is this that has made us so reputed and respected today.

But surely, a company doesn't raise itself to success simply because of a team of professionals with a very good knowledge base. As I ponder, I realize that we stand where we are today not because we are all skilled in our vocation, but because we work together and get along as one big family. To me, R&A is a family that is founded on mutual trust and confidence, and it is this that will take us further. For we have certainly not reached the top of the ladder - as the company expands, our vision too grows broader. As we stop at this juncture to savour the sweet taste of our current achievements, let us remember that there is much promise in the years to come, there are many more successes to be conquered.

As Robert Frost says in a poem:

**THE WOODS ARE LOVELY, DARK AND DEEP,
BUT I HAVE PROMISES TO KEEP,
AND MILES TO GO BEFORE I SLEEP,
AND MILES TO GO BEFORE I SLEEP...**

With kind regards,

CS. Rashida Adenwala,
Partner

Compliance Calendar

Listed below are the Common Compliances during **25th October to 25th November:-**

S. No.	Compliance	Form to be filed	Relevant Law	Due Date
1.	Annual Filings <ul style="list-style-type: none"> Balance Sheet and P & L Account; Compliance Certificate Annual Return 	Form 23AC & ACA; 66 Form 20B	Companies Act, 1956	*Within 30 days from the date of Annual General Meeting Within 60 days from the date of Annual General Meeting
2.	Service Tax Monthly Return	TR-6	Service Tax Rules, 1994	5 th November
3.	Profession Tax Monthly Return	Form V	Andhra Pradesh Tax on Professions, Trades, Callings and Employments Act, 1987.	10 th November
4.	Consolidated Statement of dues & Remittances	Form 12A	Employees' Provident Funds Scheme, 1952	25 th October & November
5.	Return of Employees	Form 5	Employees' Provident Funds Scheme, 1952	15 th November
6.	Return of Members leaving the organisation	Form 10	Employees' Provident Funds Scheme, 1952	15 th November
7.	ESI monthly deposit	ESI Challan	Employees State Insurance Act, 1948	20 th November

MCA has requested to file the Annual Filings in the specified alphabetical order, to avoid congestion and last minute rush. Click here for recommended [Filing dates](#).

Compliances under Listing Agreement

S. No.	Compliance	Relevant Clause of Listing Agreement/ Regulation	Due Date
For the Quarter ended on 30th September, 2010			
1.	Intimation for holding of Board Meeting for taking on record the unaudited results for the quarter ended on 30 th September 2010)	Clause 41	9 days in advance of the Board Meeting
2.	News Paper Advertisement about Board Meeting to consider quarterly results	Clause 41	Immediately on informing the Stock Exchanges
3.	Announcement of Quarterly Results by fax. (Simultaneously courier them to Stock Exchanges and display it in the website of the Company)	Clause 41	Within 15 minutes of the Closure of the Board meeting in which the results were considered
4.	Publish Quarterly Results	Clause 41	Within 48 hours of the conclusion of the Board Meeting
5.	Limited Review Report (If company is publishing Unaudited Results for the September, 2010 Quarter)	Clause 41	15 th November, 2010
6.	Certificate regarding physical Share Transfers	Clause 47	31 st October, 2010
7.	Submission of Reconciliation of Share Capital Audit	SEBI (Depositories & Participants) Regulations -1996	30 th October, 2010

Note: Quaterly Results should be approved within 45 days from the end of quarter.

Updates / Amendments

Reserve Bank of India	
<p><u>Consolidated FDI Policy</u></p> <p>Circular 2 of 2010</p> <p>September 29, 2010</p>	<p>To have a transparent, simple and clear Foreign Direct Investment (“FDI”) policy framework, the Department of Industrial Policy and Promotion (“DIPP”) had issued Circular No. 1 on 31 March, 2010, consolidating all prior policies/regulations, including the extant Reserve Bank of India (“RBI”) Master Circular on FDI.</p> <p>With an objective to issue an updated FDI policy every 6 months, bringing into one document all changes brought in vide various Press Notes, Press Releases, Clarifications, the DIPP has issued Consolidated Circular No. 2 (“Circular”) on 29 September, 2010. This Circular will be effective from 1 October, 2010.</p>

General amendments / clarifications as per above FDI Policy

Partly Paid shares and Warrants - It is clarified that issue of partly paid shares and warrants to persons resident outside India would be permitted after prior approval from the Government. However, these instruments would not be considered as part of ‘capital’ of the company.

Share Swaps - The DIPP has introduced a specific clause mentioning allowability of share swap transactions with prior Foreign Investment Promotion Board (“FIPB”) approval. Valuation of the shares will need to be undertaken by Category 1 merchant banker registered with Securities Exchange Board of India (“SEBI”) or a registered investment banker in the host country.

Valuation Norms - For issue / transfer of shares, the valuation norms have been updated to reflect valuation based on discounted cash flow methodology

Internal Accruals - Downstream investments are now permissible through use of internal accruals, subject to such investments complying with sectoral caps / policy

Existing venture/Tie-up - It is clarified that approval requirements will apply to all “new proposals” in the same field and not only to “new joint ventures”

Share Premium - For sectors having minimum capitalisation norms [such as Non Banking Finance Companies (“NBFC”) and construction development projects], it has been clarified that share premium received along with face value of the shares upon issue of the shares to non-resident investors would be counted as part of minimum capitalisation requirement.

Sectoral Amendments / Clarifications

Agriculture - 100% FDI under automatic route is allowed for undertaking certain agriculture activities and animal husbandry, subject to undertaking the same under 'controlled conditions'. The term 'controlled conditions' has now been defined in respect of 'floriculture/horticulture/cultivation of vegetables and mushrooms'; 'development of seeds'; 'animal husbandry'; and 'pisciculture & aquaculture'

Construction Development Projects - "Original investment" has been clarified to mean the entire amount brought in as FDI. Further, the lock-in period of three years will be applied from the date of receipt of each installment / tranche of FDI or from the date of completion of minimum capitalisation, whichever is later

NBFC - It is clarified that 100% foreign owned NBFCs, with minimum capitalisation of \$50 million, can set up subsidiaries for specific NBFC activities, without having to meet minimum capitalisation norms for such downstream subsidiaries

Wholesale Trading - The operational guidelines have been amended to remove the condition of "sales to group companies should only be for their internal use". However, the condition of sales between group companies being limited to maximum 25% of the turnover of the wholesale company still continues

Manufacturing of Tobacco products - Based on policy issued earlier this year, manufacture of Cigars, Cheroots, Cigarillos and Cigarettes, of Tobacco or of Tobacco substitutes has been included in the list of sectors/activities in which FDI is prohibited

Mining - FDI for separation of Titanium bearing minerals and ores was allowed subject to value addition facilities being set up within India along with transfer of technology. The concept of what will constitute value addition has been expressly stated

Telecom - General conditions, such as manner of computing FDI, adherence to License agreement, source of FDI etc, have also now been made applicable to companies operating telecom services with the FDI cap of 49%. This is in addition to the security conditions which are already applicable to companies operating telecom services with the FDI cap of 49%.

Residuary Sectors - For sectors not mentioned under sector specific policy for FDI (Chapter 5 of the Circular), it has been stated that 100% FDI under automatic route will be allowed, subject to applicable laws / sectoral rule / regulations. Vide this change, sectors such as "Business Services, Advertising and Films, Alcohol distillation & brewing, coffee & rubber processing and warehousing, drugs & pharmaceuticals, hotels & tourism, etc" have been removed from Chapter 5.

Important Case Laws

Companies Act, 1956

(1) Restriction on free transferability of shares of a "Public Company" - upheld

Case Law:

Messer Holdings Limited v. Shyam Madanmohan Ruia & ors.

Dated 1 September 2010 (Bom)

Brief of Judgement:

In case of a "public company", the agreements between the shareholders which provides for restrictions on free transferability of shares are to be respected as they are not in contravention of Section 111A of the Companies Act 1956 (the Act). It further held that unless there are specific restrictions in the Articles of Association (the Articles) relating to transfer of shares, the Act does not expressly restrict or curtail the right of shareholders to enter into consensual arrangement / agreement in respect of shares held by them.

(2) Transferability of Tenancy Rights on Amalgamation

Case Law:

Speedline Agencies v. T Stanes & Co. Ltd.

Dated 14th May, 2010 (SC)

Case No. 397

Brief of Judgement:

In the case of "Amalgamation" between landlord company (transferor) with the tenant company (transferee), the landlord company will lose its tenancy rights under **Sections 391 to 394 read with section 10(2)(ii)(a) of Tamil Nadu Buildings (Lease and Rent Control) Act, 1960**. In amalgamation it amounts to transfer all its asset to the transferee company and in the given case the amalgamating company is the landlord and on amalgamation all its assets get transferred to the transferee company. The transferee company becomes the landlord succeeding to all rights including the vested rights of landlord, which are also not affected because of any delayed decision on the proceedings by an evicted tenant taken under the Rent Control Act.

(3) Restriction on Redemption of Preference Shares

Case Law:

Aurobindo Pharma Ltd., In re. (AP)

AP High Court

Case No. 372

Brief of Judgment:

The Company redeemed the Preference Shares out of Capital Redemption Reserve ('CRR') without obtaining sanction of the company court under sections 100 to 103 is illegal. Further, where preference shares are redeemed not by issue of shares for the purpose but otherwise than from the proceeds of fresh issue of shares, the profits can be transferred to CRR only when there is a resolution of the Board of directors to that effect. In the absence of such a resolution, the creation of CRR and transfer of profits itself is ultra vires of the provision of the Act. The court cannot approve reduction of capital post facto more so when it amounts to approving illegal and ultra vires transaction.

(4) Reduction of Share Capital by paying off Non - Promoter Shareholders

Case Law:

Organon (India) Ltd., In re.

Bombay High Court

Case No. 480

Brief of Judgment:

The Listed Company (petitioner) passes a special resolution for reduction of share capital by paying off non-promoter equity shareholders, by providing an option of exit to them on the basis of fair valuation of shares made by the valuers and based on cogent reason. The present case is not open to the court to withhold sanction to reduction of capital unless there is some patent unfairness regarding the fair value of the shares or there is lack of an overwhelming majority of non-promoter shareholders who voted in favour the resolution and also not because of the consequences of the Delisting of Shares, consequent upon public shareholding falling below 10 per cent. The proposed reduction of shareholding is liable to be allowed, when the valuation made by the valuers is fair and based on cogent reasoning.

Legal Jargon

The two Latin phrases “*de facto*” and “*de jure*” are often found in use together, drawing a line between practices which are commonly accepted and practices which are actually legally endorsed.

1. **de facto**

Meaning:

an expression indicating the actual state of circumstances independently of any question of right or title. It means "in practice but not necessarily ordained by law".

Examples:

'de facto' racial discrimination or segregation in the USA during the fifties and sixties was simply discrimination that was *not* segregation by law

Pronunciation:

The first word can be pronounced in two different ways. The "e" can either be pronounced like the "ay" in "day" or like the "ee" in "feed", "need" and "deed". The "fact" is pronounced like the word "fact" and the final "o" sounds like the "oe" in "toe", "foe", and "hoe". The main stress is on the first syllable of "facto".

2. **de jure**

Meaning:

“in accordance with the law”; “In law: independent of what obtains in fact”

Examples:

“de jure government” to refer to a government which rules legally and with the consent of the people, in contrast with a de facto government, which takes control of a country by force

Pronunciation:

The first word can be pronounced in two different ways. The "e" can either be pronounced like the "ay" in "day" or like the "ee" in "feed" and "deed". The "ju re" is pronounced as “jooor - ey”.

News from R & A



Elevation of Mrs. Rashida Adenwala, Partner:

We are very pleased to inform that Mrs. Rashida Adenwala, the founder Partner of R & A has been inducted into the Board of DQ Entertainment (International) Limited (<http://www.dataquestinfoway.com>), as a Professional Director (effective from 1st Oct 2010). We once again congratulate Mrs. Rashida Adenwala, on behalf of Team - R & A and wish her great innings on DQ Board.



14th Foundation Day Celebrations:

Everyday is a new beginning which unravels new vistas for R & A since it was founded on 23rd October, 1996. Foundation Day marks the visualisation of Ms. Rashida Adenwala, who in 1996 saw a vision of an outstanding firm of Company Secretaries and this vision is being taken forward by Mr. Raghu Babu and Mr. Ramakrishna, Partners and other members of R & A Family as well. Its now into its Fourteenth Year of excellence. Those who have witnessed the journey of R & A down the years are ecstatic to see its development and progress over these years.

R & A takes this opportunity to acknowledge and extend its heartfelt gratitude to all the Clients - Corporate Directors, Company Secretaries and other Management Executives, all the Practising Professionals including Company Secretaries, Chartered Accountants, Advocates, etc., and all others whom it dealt with, for their continuous assistance and co-operation. Also R & A appreciates the commitment and dedication of the members of R & A Family at all levels.

All members of R & A Family are preparing with enthusiasm to make the Foundation Day a grand success paving the way to another successful year.

Article for the Month

Remuneration of Directors in a Private Limited Company

- by CS. T. Sandhya & CS. Bhavani

Introduction

Regulation on payment of directors' remuneration becomes necessary for several reasons, prominent among them being, prevention of diversion of corporate funds for personal use and unduly high executive rewards.

For Public Limited Companies the provisions under Companies Act, 1956 and the Corporate Governance requirements as per the Listing Agreement, would regulate the remuneration paid to the Directors. But, for Private Limited Companies, are there any provisions which regulate the payment of Directors' Remuneration? Many of us are under the impression that there are no provisions restricting the amount of remuneration payable to a Director in a Private Limited Company and hence we conclude that any amount can be paid as remuneration. It may also be argued that in a closely held companies where promoters and the Directors are same, there will not arise the diversion of corporate funds for personal use and hence no restrictions are posed.

A director is neither an employee nor an agent of the Company. He is holding fiduciary relation with the Company.

In general, remuneration of whatever nomenclature can be paid to any person for his services as mentioned below:

- a) rendering services as an employee
- b) supply of services as an consultant or agent

Even a Director is paid in a similar manner. It is here, the regulation of remuneration to be paid to the Director comes in force. Let us look at how the provisions of Companies Act, 1956, indirectly regulate the remuneration paid to the Directors in a Private Limited Company.

Governing Law

The following regulate the payment of remuneration to Directors in a Private Limited Company:

- (1) Companies Act, 1956
- (2) Contract of Employment

Companies Act, 1956

Though there are no direct provisions controlling on payment of remuneration to Directors in a Private Limited Company, there are certain provisions which regulate the payment made to Directors. They are:

Articles of Association:

If a Company has an Article on Appointment and mechanism to make

the payment of remuneration to a Director, the Company has to abide by such regulation. But this should be in addition to the conditions under the provisions of Companies Act, 1956 and other laws.

Schedule VI:

As per Schedule VI - Part II (4), the Profit & Loss Account shall contain by way of note, the detailed information with respect to remuneration, commissions payable, other allowances and commission, perquisites or benefits in cash or in kind, pension, etc.

Irrespective of the nature of remuneration paid to the Directors, the same needs to be disclosed under the Notes to Accounts of the Final Accounts.

Section 297:

Subject to the provisions of Section 297 of Companies Act, 1956, inter alia, a Director cannot enter into contract with the Company for supply of services without the Board's consent. Such consent may be obtained either before the contract is entered or within three months of the date on which the contract was entered into. Further, if the paid-up capital of the Company is Rs.1 Crore or more then the prior approval of Central Government is a must. Such approval of Central Government is a prior approval and no remuneration can be paid when the application is pending for approval.

However, the following payments do not fall under the purview of Section

297:

- (1) If the Director is being paid as an employee of the Company
- (2) If the Director is being paid for professional services, other than the Director, in his professional capacity.

If payment is being made to a Director, who is not an employee of the Company, then it can be made only for rendering of services under the professional capacity such as advocate, CA, CS, etc. If not, Board's consent is a must and if required, prior approval of Central Government is also required.

If consent is not obtained, the Contract is voidable at the option of the Board.

Section 314:

If the Director obtains from the Company anything by way of remuneration over and above the remuneration to which he is entitled as a Director, then Members' consent by way of special resolution is required. However, this is not required in case of remuneration to Managing Directors or Managers.

Though, Whole Time Director is not explicitly exempted from Section 314, the remuneration paid to him does not fall under the purview of Section 314, as he is paid for his whole time employment.

Another, exception even here is - payment to Directors for the services rendered in their professional capacity.

The non-compliance of Section 314 leads to the vacation of such office for which he is being paid in excess to his entitlement as a Director and he has to return to the Company all the remuneration which he has already received.

Employment Contract

The remuneration payable would also be subject to the terms and conditions for remuneration under the Employment Contract, if any.

Taxability of Remuneration

Remuneration, Salary, Commission, Perquisites, Sitting Fees, etc., whatever the form of payment, it is taxable under the Income Tax Act, 1961 either under the head "Income from Salary" (if Director is an employee) or under the head "Profits from Business or Profession" (if Director is an agent - supplier of services) in the receiver's hand. Tax is deductible at source.

Conclusion

Even a Private Limited Company must have a credible and transparent policy in determining and accounting for the remuneration of the directors. Directors or Promoters of a Private Companies cannot simply divert the funds from corporate accounts to their personal accounts in the name of remuneration, to reduce the tax burdens or for any other reason.

If it has to pay the remuneration, it has to disclose the details of payment and

comply with the provisions of Section 297 and 314, wherever applicable, to obtain the necessary approvals.

Crux is to consider the following while determining the payment of remuneration to a Director of Private Limited Company:

- Director should be an employee or Managing Director or Manager of the Company
- If Director is an employee, he would be eligible for all the benefits such as gratuity, insurance, provident fund, etc. Hence the compliance of such Acts should be verified.
- If Director is neither an employee nor a Managing Director / Manager, he can be paid for only the services under professional capacity.
- If (1) or (3) are not applicable, the provisions of Section 297 and 314 are to be complied to the required extent:-
 - Under Section 297 - Board's Consent and/or prior approval of Central Government has to be obtained, else the contract is voidable at the option of Board of Directors (Central Government approval is required in case the paid up capital is Rs.1 Crore or more)
 - Under Section 314 - Members' approval as special resolution is required, else the Director has to vacate the office for which he is receiving excess remuneration and has to refund the company the remuneration received so far.

Demysify Law

The National Green Tribunal Act, 2010

- by CS. G. Raghu Babu & Ashish

The National Green Tribunal Act 2010 ("NGT") has come into force on June 2, 2010.

Object: NGT provides for establishment of National Green Tribunal- a special fast-track court for speedy disposal of environment-related civil cases. It is meant towards an effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal rights relating to environment wherein it is included within the scope of the NGT to give relief and compensation for damages to persons and property.

Applicability: This law is applicable to all categories of persons such as an individual, a Hindu undivided family, a company, a firm, an association of persons or a body of individuals, whether incorporated or not, trustee of a trust, a local authority, and every artificial juridical person, not falling within any of the preceding persons

Scope of the Act: The Act provides that the NGT shall have the jurisdiction over all civil cases where a substantial question relating to environment (including enforcement of any legal right relating to environment) is involved besides the questions which arise out of the implementation of the specified enactments. The power to provide for "relief and compensation to the victims of pollution and other environmental damage, for restitution of property damaged" and restitution of environment" is also within the purview of the NGT.

Criteria & Eligibility: The NGT shall hear

the disputes and settle such disputes as well shall pass order thereon. It shall be noted that no application for adjudication of dispute under this section shall be entertained by the Tribunal unless it is made within a period of six months from the date on which the cause of action for such dispute first arose.

Penalty: Whoever fails to comply with any order or award or decision of the NGT under this Act, he shall be punishable with imprisonment for a term which may extend to three years, or with fine which may extend to Rs. 10 crores, or with both and in case the failure or contravention continues, with additional fine which may extend to Rs. 25000 for every day during which such failure or contravention continues after conviction for the first such failure or contravention. In case company fails to comply with any order or award or a decision of the NGT under this Act, such company shall be punishable with fine which may extend to Rs. 25 crores, and in case the failure or contravention continues, with additional fine which may extend to Rs. 1.00 lac for every day during which such failure or contravention continues after conviction for the first such failure or contravention.

The gazette copy can be accessed @ <http://www.indg.in/rural-energy/policy-support/National%20green%20tribunal%20act.pdf>

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