

**Section 66 to 70 ( both inclusive ) of the  
Companies Amendment Act 2017(CAA 2017)  
made effective from 12<sup>th</sup> Sept 2018  
(Related to remuneration of Managerial Personnel)**

Ministry of Corporate Affairs (MCA) vide Notification dated 12<sup>th</sup> September 2018, has notified Sections 66 to 70 (Both Inclusive) of the Companies (Amendment) Act, 2017 (CAA, 2017) pursuant to which there has been changes in Section 196, 197, 198, 200, 201 of the Companies Act, 2013 (CA, 2013).

Sr No.	Section no.	Title
1	196	Appointment of Managing Director, Whole Time Director or Manager
2	197	Overall maximum Managerial Remuneration, and Managerial Remuneration in case of absence or inadequacy of profits
3	198	Calculation of Profits
4	200	Central Government or Company to fix limit with regard to remuneration
5	201	Forms of, and procedure in relation to certain application

This news alert consist of amendments in the provisions of above sections, Schedule V and in the Companies (Appointment and Remuneration of Managerial personnel ) Amendment Rules, 2018.

**A. Changes in the provisions of Sections of the CA, 2013**

**1. Section 196 of CA, 2013 – Appointment of MD, WTD or Manager**

- a) In sub-section (3) of section 196, in clause (a) after the proviso, new proviso has been inserted namely;

*“Provided further that where no such special resolution is passed but vote cast in favour of the motion exceed the votes, if any, cast against the motion and Central Government is satisfied, on an application made by the board, that such appointment is most beneficial to the company, the appointment of the person who has attained the age of Seventy years may be made”.*

**Explanation:** Accordingly, now a person can be appointment as MD/ WTD/ Manager even though if he/ she exceeds the age of 70 years, if the shareholders approves his/ her appointment by way of special resolution (justification need to be given in explanatory statement). In case the shareholders do not approve his / her appointment by way of Special Resolution and if the Board considers that his/ her appointment is beneficial to the Company, the Board may make an application to the Central Government.

- b) In sub-section (4) of section 196 for the words “specified in that schedule” the words “specified in part I of that schedule” has been substituted.

**Explanation:** Private limited company is free to pay remuneration to its managerial personnel and except part I of Schedule V only will be applicable .

**2. Section 197 of CA, 2013 – Overall maximum managerial remuneration and managerial remuneration in case of absence or inadequacy of profits**

- a) In sub-section (1) of section 197, in first proviso , the words “with the approval of the Central Government” has been omitted and in 2<sup>nd</sup> proviso, after the words “General Meeting” the words “by a special resolution” has been inserted;

**Explanation:** The shareholders of public company may approve by way of special resolution, payment of remuneration to its MD, WTD or Manager exceeding 11% of the net profits of the Company, subject to the provisions of Schedule V of the CA, 2013 and there will be no need to get the approval of Central Government.

- b) In sub- section (1) of section 197, after 2<sup>nd</sup> proviso, a new proviso has been inserted, namely;

*“Provided also that where the company has defaulted in payment of dues to any bank or Public Financial Institution (PFI) or non-convertible debenture holder or any other secured creditor, the prior approval of the bank or PFI concerned or the non- convertible debenture holders or other secured creditor, as the case may be shall be obtained by the company before obtaining the approval in the general meeting”.*

**Explanation:** In case company wants to pay remuneration to its MD, WTD or Manager or to any other Director as per provisions of section 197 (1) and if it has defaulted in payment of dues to any Bank, PFI or non-convertible debenture holder or any secured creditor, prior approval from such Bank, PFI concerned or non-convertible debenture holder or any secured creditor is required prior to obtaining Shareholder’s approval in general meeting.

- c) In sub-section (3) of section 197, the words “and if it is not able to comply with such provisions, with the **previous approval of the Central Government** ” has been omitted;

**Explanation:** For payment of any remuneration [excluding sitting fees for attending meetings as per section 197 (5)] to its MD, WTD , Manager or any Director, the Company is required to comply with the provisions of Schedule V of the Companies Act

d) Sub- section (9) of section 197 has been substituted with following para :

*“If any director draws or receives, directly or indirectly, by way of remuneration any such sums in excess of the limit prescribed by this section or without approval required under this section, he shall refund such sums to the company, within two years or such lesser period as may be allowed by the company, and until such sum is refunded, hold it in trust for the company”.*

**Explanation:** If any director draws/ receives any remuneration or fees in excess of what is prescribed in this section or without proper approval required under this section , than he shall refund such excess amount within 2 years or such lesser period as may be allowed, and until then he shall hold it in trust for the Company.

e) In sub- section (10) of section 197 for the words “permitted by the Central Government” the words “approved by the company by special resolution within 2 years from the date the sum becomes refundable” has been substituted.

**Explanation:** The Company shall not waive the recovery of any sum refundable to it from any of its Directors unless, it obtains prior approval from its Shareholder by way of a Special Resolution, which shall be passed within 2 years from the date the sum becomes refundable.

f) In sub- section (10) of section 197 a new proviso has been inserted;

*“Provided that where the company has defaulted in payment of dues to any bank or PFI or non-convertible debenture holders or any other secured creditor, the prior approval of the bank or PFI concerned or the non- convertible debenture holders or other secured creditors, as the case may be, shall be obtained by the company before obtaining approval of such waiver”.*

**Explanation:** The Company cannot waive recovery of any sum to it from any of its director with reference to excess remuneration or fees as provided under Section 197 (9), if it has defaulted in payment of dues to any Bank, PFI or non-convertible debenture holder or any secured creditor, then it is required to obtain prior approval from such Bank, PFI concerned or non-convertible debenture holder or any secured creditor.

- g) In sub- section (11) of section 197 the words “and if such conditions are not being complied the approval of the Central Government had been obtained” has been omitted.

**Explanation:** In case of any increase in remuneration of any director , where the company has no profit or inadequate profit , it has to comply with the provisions of Schedule V of the CA 2013 and there is no requirement to obtain approval of the Central Government .

- h) Following sub -section (16) & (17) has been inserted in section 197

*(16) “The auditor of the company shall, in his report under section 143, makes a statement as to whether the remuneration paid by the company to its directors is in accordance with the provisions of this section, whether remuneration paid to any director is in excess of the limit laid down under this section and give such other details as may be prescribed.”*

*(17) On and from the commencement of the Companies (Amendment) Act, 2017, any application made to the Central Government under the provisions of this section (as it stood before such commencement), which is pending with that Government shall abate, and the company shall, within one year of such commencement, obtain the approval in accordance with the provisions of this section, as so amended.*

**Explanation:** The Auditor of the Company in his Report as specified under Section 143 of CA, 2013, shall state as to whether the remuneration paid by the company to its Director is in accordance with the provisions of this section and he shall give such other details as may be prescribed.

Any application pending with the Central Government prior to the date of notification of this section, shall be abated, and the Company shall obtain the approval as per provisions of amended section with in a period of one year of such commencement.

### **3. Section 198 of CA, 2013 – Calculation of profits**

- a) In sub-section (3) of section 198 in clause (a) ,after the words “sold by the company”, the words, letter, brackets and figures “unless the company ”is an investment company as referred to in clause (a) of the Explanation to Section 186 has been inserted.

**Explanation:** In calculating profits of the Company for the purpose of section 197, credit shall not be given to the profits on sale of shares or debentures on premium, unless the company is an Investment Company as referred to in clause (a) of the Explanation to Section 186 of CA, 2013.

The expression “investment company” as per clause (a) of the Explanation to Section 186 of CA, 2013 means (I) a company whose principal business is the acquisition of shares, debentures or other securities [and (II) a company will be deemed to be principally engaged in the business of acquisition of shares, debentures or other securities, if its assets in the form of investment in shares, debentures or other securities constitute not less than 50% of its total assets, or if its income derived from investment business constitutes not less than 50% as a proportion of its gross income

- b) In sub-section (3) of Section 198, following clause (f) is inserted

*Any amount representing unrealized gains, notional gains or revaluation of assets.*

**Explanation:** In calculating profits for the purpose of section 197, credit shall not be given to any amount of gains which are unrealized or notional or any amount representing revaluation of assets.

- c) In sub- section (4) of section 198 in clause (l) the words “which begins at or after the commencement of this act” has been omitted.

In making the computation of profits for the purpose of section 197, the sums shall be deducted, that is sum which is in excess of expenditure over income, which had arisen in computing the net profits in accordance with this section in any year, in so far as such excess has not been deducted in any subsequent year preceding the year in respect of which the net profits have to be ascertained.

**Explanation:** This deletion of words is to make the provision meaning full.

#### **4. Section 200 of CA, 2013 – Central Government or Company to fix limit with regard to remuneration**

- a) In Section 200 the words “the Central Government or” appearing at two places in section 200 has been omitted.

**Explanation:** Central Government approval is no more required for appointment and payment of remuneration to managerial personnel as per section 196 and payment of remuneration as per section 197 and hence in section 200 , the word Central Government is deleted.

**5. Section 201 of CA, 2013 – Forms of, and procedure in relation to, certain applications.**

- a) In sub-section (1) of section 201 for the word “this chapter”, the words and figures “Section 196” has been substituted.
- b) In sub-section (2), of section 201 in clause (a), for the words “any of the sections aforesaid” the word and figures “section 196” has been substituted.

**Explanation:** There is no application to be made to Central Government (CG) for payment of remuneration to Directors by the Company which is left open for the shareholders to decide. Hence, now the application to Central Government is only for the appointment of any person as MD/ WTD or Manager, who has attained the age of 70 years and shareholders have not approved his / her appointment but the Board of the Company is of the opinion that his/ her appointment is most beneficial to the Company, than the Board can make application to CG under section 196 (3) of the CA 2013.

With such changes in section 196, there is a need to alter section 201 by deleting reference of application to CG under *this Chapter* instead to make amendment that an application to CG under *section 196* .

**B. Changes in Schedule V of the CA, 2013**

Central Government has made amendment in Schedule V of the CA 2013 by exercising powers conferred on CG pursuant to section 467 of the CA,2013. This changes is effective from 12<sup>th</sup> September 2018.

Following are the amendments in Schedule V, which is related to appointment and remuneration to MD , WTD and Manager .

**1. Part I of Schedule V of CA, 2013 – APPOINTMENT :** Conditions to be fulfilled for the appointment of a Managing or Whole-Time Director (WTD) or a Manager without the approval of the Central Government.

- (a) As per Part I of Schedule V, No person shall be eligible to be appointed as the MD or WTD or a Manager i.e. Managerial Personnel, of a Company, who has been sentenced to imprisonment for any period or to a fine not exceeding Rs. 1,000 for the conviction of an offence under certain Acts listed in Part I.

CG vide notification dated 12<sup>th</sup> September 2018 , added following three Acts in Part (I) (a) in Schedule V.

- (xvii) the Insolvency and Bankruptcy Code, 2016;
- (xviii) the Goods and Services Tax Act, 2017;
- (xix) the Fugitive Economic offenders Act, 2018;

**Explanation :** With the notification of new Acts, Central Government had added the above three Acts in the list of certain Acts in part (I) (a) of Schedule V, for eligibility of any person for the appointment of MD/ WTD or Manager in a Company. Such person should not have been convicted of offense and punished with imprisonment for any period or to a fine which is more than Rs.1000/-.

(b) As per Para (d) of Part I of Schedule V, the following condition is delted.

*(d) no person shall be eligible to be appointed as MD, WTD or Manager, if he is Managerial personnel in more than one company and draws remuneration from one or more companies subject to the ceiling provided in Section V of Part II.*

**Explanation:** This conditions is redundant after the changes made in part II of Schedule V with reference to remuneration to Managerial Personnel

## **2. Part II of Schedule V of CA, 2013- REMUNERATION :**

- a) In Section II – Remuneration payable by companies having no profit or inadequate profit without Central Government approval, the words **“without Central Government approval”** mentioned in the heading and the first para **has been omitted.**

**Explanation:** Now no approval of Central Government is required after the amendment under CAA 2013

- b) In Section II- Item (A) in proviso, for the word “provided that the above limits shall be doubled” the words **“provided that the remuneration in excess of the limits may be paid”** has been substituted;

**Explanation :** In case the company has no profit or inadequate profit, it may pay remuneration to its Managerial Personnel not exceeding the limits under Item (A) and (B) mentioned in Part (II) . However, if the company pass Special Resolution , it may pay remuneration in excess of limit specified under Item (A) of Section (II) of Part II of Schedule V.

- c) In Section II- under Item (B), for the words “no approval of Central Government is required” the words **“remuneration as per item (A) may be paid”** shall be substituted;

**Explanation:** In case the company has no profit or inadequate profit, it may pay remuneration to its Managerial Personnel who is functioning in a professional capacity, **“remuneration as per item (A) may be paid,** if such managerial person is

- not having any interest in the capital of the company or its holding company or any of its subsidiaries directly or indirectly or through any other statutory structures ; and
  - not having any, direct or indirect interest or related to the directors or promoters of the company or its holding company or any of its subsidiaries at any time during the last two years before or on or after the date of appointment ; and
  - possesses graduate level qualification with expertise and specialized knowledge in the field in which the company operates
- d) In Section II- under item (B), in second proviso, for clause(ii), the following is substituted

*The company has not committed any default in payment of dues to any bank or Public Financial Institution (PFI) or non- convertible debenture holder or any other secured creditor, and in case of default, the prior approval of the bank or PFI concerned or the non- convertible debenture holders or other secured creditor, as the case may be shall be obtained by the company before obtaining the approval in the general meeting.*

**Explanation** : In case the company has no profit or inadequate profit, it may pay remuneration to its Managerial Personnel as a condition, either (i) it has not committed any default in payment of dues to any Bank or public financial institution or non-convertible debenture holder or any other secured creditors, and (ii) in case of default, the **prior approval** of the bank, or public financial institution concerned or non-convertible debenture holders or other secured creditors, as the case may be shall be obtained by the company before obtaining the approval in the general meeting;

- e) In Section II , in Item (B), in second proviso, clause (iii), the words “**the limits laid down in**” has been omitted;

**Explanation** : : In case the company has no profit or inadequate profit, it may pay remuneration to its Managerial Personnel , subject to limits specified under items (A) and (B) of section II, if conditions under clause (iii) is complied with , that is an ordinary resolution or a special resolution, as the case may be, has been passed for payment of remuneration as per **item (A)** or a special resolution has been passed for payment of remuneration as per item (B), at the general meeting of the company for a period not exceeding three years.

The words “**the limits laid down in item (A)**” is changed to only “**item (A)**”, as there is no limit of remuneration if resolution approved by members is special resolution and accordingly this amendment.



**3. In Part II , Section III of Schedule V of CA, 2013 – Remuneration payable by companies having no profits or inadequate profit without Central Government approval in certain special circumstances**

- a) In Part II, Section III , in the title heading and in the first para the words *”without Central Government Approval”* has been omitted.

**Explanation :** Now with the amendment under CAA 2017, no approval of Central Government is require for payment of remuneration to Managerial Personnel by the Company and hence these words are deleted from Section III of Part II.

- b) In Part II, Section III, in clause (b), in the long line, for the words *”Remuneration up to two times the amount permissible under Section II”* the words *“any remuneration to its managerial persons”* has been substituted.

**Explanation:** A Company may pay remuneration to its managerial personnel in excess of the amounts provided in Section II, where the company (i) is a newly incorporated company, for a period of seven years from the date of its incorporation, or (ii) is a sick company, for whom a scheme of revival or rehabilitation has been ordered by the Board for Industrial and Financial Reconstruction for a period of five years from the date of sanction of scheme of revival, or (iii) is a company in relation to which a resolution plan has been approved by the National Company Law Tribunal under the Insolvency and Bankruptcy Code, 2016 for a period of five years from the date of such approval, it may pay *“any remuneration to its managerial persons.*

Now there is no limit of remuneration under section II and hence this amendment .

- c) In Part II, Section III, in clause (d) the following para **has been omitted.**

*(d) a company in a Special Economic Zone as notified by Department of Commerce from time to time which has not raised any money by public issue of shares or debentures in India, and has not made any default in India in repayment of any of its debts (including public deposits) or debentures or interest payable thereon for a continuous period of thirty days in any financial year, may pay remuneration up to Rs. 2,40,00,000 per annum*

**Explanation :** With the amendment in CAA 2017, there is no limit provided in Section II of Part II of Schedule V and hence these provisions of limit of upper side is also not required to be in Schedule V and hence deleted.

#### **4. Section IV of Schedule V– Perquisites not included in managerial remuneration**

- a) In Section IV of Schedule V under Explanation VI, following clause (A) has been omitted.

(A) *“current relevant profit” means the profit as calculated under section 198 but without deducting the excess of expenditure over income referred to in sub-section 4 (l) thereof in respect of those years during which the managerial person was not an employee, director or shareholder of the company or its holding or subsidiary companies*

**Explanation:** This definition of current relevant profit is not required in schedule V as the amendment has been made in Section 198 (4) (l) vide CAA 2017.

#### **C. The Companies (Appointment and Remuneration of Managerial Personnel) Amendment Rules, 2018**

The Central Government has amended the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 and these rules will be called as the Companies (Appointment and Remuneration of Managerial Personnel) Amendment Rules, 2018. This rule will be effective from 12<sup>th</sup> September 2018. Following are the amendment in the Rules

1. (a) In Rule 6, the heading *“Applications to the Central Government”* has been renamed as **“Parameters for Consideration of Remuneration”**.

(b) In Rule 6 the word **“Central Government”** has been omitted.

**Explanation:** Since the approval of Central Government is not required , it is only to the Company to have regards to the parameters for considering the remuneration.

2. (a) In Rule 7 sub –rule (2), has been omitted.

**Explanation :** The conditions referred under Rule 7 (2) is already mentioned in the 2<sup>nd</sup> proviso under item (B) of Section II of Part II of Schedule V and hence it is deleted from Rule 7 .

- (c) In Rule 7 sub-rule (1), refers to application to be made to the Central Government under the provisions of chapter XIII [it should have been section 196(3)] to be made in Form No. MR-2 . These Form No. , is substituted with new Form No. MR 2 .

In Form MR 2 following changes are made

1. In Form No.MR 2, point no. 4 (a) following four reasons were mentioned
  - a. Appointment or reappointment without complying with the Part I of Schedule V
  - b. Payment of remuneration exceeding 11 percent of Net Profit
  - c. Waiver of excess remuneration paid during a particular financial year
  - d.** Payment of remuneration exceeding the limits provided in Schedule V

Now it is only for one reason

- a. Appointment or reappointment without complying with the Part I of Schedule V
2. In Form No. MR 2 , point no. 11 to 18 are deleted, which are like financial position of the company, managerial remuneration paid during the last three years for each director, details of remuneration per annum , details of resolution of Board, NRC and shareholders, whether the company has made any default in repayment of its debt , in case of remuneration paid in excess of 11% of net profit , calculation of Table (A) effective capital and in case of waiver of remuneration etc.

**Conclusion:** The changes made under CAA 2017 with reference to remuneration to the managerial personnel is a welcome move. The same is left open for the shareholders to decide and in case of any default in repayment of debt , the prior approval of such bank or financial institute concerned to be obtained.

However, the Central Government has still kept certain control by adding a new provisions to section 196 (3) (a) in which, for the appointment of any person who has attained the age of 70 years, if the approval of shareholders are not obtained by way of special resolution and the Board still is of the opinion that such appointment is most beneficial to the company, it may apply to Central Government.

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