



Members' Section



Few Issues for Companies Under The Companies Act, 2013

By CA. Niteh More, Kolkata



EVERY COMPANY IS NOT REQUIRED TO FILE FORM 5INV

WHEN A CO IS REQUIRED TO FILE FORM 5 INV?

As per Rule 3 of Investor Education and Protection Fund (Uploading of information regarding unpaid & unclaimed amount lying with companies) Rules 2012, every company (including Non-banking Financial companies and Residuary Non-Banking Companies) shall, within a period of 90-days after the holding of Annual General Meeting or the date on which it should have been held as per the provisions of section 166 of the Act and every year thereafter till completion of seven years period, **identify "the unclaimed amounts"** as referred in sub-section (2) of section 205C or in Act, separately furnish and upload on its website and also on the Ministry's website or any other website as may be specified by the Government a statement or information through e Form 5 INV' separately for each year' containing following information, namely:

- a) the names and last known addresses of the persons entitled to receive the sum;
- b) the nature of amount;
- c) the amount to which each person is entitled;
- d) the names and last known addresses of the persons entitled to receive the sum;
- e) the nature of amount;
- f) the amount to which each person is entitled;

As per circular 17/2012 dated 23 July, 2012, the cut off date for filling information in Form 5 INV is "date of AGM". Form 5INV is to be filled for each year from f.y. 2010-11 onwards.

CONDITIONS FOR FILLING FORM 5 INV:

- 1) There must be unclaimed amount lying (amount for which there is no claimant) with company.
- 2) Such amount must exist as on the AGM date i.e. at the end of AGM date.

PROCEDURE TO FILE FORM 5INV:

- 1) Call a board meeting within 90 days of AGM to identify unclaimed amount as on date of AGM
- 2) Hold Board meeting & identify unclaimed amount as on date of AGM,
- 3) Authorize a director to file Form 5INV, only if there is unclaimed amount as on AGM date.
- 4) File Form INV5 within 90 days of AGM

NOTE: Resolution by circulation is allowed.

STEPS TO FILE STATEMENT OF INVESTOR-WISE UNCLAIMED & UNPAID AMOUNTS

- Install the Pre-requisite Software's from www.iepf.gov.in

- Download Form 5 INV.
- Fill the form according to the instructions given in its instruction kit
- Upload the filled form on the MCA portal as usual
- After uploading, an acknowledgement slip will be generated containing the user id & password, which will be used to upload excel template.
- You are required to provide the investor wise details of unclaimed and unpaid amount in an excel file
- Download the excel template from the IEPF Portal
- Fill in the excel template with investor-wise detail. Refer the read Me instruction provided in the excel template
- Upload the excel file with investor-wise details of unclaimed and unpaid amounts
- After all the details are uploaded, confirm upload of unclaimed and unpaid amount details.

PRIVATE LTD COMPANIES/CLOSELY HELD COMPANIES GENERALLY DO NOT HAVE UNCLAIMED AMOUNT:

In case of closely held companies, there is no unclaimed amount lying with them generally. There is an identified claimant for each item of money lying with them. Hence, such companies are not required to file such form, even though application money is lying with them from 20 years. In such case, such companies are required to transfer such amount to investor education & protection fund, which have been discussed later. If such companies have unclaimed amount as on AGM date, such companies are required to file Form 5 INV. Example, dividend warrant dispatched, not deposited & no claim has been received till date.

WHEN A CO IS REQUIRED TO CREDIT AMOUNT TO INVESTOR EDUCATION & PROTECTION FUND?

As per clause (b) of sub sec 2 of Sec 205C, the application moneys received by companies for allotment of any securities and "due" for refund shall be credited to Investor protection & Education fund;

Provided that no such amounts referred as above shall form part of the Fund unless such amounts have remained **unclaimed and unpaid** for a period of **seven years** from the date they became **due** for payment.

In short, Share Application money shall be transferred to such fund after expiry of 7 years from the date it becomes "due" only when such amount remains unclaimed & unpaid. Hence, in case when such amount is claimed by the claimant, such amount is not required to be transferred even if 7 years has been expired.

WHEN DOES SHARE APPLICATION MONEY BECOMES "DUE" FOR PAYMENT UNDER THE COMPANIES ACT, 1956?

The companies Act, 2013, prescribes that share application money shall be refunded with 15 days from the expiry of 60 days from the date of receipts of application money. However,



Members' Section

there is no such restriction under the companies Act, 1956. Should we assume that there is a blanket allowance & company can keep share application money without any limit of refund. I am of the firm view that if any share application money is received, company should in its board meeting either reject or accept application (within next 2-3 board meetings). To be on safer side, date of Board meeting on which decision to refund application has been taken, may be considered as **"due date"** under Companies Act, 1956.

DISPUTE MAY BE A REASON FOR NON ALLOTMENT:

Dispute arises among directors/family after receipt of share application money may be a reason for non allotment of shares or belated allotment under the Companies Act, 1956.

CONDITIONS FOR TRANSFER TO IEPF

- 1) Application money must be due for refund.
- 2) 7 years must be expired from due date
- 3) Application money must remain unclaimed after expiry of 7 years from due date.

A FEW EXAMPLES TO ADDRESS THE ISSUE ARE AS FOLLOWS:

Example 1 : A company received share application money in Jan 2011, which is lying in the share application a/c as on 31.3.13 & non compliance notice is received from ROC.

Case (a): Such money had already been refunded before the date of AGM or

Case (b): Share had been allotted before the end of financial year. However, Return of allotment had not been filed.

Case (c): Co with mutual consent transferred investment to shareholder in lieu of application money after 31.3.2013, but before the date of AGM.

Case (d): Co with mutual consent converted share application money to Loan after 31.3.2013, but before the date of AGM.

Suggestions:

Case (a): Reply to ROC stating the fact that as money had been refunded before the date of AGM, the company had identified the unclaimed amounts as "NIL" & hence such form had not been submitted.

Case (b):

- File Return of Allotment now &
- Submit a reply to ROC stating the fact that as shares had been allotted before 90 days from the date of AGM, company had identified, the unclaimed amounts as NIL & hence such form had not been submitted.

Case (c): Reply to ROC stating the fact that the company had identified the unclaimed amounts as "NIL" & hence such form had not been submitted.

Case (d): Reply to ROC stating the fact that the company had identified the unclaimed amounts as "NIL" & hence such form had not been submitted.

Example 2 : A company received share application money in Jan 2011, which is lying in the share application a/c as on 31.3.13 & non compliance notice is received from ROC. Such money had either already been refunded or share had been allotted before 1.4.14. Return of allotment had not been filed till date.

However, there is no unclaimed amount lying with company.

Suggestions:

- a) File Return of Allotment, if shares had been allotted. As allotment has been made under Companies Act, 1956, MGT 14 is not required to be filed.
- b) Reply to ROC stating the fact that the company had identified the unclaimed amounts as "NIL" & hence such form had not been submitted. Also state the fact that the amount had been allotted & return of allotment had been filed.

Example 3 : A company received share application money in Jan 2014, which is lying in the share application a/c as on 31.3.14. Co with mutual consent converted share application money to Loan after 31.3.2014. Can company do so?

Suggestions: No, company cannot adjust share application amount & company have to refund it to the applicant w.e.f 01.04.2014. As per Explanation (b) to clause (vii) of the definition of deposit under Companies (acceptance of deposit) Rules, 2014, any adjustment of share application money shall not be treated as refund. As per sec 42(6), A company making an offer or invitation under this section shall allot its securities within sixty days from the date of receipt of the application money for such securities and if the company is not able to allot the securities within that period, it shall **repay** the application money to the subscribers within fifteen days from the date of completion of sixty days and if the company fails to repay the application money within the aforesaid period, it shall be liable to repay that money with interest at the rate of twelve per cent. per annum from the expiry of the sixtieth day: monies received on application under this section shall be kept in a separate bank account in a scheduled bank and shall not be utilised for any purpose other than—

(a) for adjustment against allotment of securities; or

(b) for the repayment of monies where the company is unable to allot securities.

SIMPLE PROCESS TO RAISE CAPITAL FOR UNLISTED COMPANIES UNDER NEW COMPANY LAW

A SAMPLE CASE STUDY:

A Pvt Ltd is having two members, Mr A & Mrs A. Co wants to raise Rs 2 Lakhs by issue of equity shares. Mr A & Mrs A do not want to invest further. Even Mrs A wants to sell some shares. However, Mr C wants to invest in the Company. It is very costly & complex for company to follow private placement provisions. Mr C purchases 100 shares from Mrs A. Now, company have 3 members: Mr A, Mrs A & Mr C. Company comes with right issue, the process of which is very simple i.e. by calling a Board meeting, without opening new bank a/c, without valuation of shares, without need to pass SR in general meeting. Mr A & Mrs A renounced right in favour of C & company able to raise fund easily.

A. RELEVANT PROVISIONS ARE AS FOLLOWS:

Sec 62. (1) Where at any time, a company having a share capital proposes to increase its subscribed capital by the issue of further shares, such shares shall be offered—

(a) to persons who, **at the date of the offer, are holders** of equity shares of the company in proportion, as nearly as circumstances



Members' Section

admit, to the paid-up share capital on those shares by sending a letter of offer subject to the following conditions, namely:—

(i) the offer shall be made by notice specifying the number of shares offered and limiting a time not being less than fifteen days and not exceeding thirty days from the date of the offer within which the offer, if not accepted, shall be deemed to have been declined;

(ii) unless the articles of the company otherwise provide, the offer aforesaid shall be deemed to include a right exercisable by the person concerned to renounce the shares offered to him or any of them in favour of any other person; and the notice referred to in clause (i) shall contain a statement of this right;

(iii) after the expiry of the time specified in the notice aforesaid, or on receipt of earlier intimation from the person to whom such notice is given that he declines to accept the shares offered, the Board of Directors may dispose of them in such manner which is not dis-advantageous to the shareholders and the company;

(b) The notice referred to in sub-clause (i) of clause (a) of sub-section (1) shall be despatched through registered post or speed post or through electronic mode to all the existing shareholders at least three days before the opening of the issue.

B. PROCEDURE:

- i) Call a Board meeting to approve right issue including "letter of offer", which shall include right of renunciation also.
- ii) Send offer letter to all existing members as on the date of offer
- iii) Receive acceptance/renunciation/rejection of rights from members to whom offer has been sent & also from persons in whose favour right renounced.

iv) Call a Board meeting to approve allotment, issue of share certificate & authorize a director to file E-form PAS 3(Return of Allotment) to ROC & MGT 14 for issue of share certificate.

v) File E-form MGT 14 for issue of share (Allotment of shares & Issue of share certificate: Refer D below) & PAS 3(Return of Allotment) to ROC for allotment

vi) Issue share certificate

C. MGT14 IS NOT REQUIRED TO BE FILED FOR ALLOTMENT OF SHARES, HOWEVER, IT IS REQUIRED TO BE FILED FOR ISSUE OF SHARES:

i) As per sec 179(3)(c), the Board of Directors of a company shall exercise the powers to "issue" securities on behalf of the company by means of resolutions passed at meetings of the Board.

ii) As per sec 117(1) & (3), such resolutions are to be filed to ROC.

iii) It has been decided that allotment of shares & issue of share are different.

iv) To avoid dispute, it is suggested to pass both resolutions i.e.

i) for allotment of shares as well **ii)** for issue of share certificate in same meeting & file with ROC in MGT14.

D. WHY IT IS SAFER TO RENOUNCE RIGHT IN FAVOUR OF MEMBER ?

As per Letter No. 8/81/56-PR, dated 4 November, 1957, the issue of further shares by a company to its members with the right to renounce them in favour of third parties does not require the issue or registration of a prospectus. However, there is no such circular under Companies Act, 2013.