

## Removal and Resignation of Auditor (Sec 140) Part-2

*(Continued from Geeta Saar 104)*

### 6. Filing of resignation of auditor

As per sub-section (2) of section 140 of the Act read with rule 8, the auditor who has resigned from the company shall file within a period of 30 days from the date of resignation, a statement in the e-form ADT - 3 with the company and the Registrar. Further, in case of Government Companies and other companies referred to in subsection (5) of section 139, the auditor shall also file such statement with the C&AG. Such statement shall indicate the reasons and other facts as may be relevant with regard to his resignation.

As per reading of this sub-section, it is clear that the Auditor has to file form ADT - 3 with two parties i.e. the company and also, the Registrar of Companies and in case it is a government company, additionally to C&AG, indicating the reasons and other facts as may be relevant with regard to his resignation.

Practically, e-form ADT - 3 is filed online with the Registrar and therefore, once the auditor files e-form ADT-3 online along with copy of resignation letter indicating therein the reasons and other facts as may be relevant with regard to his resignation, the same can be sent/forwarded to the company along with copy of payment challan. Further, in case of Government Company, the e-form ADT-3 along with copy of payment challan is also to be forwarded to the C&AG. While no time period has been prescribed, the same can be forwarded after filing the resignation with the Registrar.

### 7. Appointment of auditor other than a retiring auditor

As per sub-section (4) of section 140 of the Act, special notice shall be required for a resolution at an annual general meeting for:

- (a) appointing as auditor a person other than a retiring auditor, or
- (b) Providing expressly that a retiring auditor shall not be re-appointed, except where the retiring auditor has completed a consecutive tenure of five years or, as the case may be, ten years, as provided under sub-section (2) of section 139.

In case of ratification of appointment of Auditor, if a member gives a notice that the appointment of auditor not be ratified and another auditor be appointed, then another auditor be appointed by passing ordinary resolution.

Section 115 read with rule 23 of Companies (Management and Administration) Rules, 2014 deals with resolutions requiring special notice. It provides that where, by any provision contained in this Act or in the articles of a company, special notice

is required of any resolution, notice of the intention to move such resolution shall be given to the company by such number of members holding not less than one per cent of total voting power or holding shares on which such aggregate sum not less than 5 lakh rupees has been paid-up on the date of notice. Such notice is required to be sent by members to the company not earlier than three months but at least 14 days before the date of the meeting at which the resolution is to be moved. Such period shall exclude the day on which the notice is given and the day of the meeting. The company is required to immediately after receipt of the notice, give its members notice of the resolution at least seven days before the meeting, exclusive of the day of dispatch of notice and day of the meeting. Such notice is required to be given in the same manner as a notice of any general meeting. Where it is not practicable to give the notice in such manner, the notice shall be published in English language in English newspaper and in vernacular language in a vernacular newspaper, both having wide circulation in the State where the registered office of the company is situated and such notice shall also be posted on the website, if any, of the company.

The notice shall be published at least seven days before the meeting, exclusive of the day of publication of the notice and day of the meeting.

As per clause (ii) of sub-section (4) of section 140, on receipt of notice of such a resolution, the company shall forthwith send a copy thereof to the retiring auditor.

**Auditor's right to representation:** As provided in clause (iii) of sub-section (4) of section 140, where notice of such a resolution is given and the retiring auditor makes with respect thereto representation in writing to the company (not exceeding a reasonable length) and requests its notification to members of the company, the company shall, unless the representation is received by it too late for it to do so,

- (a) in any notice of the resolution given to members of the company, state the fact of the representation having been made; and
- (b) send a copy of the representation to every member of the company to whom notice of the meeting is sent, whether before or after the receipt of the representation by the company.

If a copy of the representation is not sent as aforesaid because it was received too late or because of the company's default, the auditor may (without prejudice to his right to be heard orally) require that the representation shall be read out at the meeting.

If a copy of representation is not sent as aforesaid, a copy thereof shall be filed with the Registrar.

If the Tribunal is satisfied on an application either of the company or of any other aggrieved person that the rights conferred by this sub-section are being abused by the auditor, then, the copy of the representation may not be sent and the

representation need not be read out at the meeting. Rule 78 of National Company Law Tribunal Rules, 2016 provides for filling of such application.

## 8. Relevant MCA Circulars

1. **Notice under sub-section (2) of section 225 if not forwarded to the retiring auditors, would render the resolution for appointment or removal of auditors illegal and ineffective.**

The effect of non-forwarding of notice under section 225(2) to the retiring auditors has been examined by the company Law Board in consultation with the Ministry of Law.

The Board has been advised that such an omission would make the resolution for appointing or removing auditors illegal and ineffective. The object of section 225 is to see that a special notice of a resolution to be moved at an AGM for appointing or removing an auditor is given to the company, that the retiring auditor receives a copy of the notice of such a resolution and that he shall have the right to make representations in writing to the company and, where practicable, to call upon the company to send a copy of the representation to every member of the company. The use of the expressions 'shall be required', 'shall forthwith send', etc., occurring in the said section 225 show that the provisions of the section are mandatory in nature and must, therefore, be strictly complied with. Further any resolution requiring special notice must comply with the requirements of section 190. Contravention of the provision of section 225 would attract penalty to the company under section 629A. Further, if the new auditor, being a chartered accountant in practice, accepts the position as auditor previously held by a retiring auditor, being another chartered accountant in practice, without first /disqualifications of auditors communication with him in writing, the new auditor shall be deemed to be guilty of professional misconduct as contemplated by clause (8) of the First Schedule to the Chartered Accountants Act, 1949. Finally, if the appointment is accepted by the new auditor, without first ascertaining from the company whether the requirements of section 225 in respect of such appointment had been complied with, that would attract clause (9) of the First Schedule to the Chartered Accountants Act, 1949. [Circular: No. 35/6/68-CL-III, dated 18th November, 1969]

2. **Appointing another person as an auditor, without mentioning the words 'instead of him' or 'in place of retiring auditor' in the resolution/special notice is sufficient compliance under section 225(1).**

A point has been raised as to whether the words 'other than a retiring auditor' occurring in section 225(1) should be mentioned in the special notice under section 225(1) while proposing a new person to be appointed as auditor and whether the words 'instead of him' should be mentioned in the resolution

passed in the AGM appointing a person other than a retiring auditor as an auditor of the company under clause (c) of section 224(2).

The issue has been examined in detail and this Department is of the view that the provisions of section 225(1) or clause (c) of section 224(2) do not require that the words 'other than a retiring auditor' or 'instead of him' should be specifically mentioned either in the special notice or in the resolution of the AGM respectively. Since the reappointment of the retiring auditor is not automatic and a specific resolution for the reappointment of the retiring auditor is a must and in the absence of such a resolution the term of the retiring auditor shall automatically come to an end at the conclusion of the AGM, these words have no specific meaning attached to them. These words are suggestive only to indicate a new person and are not the mandatory requirement of law requiring these words to be included in the special notice under section 225(1) or in the resolution passed under clause (c) of section 224(2). Thus, passing of a resolution in the AGM appointing another person as an auditor of the company without mentioning the words "instead of him" is quite sufficient and valid under clause (c) of section 224(2) and similarly a special notice proposing to move a resolution to appoint a new persons as an auditor of the company without mentioning the words 'in place of retiring auditor' is sufficient compliance under section 225(1). [Circular: No. 22/76[35/4/76-CL-III], dated 26th June, 1976]

## 9. Tribunal's power to direct the company to change its auditors in certain circumstances

As per sub-section (5) of section 140 of the Act, without prejudice to any action under the provisions of this Act or any other law for the time being in force, the Tribunal either:

- (a) Suo motu or
- (b) on an application made to it by the Central Government or
- (c) by any person concerned, if it is satisfied that the auditor of a company has, whether directly or indirectly, acted in a fraudulent manner or abetted or colluded in any fraud by, or in relation to, the company or its directors or officers, it may, by order, direct the company to change its auditors. This right is exercised without any prejudice to any action under any provisions under the Act or any other law for the time being in force.

If the application is made by the Central Government and the Tribunal is satisfied that any change of the auditor is required, it shall within fifteen days of receipt of such application, make an order that he shall not function as an auditor and the Central Government may appoint another auditor in his place.

The application by the concern person shall be in Form NCLT-1, while application by Central Government shall be in NCLT-9.

An auditor, whether individual or firm, against whom final order has been passed by the Tribunal under this section shall not be eligible to be appointed as an auditor of any company for a period of five years from the date of passing of the order and the auditor shall also be liable for action under section 447. As per the Explanation I appended to the section, in case of a firm, the liability shall be of the firm and that of every partner or partners who acted in a fraudulent manner or abetted or colluded in any fraud by, or in relation to, the company or its director or officers.

## 10. Punishment and Compoundability

For contravention by the company of provisions of this section, sub-section (1) of section 147 will be applicable. (For detailed analysis, refer commentary on section 147). As per sub-section (3) of section 140 of the Act, if the auditor does not comply with sub-section (2), he or it shall be punishable with fine which shall not be less than Rs. 50,000 but which may extend to Rs. 5,00,000. The said offence by auditor or firm is not compoundable.

The Companies (Amendment) Bill, 2016, proposes to substitute the minimum fine of Rs. 50,000 with “fifty thousand rupees or the remuneration of the auditor, whichever is less”.

*(Concluded)*

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