

Re-opening of accounts on Court's or Tribunal's orders (Sec 130)

1. Legislative background

The notes on clauses to the Companies Bill, 2011 read as follows:

“This is a new section which seeks to provide for the re-opening of books of accounts and recasting its financial statements on an order by the competent court or Tribunal if it was found that earlier accounts were prepared in fraudulent manner or financial statements are not reliable due to mismanagement of affairs of the company.”

The 57th Report of the Standing Committee on Finance on the Companies Bill, 2011 sheds further light upon the same in the part of 'New Provisions introduced in Companies Bill, 2011'. It states as follows while dealing with Clause 130 and 131 (corresponding with respective sections): “Re-opening of accounts by companies after obtaining approval of Tribunal: The change proposes to provide procedural requirement in respect of revision in accounts in certain cases. The present law is silent in respect of re-opening or recasting of accounts. In certain cases, particularly, in cases relating to fraud, there may be need to re-open/ re-cast accounts to reflect true and fair accounts. In case of Satyam case, such recasting was ordered by Court. The provisions in the Bill mandate such re-opening on the order of Court or Tribunal. In other cases the re-opening is being permitted, through order of Tribunal, with adequate safeguards.”

Further while stating that the reasons other than fraud and mismanagement is not covered in this section, it stated as follows in Part 4.3 of 'Suggestions on the Companies Bill, 2011': “The powers of the Tribunal to permit re-opening or re-casting should be extended in addition to incidents of fraud or mismanagement, to an event of a manifest or patent error and for any other reason that the Tribunal may deem just and proper.: The suggestion made is already covered under provisions of clause 131 of the Bill. (Voluntary Revision of Financial Statement or Board's report).”

2. Position under Companies Act, 1956

Under the Companies Act, 1956, there were no express provisions dealing with this situation. However, significant guidance was given by the circulars which were issued. Further, ICAI had issued a guidance note in 1979 on Auditor's Report on revised accounts of the company before circulation to shareholders. In the year 1987, the Department has clarified vide circular dated 28.07.1987 that a company could reopen and revise its accounts even after their adoption in the annual general meeting in order to comply with technical requirements of taxation laws and further adopt the revised annual accounts in the subsequent annual general meeting and file with the Registrar.

Later on vide General Circular No. 1/2003 dated 13.01.2003, the Department has mentioned that “It is hereby clarified that a company could reopen and revise its accounts even after their adoption in the annual general meeting and filing with the Registrar in order to comply with technical requirements of any other law to achieve the object of exhibiting true and fair view. The revised annual accounts would be required to be adopted either in the extraordinary general meeting or in the subsequent annual general meeting and filed with the Registrar of Companies.” This circular was specifically issued in light of the fact that some insurance companies were required to reopen the accounts pursuant to directions of Insurance Regulatory and Development Authority. However, it should be noted that the need for revision was to arise in pursuance of ‘any other law’.

Further, a clarification was issued by the Ministry vide circular number 5/2010 dated 22.11.2010 stating that “few companies have been filing their annual accounts under section 220 more than once resulting into filing/availability of more than one such accounts in the Registry for a particular financial year. The matter has been examined in the Ministry in detail and it has been concluded that keeping in view the provisions of section 220 of the Act read with Ministry’s General Circular 1/2003, a company cannot lay more than one set of annual accounts for a particular financial year unless it has reopened/ revised such annual accounts after their adoption in the Annual General Meeting on the grounds specified in Ministry’s circular Number 1/2003. Accordingly, it is hereby directed that ROCs should keep a watch on such kinds of repeat filings of annual accounts and such accounts should not be accepted except in accordance with provisions of section 220 read with Ministry’s General Circular 1/2003.”

Therefore, under the Companies Act, 1956 reopening/ revision of annual accounts after their adoption in the annual general meeting was allowed for a very limited purpose.

3. Reopening or recasting upon orders of Tribunal/ Competent Court

As per the provision of sub-section (1) of section 130, a company is allowed to reopen the books of accounts or recast its financial statements only on the order of court of competent jurisdiction or the Tribunal made upon application of specified persons. The words ‘reopen’ and ‘recast’ represent the nature of treatment required for books of accounts and financial statements respectively. The basic connotation remains the same. The facts of each case will decide whether an order for reopening will include recasting or vice versa. Further, for the definition of Tribunal, Books of Account and Financial Statements, clauses (90), (13) and (40) of section 2 shall be referred.

4. Authority to make application

The following persons may apply to court of competent jurisdiction or the Tribunal for the purpose of reopening of books of account or recasting of financial statements:

- the Central Government
- the Income-tax authorities
- the Securities and Exchange Board of India
- any other statutory regulatory body or authority
- any person concerned

Income Tax Authorities are defined in section 116 of the Income Tax Act, 1961 as follows:

- (a) the Central Board of Direct Taxes constituted under the Central Boards of Revenue Act, 1963 (54 of 1963),
- (b) Directors- General of Income- tax or Chief Commissioners of Income-tax,
- (c) Directors of Income- tax or, Commissioners of Income- tax or Commissioners of Income- tax (Appeals),
- (cc) Additional Directors of Income- tax or Additional Commissioners of Income- tax or Additional Commissioners of income- tax (Appeals),
- (cca) Joint Directors of Income-tax or Joint Commissioners of Income-tax
- (d) Deputy Directors of Income- tax or Deputy Commissioners of Income- tax or Deputy Commissioners of Income- tax (Appeals),
- (e) Assistant Directors of Income- tax or Assistant Commissioners of Income- tax,
- (f) Income- tax Officers,
- (g) Tax Recovery Officers,
- (h) Inspectors of Income- tax.

Further, the statutory regulatory body or authority may include sectoral regulators like Reserve Bank of India, Insurance Regulatory and Development Authority, Telecom Regulatory Authority of India etc. Such bodies are established in pursuance of specific statutes. SEBI has been recognized separately as well. 'Any person concerned' may be read using principle of ejusdem generis. However, the same is not to be confined only to statutory bodies. It may include any person who has any interest/ concern in the accounts of the company.

5. Grounds on which application may be made

There are two grounds on and for which the order may be made by a court of competent jurisdiction or the Tribunal:

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

The word fraudulent manner is not defined under this section. However, recourse can be taken to the definition of 'fraud' given in section 447. The court or Tribunal may pass the appropriate order for the re-opening or recasting. One view is that even Tribunal has the power to re-open or recasting of account under section 241, where an application to Tribunal for relief in cases of oppression, etc. is filed.

6. Prior notice and representation by certain authorities

Proviso to sub-section (1) of section 130 provides that the court or the Tribunal, as the case may be, shall give notice of the application made under this section to the Central Government, the Income-tax authorities (as defined in section 116 of the Income Tax Act, 1961), SEBI or any other statutory regulatory body or authority concerned. Further, any representations made by Government or the authorities mentioned above are required to be considered by the court or Tribunal before passing any order under this section.

The Companies (Amendment) Bill, 2016 proposes to insert the term "any other person concerned" for giving notice to and considering recommendation by the court or Tribunal. The proposed insertion enhances the scope of the section considerably.

7. Period for which reopening or recasting can be made

The period for which the reopening or recasting can be made is not prescribed in the section. However, sub-section (5) of section 128 prescribes that the period of maintenance of books of accounts is limited to a period of eight financial years immediately preceding a financial year. In case where an investigation is ordered under Chapter XIV, Central Government may prescribe a longer period. Hence, this period may act as a cap on reopening of accounts. However, no corresponding provisions are made for the maintenance of financial statements.

The Companies (Amendment) Bill, 2016 seeks to embed the above view by inserting a new sub-section as sub-section (3) of section 130:

“(3) No order shall be made under sub-section (1) in respect of re-opening of books of account relating to a period earlier than eight financial years immediately preceding the current financial year:

Provided that where a direction has been issued by the Central Government under the proviso to sub-section (5) of section 128 for keeping of books of account for a period longer than eight years, the books of account may be ordered to be re-opened within such longer period.”.

8. Finality of accounts so recast

The accounts so revised or re-cast as per the order of the court or Tribunal shall be final. Hence, after the order of Tribunal or Court, no further revision can be made.

9. Punishment and Compoundability

There are no specific penal provisions provided in this section 130. Therefore the penal provisions under section 450 would apply in case of any non-compliance of this section. Accordingly, for contravention, the company and every officer of the company who is in default shall be punishable with a fine upto Rs.10,000, in case the contravention is a continuing one then the fine shall be Rs.1,000 every day. The offences under this section are compoundable under section 441 of the Act.

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