

SECRETARIAL AUDIT UNDER COMPANIES ACT, 2013 - A MOVE TOWARDS BETTER CORPORATE GOVERNANCE

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Abstract

Secretarial Audit is a compliance audit. It is a part of total compliance management in an organization. The Secretarial Audit is an effective tool for corporate compliance management. It helps ensure timely corrective measures when non-compliance is detected. The Companies Act, 2013, seems to revolve around this concept of compliance and the ways to ensure its implementation. The enforcement mechanism is also well incorporated in the Act itself providing the requisite arms to strike home the point. The corporate sector as well as the professional community is required to be extra vigilant in discharging their functions to ensure that they are compliant in their approach. Over abundance of provisions spread over the Act and the rules coupled with enhanced penal provisions, inflated additional filing fees and fraud related provisions make the situation look more frightening. Audit is perhaps the only mechanism which provides some sort of comfort and assurance that controls and checks are in place. An audit helps to ensure that the company is following the right principles and procedures and also highlights areas which require attention to make timely corrections. The study focuses on the importance and various aspects of Secretarial Audit under the provisions of the Companies Act, 2013.

Key words: Companies Act, Penal provisions, Secretarial audit, Compliance management, Implementation.

I INTRODUCTION

Secretarial Audit is a mechanism which gives necessary comfort to the management, regulators and the stakeholders, as to the compliance by the company of applicable laws and the existence of proper and adequate systems and processes. Secretarial Audit also covers non-financial aspects of the business having impact on its business performance and verifies compliance of applicable laws, regulations and guidelines. Nonetheless, this exercise also mitigates business risk to a great extent. It evaluates the manner in which the affairs of a company are conducted. While pursuing its business activities, the company has to comply with the rules and regulations relating to the Companies Act, Securities laws, FEMA, industry specific laws and general laws like Labour Laws, Competition Law and Environmental and Pollution Related laws. Secretarial Audit as the name suggests, is an examination of the various records, registers, documents, books and papers etc. of the company by an independent qualified person to check the compliance with the provisions of various Acts, Rules, Regulations, procedures and to highlight areas of non-compliance. A Secretarial audit complements the financial audit and cost audit thereby ensuring that all the three primary facets of business are covered within the ambit of audit exercise.

II REVIEW OF LITERATURE

Girdhari Lal Gupta V. D.N. Mehta(2012) The Supreme Court has construed the expression a person in-charge and responsible for the conduct of the business of the company' as to mean the person in overall control of the day-to-day business of the company. This ruling has been followed in a number of subsequent decisions- Key Managerial Personnel [Section 2(51) of the Companies Act, 2013] for company's offences. Besides under the Companies Act, 2013 section 447 and section 448 cast harsh penalties for false statements and fraud respectively.

Alaa-Aldin Abdul Rahim A. Al Athmay,(2010) Performance auditing and public sector management in Brunei Darussalam explains that although performance auditing is envisaged in the legislation, the main thrust of auditing is still on financial and procedural compliance; the paper discusses why this is so and in what circumstances it might change.

Government of Saskatchewan News Release (2007) Results of Independent Forest Management Audit Released, this article refers to the results of the second independent sustainable forest management audit conducted under Saskatchewan's updated legislation were released today, highlighting requirements for monitoring and reporting of forest practices in the province.

III OBJECTIVES

1. To study about concept and significance of secretarial audit under companies Act 2013.
2. What are the provisions applicable to Companies Act, 2013 relating to secretarial audit? – A study.

III. 1. CONCEPT AND SIGNIFICANCE OF SECRETARIAL AUDIT UNDER COMPANIES ACT 2013.

Secretarial Audit is an examination of the various records, registers, documents, books and papers etc. of the company by an independent qualified person to check the compliance with the provisions of various Acts, Rules, Regulations, procedures and to highlight areas of non-compliance. Secretarial Audit is a mechanism which gives a sense of satisfaction to the management, regulators and the stakeholders, as to the compliance by the company of applicable laws and the existence of proper and adequate systems and processes. Secretarial Audit also covers non-financial aspects of the business having impact on its business performance and verifies compliance of applicable laws, regulations and guidelines. Nonetheless, this exercise also mitigates business risk to a great extent. It evaluates the manner in which the affairs of a company are conducted. While pursuing its business activities, the company has to comply with the rules and regulations relating to the Companies Act, Securities laws, FEMA, industry specific laws and general laws like Labour Laws, Competition Law and Environmental and Pollution Related laws. A Secretarial audit compliments the financial audit and cost audit thereby ensuring that all the three primary facets of business are covered within the ambit of audit exercise.

2. SIGNIFICANCE OF SECRETARIAL AUDIT

Secretarial audit aims at achieving a two-fold objective; on one hand it seeks to protect the interests of the customers, employees, revenue, environment and the directors and officers of the company, and on the other hand it helps to avoid any unwarranted legal actions by the law-enforcing agencies and other persons as well. Secretarial Audit is not only essential for listed companies and big size public companies but it is vital for each and every

company incorporated under the Companies Act. How financial audit has been mandated for each company irrespective of their capital, size or operations, same way a secretarial audit is also required for each entity in order to ensure that the company is compliant from all aspects, not only financial but all also legal and procedural. Financial audit has a defined scope and it covers only certain aspect of the functioning of a company. Likewise, cost audit also focuses on a specific aspect. A secretarial audit bridges the remaining gap and is essential to ensure that the company is functioning in line with the provisions of the various statutes applicable to it and also the following the various rules and regulations made thereunder. The need for a secretarial audit has become even more profound in the current scenario due to the reason that the Companies Act has recently been changed and as with any other law it has given rise to lot of interpretation and understanding issues. The Act is in nascent stage and requires time to settle down. Till then a regular independent audit exercise is extremely essential to ensure the corporate as well the legislature that all is well. Secretarial Audit will fill the vacuum which presently exists in the realm of legal compliance management.

IV. PROVISIONS APPLICABLE TO COMPANIES ACT, 2013 RELATING TO SECRETARIAL AUDIT

Secretarial Audit has been a matter of discussion for a long time. In the year 2009, Ministry of Company Affairs had released Corporate Governance Voluntary Guidelines 2009. The Guidelines, amongst other things, recommended the introduction of Secretarial Audit. Pursuant to these guidelines, The Institute of Company Secretaries of India had issued a Referencer on Secretarial Audit. This referencer not only provided the scope and usefulness of secretarial audit, but also provided a detailed format of the Secretarial Audit Report. However, these guidelines being voluntary in nature could not make their required mark. Companies Act, 2013, for the first time, makes secretarial audit mandatory. Secretarial audit has a very vast scope. It extends not only to Companies Act but covers all the laws, rules and regulations applicable to the entity under audit. The scope of secretarial audit can be understood in the below manner:-

- ❖ The **Companies Act, 2013** and the rules made thereunder
- ❖ The **Securities Contracts (Regulation) Act, 1956** (SCRA) and the rules made thereunder
- ❖ The **Depositories Act, 1996** and the Regulations and Bye-laws framed thereunder
- ❖ **Foreign Exchange Management Act, 1999** and the rules and regulations made thereunder to the extent of Foreign Direct Investment, Overseas Direct Investment and External Commercial
- ❖ The following Regulations and Guidelines prescribed under the **Securities and Exchange Board of India Act, 1992** (SEBI Act):-
- ❖ The Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011
- ❖ The Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992
- ❖ The Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009
- ❖ The Securities and Exchange Board of India (Employee Stock Option Scheme and Employee Stock Purchase Scheme) Guidelines, 1999
- ❖ The Securities and Exchange Board of India (Issue and Listing of Debt Securities) Regulations, 2008

- ❖ The Securities and Exchange Board of India (Registrars to an Issue and Share Transfer Agents) Regulations, 1993 regarding the Companies Act and dealing with client
- ❖ The Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2009
- ❖ The Securities and Exchange Board of India (Buyback of Securities) Regulations, 1998
- ❖ Other laws as may be applicable specifically to the company.
- ❖ Secretarial Standard issued by the Institute of Company Secretaries of India.

SECRETARIAL AREAS TO BE VERIFIED

Following are the important aspects that require verification by the Secretarial Auditor

- ❖ Constitution and Composition of Board of Directors
- ❖ Meeting of the Board Members – frequency of notes, agenda, minutes, voting, quorum
- ❖ Maintenance of statutory register and entries therein
- ❖ Share transfer or transmission process
- ❖ Availability of adequate systems and processes in the company commensurate the size and operations of the company to monitor and ensure compliance with applicable laws, rules, regulations and guidelines.

Major Events during the Period under Review Like:-

- Public / Right/ Preferential issue of shares/Debentures/Sweat equity, etc.
- Redemption/Buy back of securities
- Major decisions taken by the members in pursuance to section 180 of the companies act, 2013
- Mergers / amalgamation/ reconstruction, etc.

Categories of Companies under the Secretarial Audit

As per Section 204 of the Companies Act, 2013 read with Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 notified to come on force from 01.04.2014, Secretarial Audit is mandatory for following class of Companies:

- ✓ All listed Companies
- ✓ Every other public company having a paid-up share capital of fifty crore rupees or more
- ✓ Every other public company having a turnover of two hundred fifty crore rupees or more.

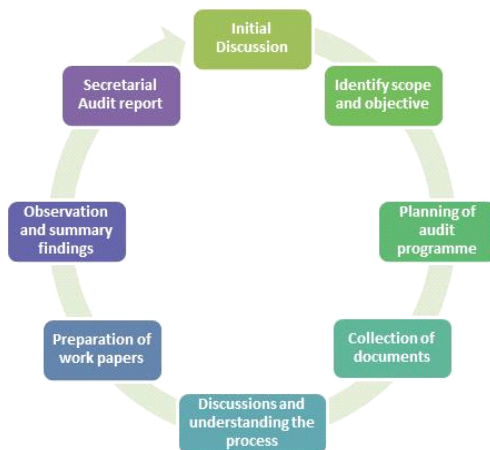
POWERS AND OBLIGATIONS OF THE SECRETARIAL AUDITOR

A Secretarial Auditor is appointed by the Board of directors to conduct an audit and provide his report, in the manner prescribed, to the members of the Company. The report of the secretarial auditor has to be annexed to the Board's Report. As per Rule 9 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014, the format of the Secretarial Audit Report shall be in Form No.MR.3.As per Section 143, which deals with powers of auditors, the provisions of the said Section 143 are mutatis mtuandis, applicable to a secretarial auditor also. This implies that the Secretarial Auditor has the same power and duties which are applicable to a statutory auditor conducting statutory financial audit, in so far they are relevant to his scope of audit. This includes both powers as well as duties, including the duty to report fraud as contemplated under sub-section 12 of Section 143.

PROCEDURE OF CONDUCTING SECRETARIAL AUDIT

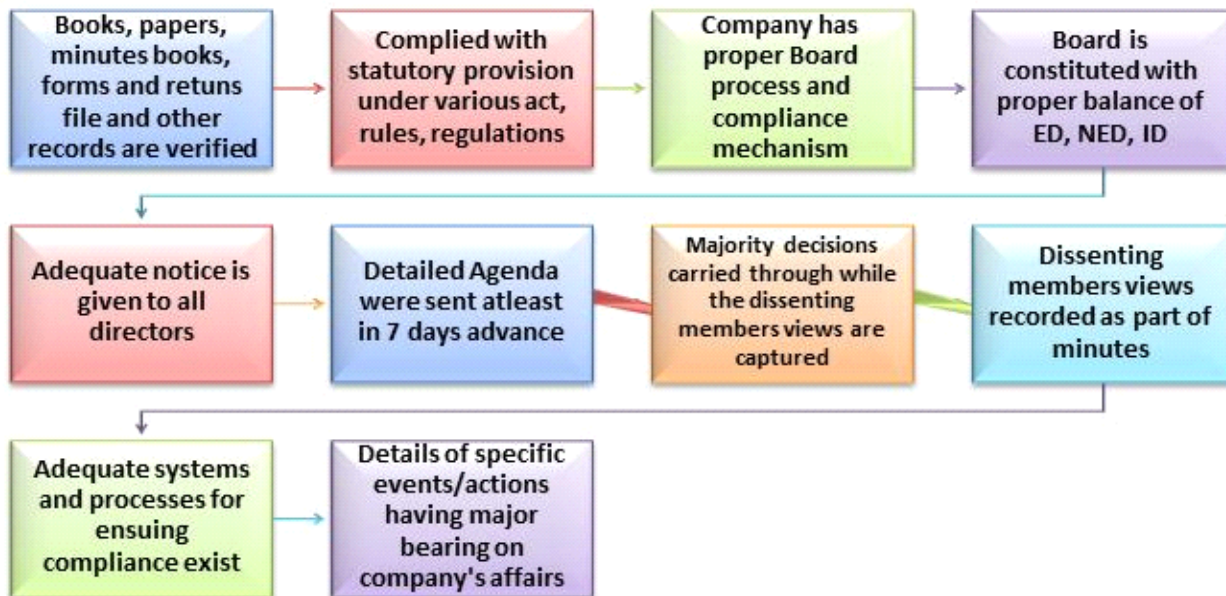
A Secretarial Auditor may adopt the following procedure while conducting a secretarial audit.

LIST THE PROCEDURE AS SHOWN IN THE FOLLOWING FIGURE



Source: www.icsi.edu.in

The Format of the Secretarial Audit Report shall be in Form No.MR.3. As per Form MR 3, a secretarial auditor reports on the following matters in his audit report:



Source: www.icsi.edu.in

BENEFITS OF SECRETARIAL AUDIT

The corporate sector is governed by a complex web of laws, rules and regulations. However, enactment of laws is not enough and the desired results cannot be achieved unless their implementation is geared up. Lack of implementation of laws with no mechanism of audit to check their compliances have resulted in various scams. These setbacks not only

impact the capital market but mar the economy has a whole and lowers the image of our country in the international market.

Some of the benefits of secretarial audit to various stakeholders are enumerated below:

- ❖ Secretarial Audit is compliance audit; it is a part of total compliance management in an organization. The Secretarial Audit is an effective tool for corporate compliance management. It helps ensure timely corrective measures when non compliance is detected.
- ❖ One of the most arresting features of Companies Act, 2013 is its penal provisions. A Secretarial Audit helps to reduce the risk of exposure to penal provisions by providing timely check on the levels of compliances for both the company, its officers and also for the professionals.
- ❖ It helps to foster the image of the company in the minds of the regulators as well as stakeholders. A duly audited company is well perceived in the minds of the stakeholders and is looked upon favorably by the society.
- ❖ It protects the interest of the management, directors and key managerial personnel by reducing unwarranted exposure to legal actions and issues thereby reducing time and cost also.
- ❖ It helps to reduce cost of additional filing fees to be paid in case of delay in filing of reports and returns in time as required under the various provisions of law.
- ❖ It provides information to the management highlighting the level of compliances being followed in the company and the areas which require correction.
- ❖ It also provides an opportunity to the company to understand the complex laws applicable to them thereby enabling them and to carry out their activities in tune with the requirements of law.
- ❖ It also helps the shareholders, creditors and other stakeholders by providing them a report regarding the level of compliance being followed in the company.
- ❖ A company secretary conducting secretarial audit is duty bound to report any instances of fraud being committed in the company.

PENALTY PRESCRIBED UNDER SECTION 143 OF THE ACT

✓ Section 143 of the Companies Act has prescribed penalty provisions. Accordingly, if any auditor, cost accountant or company secretary in practice does not comply with the provisions of Sec 143(12), he shall be punishable with fine which shall not be less than one lakh rupees but which may extend to **twenty-five lakh rupees**.

✓ Penalty prescribed under Section 204. Accordingly, If a company or any officer of the company or the Company Secretary in Practice contravenes the provisions of this section, the company, every officer of the company or the company secretary in practice, who is in default, shall be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees.

V CONCLUSION

Secretarial Audit is a tool of risk mitigation and will allow companies to effectively address the issues related to compliance risk. Secretarial Audit will not only provide wide scope for Company Secretaries but also it will provide protection to companies from regulatory actions. This will be a good exercise for companies to make timely compliances. Secretarial Audit

focuses on greater transparency in corporate functioning and helps to restore the confidence of investors. It is beneficial for investors, promoters, management and various stakeholders. Secretarial Audit is an effective multi-pronged weapon to assure the regulator, generate confidence amongst the shareholders, the creditors and other stakeholders in companies and instills self regulation and professional discipline in companies. Hence, Secretarial audit is salutary and surely a move towards better corporate governance.

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