

# *Legal Updates*

## Managerial remuneration by unlisted companies:

The Government means to relax, but language  
misses intent. . .

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A recent press note of the Ministry of Corporate Affairs (MCA) **4/2011 dated 08.02.2011** spoke the intention of the government, that the current controls on managerial remuneration in the case of unlisted companies are not warranted, and therefore, the government wanted to remove the controls as far as unlisted companies are concerned.

However, as the Notification came out on 8<sup>th</sup> February, 2011, the actual language used by the notification will leave lot of confusion. Good drafting is not a great skill of the MCA these days, but this one has been put in a very juvenile manner, at a very unlikely place in the schedule.

The Notification has two limbs, one pertaining to the intended exemption in case of unlisted companies, and the second limb laying down the condition for unlisted companies to pay managerial remuneration. The text of the Notification being **Notification GSR 70(E), dated 08.02.2011** is as follows:

In the Schedule XIII, Part II, in Section II, after the word "scale" in sub para (c), third proviso the following words were inserted- "if the company is a listed company or a subsidiary of a listed company" and in Section II, Explanation IV was substituted by the following- "Remuneration Committee" means:

(i) In respect of a listed company, a committee which consists of at least three non-executive independent directors including nominee director or nominee directors, if any; and

(ii) In respect of any other company, a Remuneration Committee of Directors";

### ***First limb:***

As may be seen, the first limb has been put in Schedule XIII, Part II, section II, para (C). Part II of Schedule XIII lays down the limits of managerial remuneration and the scheme of the part is that it is divided into 4 sections as follows:

Para (A): Remuneration, based on effective capital, upto Rs 2 lac per month, that can be paid without any special resolution

Para (B): Remuneration from Rs 2 lac to Rs 4 lac per month, based on effective capital that can be paid with special resolution

Para (C): Remuneration exceeding Rs 4 lac per month, based on effective capital, that can be paid with special resolution and prior Central Government sanction

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Part (D): Remuneration in case of companies in SEZs.

As may be noted, the Central Government approval is required in case of Para (C) only – that is, where a company proposes to pay remuneration exceeding Rs 4 lac, as per the scales listed in the paragraph.

The amendment by the Notification has been made only in Para C.

This would imply that the existing scales, based on effective capital, remain applicable to both listed and unlisted companies. It is only in case payments falling in Para C that the words “if the company is listed company or subsidiary of a listed company” have been added by the Notification. While the intent of the government in inserting these words is clear – to remove the controls in case of unlisted public companies, but the actual implication of the way the words have been inserted is completely unclear.

It might, for example, be intended to mean that para C does not apply to an unlisted company at all, that is to say, an unlisted company cannot even go to the scales provided in para C. If that was the intent, the whole purpose of deregulation of unlisted companies gets frustrated.

There is yet another way to interpret these words – that in case of unlisted companies, the scales provided in Para C will not be applicable, that is, the company may pay remuneration without having to be limited by the scales. This may sound even more strange, because an unlisted company making payment as per Para A and B is still bound by the scales based on effective capital. Hence, it is highly illogical to say that there are no scales whatsoever, if the remuneration to be paid is Rs 4 lac per month or more, but there are scales to be observed, if the same is less than Rs 4 lac.

In fact, if the government wanted to deregulate unlisted companies, it would have been easier to say by way of a separate category, say, Para E, of unlisted companies, that unlisted companies may pay remuneration on the strength of a special resolution and approval of remuneration committee, and the approval of the Central Government will not be required. However, the way the clause has been inserted, the intent of the government gets diffused in the language and the corporate sector will be left baffled as to what the actual meaning is.

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### **Second limb:**

The second limb of the amendment pertains to constitution of the remuneration committee. It is clear from the amendment that remuneration committee will be required in case of unlisted companies too. However, the constitution of the remuneration committee in case of unlisted companies is not controlled – that is, it may not have independent directors. On other hand, in case of listed companies, the remuneration committee must consist of independent directors.

### **Result of the amendment:**

Though, as we discuss above, the result of the amendment is quite unclear, the position that appears after the amendment as far as managerial remuneration is concerned is as follows:

