Appointment of Auditors (Sec 139) Part-2

(Continued from Geeta Saar 101)

4.1 Appointment of statutory auditor at the annual general meeting *(Continued)*

(i) Rule 3 deals with the manner and procedure of selection and appointment of auditors:

(a) Sub-rule (1) of rule 3 provides that audit committee constituted under section 177 and in cases where such a committee is not required to be constituted, the board, shall take into consideration the qualifications and experience of the individual or the firm proposed to be considered for appointment as auditor and whether such qualifications and experience are commensurate with the size and requirements of the company. However, while considering the appointment, due regard shall be given to any order or pending proceeding relating to professional matters of conduct against the proposed auditor before the Institute of Chartered Accountants of India or any competent authority or any Court.

The audit committee or the board, as the case may be, may call for such other information from the proposed auditor as it may deem fit.

(b) In case where the company is required to constitute audit committee, the committee shall recommend the name of an individual or a firm as auditor to the board for consideration. If the Board agrees with the recommendation of the audit committee made under sub-rule (3), it shall further recommend the appointment of an individual or a firm as auditor to the members in the annual general meeting. If the board disagrees with the recommendation of the audit committee, it shall refer back the recommendation to the committee for reconsideration citing reasons for such disagreement. If the audit committee decides not to reconsider its original recommendation after considering the reasons given by the board, the board is required to record reasons for its disagreement with the committee and send its own recommendation for consideration of the members in the annual general meeting. If the board agrees with the recommendations of the audit committee, it shall place the matter for consideration by members in the annual general meeting.

(c) In other cases, the board shall consider and recommend an individual or a firm as auditor to the members in the annual general meeting for appointment.

(ii) Certificate/declarations to be furnished by auditor before appointment: As per sub-rule (1) of rule 4, auditor appointed under rule 3 shall submit a certificate that:

(a) the individual or the firm, as the case may be, is eligible for appointment and is not disqualified for appointment under the Act, the Chartered Accountants Act, 1949 and the rules or regulations made thereunder;
(b) the proposed appointment is as per the term provided under the Act;
(c) the proposed appointment is within the limits laid down by or under the authority of the Act;
(d) the list of proceedings against the auditor or audit firm or any partner of the audit firm pending with respect to professional matters of conduct, as disclosed in the certificate, is true and correct.

(iii) Analysis of sub-section (1) of section 139 and its provisos vis-à-vis other provisions:

Before proceeding to discuss on the manner and procedure of selection of auditors by the members, it is pertinent to analyse the intent and purpose of sub-section (1) of section 139.

Sub-section (1) of section 139 provides for appointment of auditors at the Annual General Meeting. It does not provide for various other modes of appointment of auditors in special circumstances under the Act. Other sub-sections of section 139 deals with such special circumstances.

That is the reason that sub-section (1) of section 139 starts with the expression “subject to the provisions of this chapter”.

Further, sub-section (1) of section 139 has 4 provisos. In order to understand the coverage and applicability of provisos to sub-section (1) of section 139, the meaning of proviso in the context of sub-section (1) of section 139 needs to be understood.

The general object of a proviso is to except something from the main clause or to qualify or restrain its generality and prevent mis-interpretation. The object of the proviso being to carve out from a main section a class or category to the main section which does not apply, though in exceptional cases, the proviso may be substantive provision itself.

It is a fundamental rule of construction that a proper canon of construing a section, is to read the section and the proviso as a whole and give a meaning to the whole of the section along with the proviso which has comprehensive and logical meaning. The principle is that while interpreting a statutory provision, the enacting clause, saving clause and proviso, taken and construed together is to prevail. It is not necessary for the purpose of making a proviso applicable to the entire section to repeat it after each clause of that section. The proviso is really in the nature of an exception which takes a

clause out of the operation of the main section. In Saradambal v. Seethalakshmi *[MANU/TN/0197/1962, A.I.R. 1962 Mad 108]* the Madras High Court held that in the absence of a special indication to show that the proviso to a section is limited to one part of it normally, the proviso governs the entire section and further that it is not necessary for the purpose of making a proviso applicable to the entire section to repeat it under each sub-section.

The Honourable Supreme Court in The Sales Tax Commissioner, etc., v. B.G. Patel, etc. *[MANU/SC/0930/1995: JT 1995(6) SC 271]*, has held that:

"It is settled law that the proviso of the main part of the Rule are to be harmoniously read to and interpreted to give effect to the object of the provision. *[Kareem Vs. State of Kerala (2001) (Kerala High Court)]*"

(iv) Analysis of proviso to sub-section (1) of section 139:

(a) First proviso to sub-section (1) deals with ratification of appointment at every annual general meeting. It is pertinent to note the ratification of appointment is only applicable in case of appointment under operating part of sub-section (1) of section 139 and therefore, this proviso clearly indicates and establishes the fact that it applies to appointment made at the ensuing AGM till conclusion of sixth AGM.

(b) Second proviso provides that, before such appointment is made, the written consent of the auditor to such appointment, and a certificate from him or it that the appointment, if made, shall be in accordance with the conditions as may be prescribed, shall be obtained from the auditor. Rule 4 provides for content of such certificate.

(c) Further, third proviso states that the certificate shall also indicate whether the auditor satisfies the criteria provided in section 141 which provides for eligibility, qualifications and disqualifications of auditors.

As per one school of thought, harmonious reading of sub-section (1) of section 139, 141 with rule 3 and 4 clearly requires a company to obtain written consent of the auditor and a certificate from him or it, that the appointment, if made, shall be in accordance with the conditions as may be prescribed irrespective of the fact whether the proposed auditor is required to be appointed as a first auditor or auditor of a government company by C&AG or in case of casual vacancy etc. Further, it may be noted here that the powers of the Board, C&AG are also limited in scope and has to be exercised keeping in mind the terms and conditions of exercising such powers.

On the other hand, supporters of rule of literal interpretation argue that all the four provisos to sub-section (1) of section 139 applies only to subsection (1) and therefore, does not apply in case of appointment of auditor under other

provisions i.e. provisions except under sub-section (1) of section 139) of the Act.

(d) Fourth proviso read with rule 4(2) states that the company shall inform the auditor concerned of his or its appointment, and also file a notice of such appointment with the Registrar within 15 days of the meeting in which the auditor is appointed in Form ADT 1.

Arguments in favour of filing of ADT -1 in case of all appointments: In fourth proviso to sub-section (1) of section 139, the legislature has used the words "fifteen days of the meeting". If the legislature wanted to restrict scope of this proviso only to the extent of appointments made at the annual general meeting, then the legislature could have used the words "15 days of the annual general meeting". However, the legislature has chosen the words "fifteen days of the meeting".

In view of the intent of the legislature and keeping other provisions of sub-section 139, 141 of the Act in mind and also, in absence of a special indication to show that the proviso to this sub- section (1) of section 139 is limited to this sub-section only, the proviso will govern the entire section and further that it is not necessary for the purpose of making a proviso applicable to the entire section to repeat it under each sub-section and hence, the requirement relating to informing the auditor concerned of his or its appointment, and also of filing a notice of such appointment with the Registrar within 15 days of the meeting in which the auditor is appointed has to be complied with in case of all appointments made under section 139 and not only those appointments which are made pursuant to operating part of sub-section (1) of section 139.

Further, the sub-sections (5) and (6) of section 139 of the Act starts with the expression "notwithstanding anything contained in sub-section (1)". However, this expression is superfluous in these sub-sections as subsection (1) of section 139 of the Act already started with the expression "subject to the provisions of this chapter". Further, even sub-section (2) of section 139 overrides sub-section (1) as long as it is contrary to the mandate given in sub-section (1) as sub-section (1) starts with a phrase "subject to the provisions of this Chapter,".

It is well settled that the expression 'notwithstanding' is in contradistinction to the phrase 'subject to', to the latter conveying the idea of a provision yielding place to another provision or other provisions to which it is made subject.

Further, in Chandavarkar Sita Ratna Rao v. Ashalata S Guram *[1987 AIR 117]*, the Court observed as under with regard to the effect of a non obstante clause:

"A clause beginning with the expression "notwithstanding anything contained" in this Act or in some particular provision in the Act or in some particular Act or in any law for the time being in force, or in any contract" is more often than not appended to a section in the beginning with a view, to give the enacting part of the section in case of conflict an overriding effect over the provision of the Act or the contract mentioned in the non obstante clause. It is equivalent to saying that in spite of the

provision of the Act or any other Act mentioned in the non obstante clause or any contract or document mentioned the enactment following it will have its full operation or that the provisions embraced in the non obstante clause would not be an impediment for an operation of the enactment. See in this connection the observations of this Court in South India Corp. (P) Ltd. v. Secretary, Board of Revenue, Trivandrum."

It is a well settled principle that non obstante clause carves out an exception to the operation of provisions. "The Apex Court has held in CM. Kokil and Ors. case (supra) that a non obstante clause is a legislative device which is usually employed to give overriding effect to certain provisions over some other contrary provisions that may be found either in the same enactment or some other enactment and to avoid the operation and effect of all contrary provisions." *[Das and Company v.Collector of Central Excise 2001 (75) ECC 330 (CESTAT, New Delhi)]*

Looking at the purpose of using the expression "notwithstanding anything contained in sub-section (1)" it is amply clear that the authority for appointment, period of appointment is the matter which is contrary to power given to shareholders under sub-section (1) of section 139 and due to the same, sub-section (5) and (6) have an overriding effect over sub-section (1). As stated earlier, sub-section (5) and (6) would have overridden sub-section (1) of section 139 even without the usage of the expression "notwithstanding anything contained in sub-section (1)". This is a classic case for harmonious construction.

Argument against filing of ADT-1 in case of appointment of First Auditor, appointment of auditor of a government Company : As stated in analysis under proviso (3) of sub-section (1) of section 139, supporters of rule of literal interpretation argue that all the four provisos to sub-section (1) of section 139 applies only to sub-section (1) and therefore, does not apply in case of appointment of auditor under other provisions i.e. provisions except under sub-section (1) of section 139) of the Act. Sub section (5), (6) and (7) have non-obstante clause and the provisions sub section (1) are not applicable in case of appointment of first auditor and appointment of auditor of a government company and hence no requirement of filing of Form ADT-1.

(To be continued...)

Contents of Geeta Saar, as extracted from ICSI Premier on Company Law, is as per notified law as on 30th September, 2016.