



COMPANY LAW

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Interim dividend through circular resolution – Is it good governance ?

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There is a practice being followed by some listed companies to approve the interim dividend through circular resolutions of the Board of directors without placing for considering at the audit committee and Board meetings. In this article, the author makes an attempt to examine whether approval of interim dividend through circular resolution is a good governance ?

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Introduction

1. The definition 'dividend' has been inserted by the Companies (Amendment) Act, 2000 to provide that dividend includes 'interim dividend'. Further, the Companies (Amendment) Act, 2017 also substituted sub-section (3) of section 123 of the Companies Act, 2013 ('the Act'), thereby interim dividend, inter alia, may be declared during any financial year or at any time the period from closure of financial year till holding of the annual general meeting out of the surplus in the profit and loss account. Normally, dividend is recommended by the Board of directors on consideration of annual accounts and the shareholders approve such recommended dividend at their annual general meetings. Profit earning listed companies do consider and distribute a portion of profits to the shareholders at the time of considering and approving quarterly results as a reward on capital and retain the remaining portion of profits. But, there is a practice being followed by some listed companies to approve the interim dividend through circular resolutions of the Board without placing for consideration at the audit committee and Board meetings.

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Powers to declare interim dividend

2. The Board of directors of a company may declare interim dividend during any financial year or at any time during the period from closure of financial year till holding of the annual general meeting out of the surplus in the profit and loss account or out of profits of the financial year for which such interim dividend is sought to be declared or out of profits generated in the financial year till the quarter preceding the date of declaration of the interim dividend. There is no need for shareholders to approve the interim dividend. The SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ('the LODR Regulations') mandated certain compliances by a listed company for declaration and payment of dividend. All such requirements such as (a) prior intimation to stock exchanges about Board meeting ; (b) disclosure of outcome of Board meeting ; and (c) record date ; recognise the concept of Board meeting.

Whether interim dividend can be declared by circular resolution ?

3. The Act recognises the concept of circular resolution by the Board of directors ('Board'). However, where not less than one-third of the total number of directors of the company for the time being require that any resolution under circulation must be decided at a meeting, the chairperson shall put the resolution to be decided at a meeting of the Board. Further, the Board of a company shall exercise certain powers on behalf of the company by means of resolutions passed at meetings of the Board the dividend is not one among such powers to be exercised only at the Board meetings. Secretarial Standards-I (SS-1), which is mandatory for compliance by listed companies, also place certain resolutions to be passed only at a Board meeting and again dividend is not one among such resolutions to be passed at Board meetings. At the same time, SS-1 confirms that resolutions passed by circulation are deemed to be passed at a duly convened meeting of the Board and have equal authority. SS-3 on dividend issued by the Institute of Company Secretaries of India ('ICSI') requires that approval of dividend has to be in a duly convened Board meeting but the said SS-3 is not mandatory and only recommendatory. Therefore, circular resolution passed by a company for declaration of dividend is not barred but wonders whether declaration of dividend by circular resolution is a good corporate governance?

Role of audit committee

4. Audit committee shall have minimum three directors as members and all members shall be financially literate and at least one member shall have accounting or related financial management expertise. "Financially literate" has been explained in the LODR Regulations which means the ability to read and understand basic financial statements, *i.e.*, balance sheet, profit and loss account and statement of cash flows. The role of audit committee includes

(a) approval of payment to statutory auditors for any other services rendered by the statutory auditors; and (b) the appointment, removal and terms of remuneration of the chief internal auditor shall be subject to review by the audit committee. While the payment of remuneration to both internal and statutory auditors have been included for the approval of audit committee, but, unfortunately no express provision has been included for declaration and payment of interim dividend. There are chances that in a listed company, the remaining directors in the Board other than the audit committee members may exceed the number of audit committee members. If that is so, all other directors other than the audit committee members can pass a circular resolution for payment of interim dividend and the role of audit committee may be infructuous.

Will it fall under the unpublished price sensitive information ?

5. Listed company has to give prior intimation to the stock exchange about the Board meeting in which the declaration of interim dividend is to be considered, at least 2 working days in advance, excluding the date of intimation and date of the meeting. Normally, listed companies inform the date of such Board meeting and only on consideration and declared at the Board meeting the rate and amount of dividend, are again informed to the stock exchanges the outcome of Board meeting within 30 minutes of the closure of Board meeting. Whereas, for passing a circular resolution for consideration and approval of interim dividend, it is very much necessary to inform the directors about the rate and amount of interim dividend to be declared and one wonders whether this would fall under the unpublished price sensitive information?

Suggestions

6. The Act requires certain business to be approved only at meetings of the Board. However, other business that requires urgent decisions can be approved by means of resolutions passed by circulation. No doubt, passing of circular resolutions are deemed to be passed at Board meeting. The Act, SS-1 and LODR Regulations do not mandate that interim dividend is to be declared at a duly convened Board meeting. Board may also validly pass a circular resolution without any audit committee member's participation. But will such circular resolution for declaration of interim dividend test the principles of good governance? I leave this question among professionals for further discussion and analysis.