

## GUIDANCE NOTE ON SECTION 293A OF THE COMPANIES ACT AND THE AUDITOR

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### Foreword to the First Edition

*Under Section 293A of the Companies Act, 1956, companies are prohibited from making contributions to a political party or for any political purpose. Our members are often confronted with the problem of interpreting this requirement for the purpose of deciding whether or not a contribution to a political party or for a political purpose is involved in a particular case. In view of the importance of the matter and the need for maintaining a uniform approach, the Company Law Committee of the Council of the Institute of Chartered Accountants of India decided to bring out a Guidance Note for the benefit of the members of the Institute. It is hoped that this Note will be of use to members in dealing with the complex problem of political contributions in the accounts of companies.*

*I wish to place on record our appreciation for the service rendered by Shri A.K. Majumdar, A.C.A., Deputy Director of Studies of the Institute, in preparing this Note.*

New Delhi  
12th March, 1976

**S. K. Gupta**  
Chairman  
Company Law Committee

## **Section 293A of the Companies Act and the Auditor**

### **Foreword to the Second Edition**

*The hitherto complete ban on contribution by companies to political parties or for political purposes was relaxed to a considerable extent by the Companies (Amendment) Act, 1985, by which the existing Provisions of Section 293A of the Companies Act, 1956 were substituted with effect from May 24, 1985.*

*The Company Law Committee of the Council, therefore, decided to revise the Guidance Note on the subject. I am sure, the revised Guidance Note will be found useful by the members while dealing with the complex issue of political contributions.*

*I would like to place on record, both on behalf of the Council and on my own behalf, our appreciation and thanks to Mr. A. H. Dalal, Chairman of the Company Law Committee of the Council and his team for their efforts in bringing out this Second Edition.*

New Delhi  
6-6-1986

**P. A. Nair**  
President

## **Preface to the Second Edition**

*This Guidance Note was first published in 1976 when, under Section 293A of the Companies Act, 1956, companies were prohibited from making contributions to a political party or for any political purpose. Subsequent thereto, it was reprinted five times, the last being in 1985. Since elaborate amendments have been incorporated in Section 293A of the Act by the Companies (Amendment) Act, 1985 which came into force from May 24, 1985, the Company Law Committee of the Council felt it imperative to revise the existing Guidance Note in consonance with the amended provisions. Broadly, the amended Section seeks to: (i) continue the blanket ban which existed before the aforesaid Amendment Act of 1985, on political contributions in the case of Government companies and companies which have been in existence for less than three financial years; (ii) permit any other company to make political contributions not exceeding five per cent of the average net profit if a resolution authorising any such contributions is passed at a meeting of the Board of Directors; (iii) impose an obligation on every company to disclose in its Profit & Loss Account any amount or amounts contributed by it to any political party or any political purpose.*

*On behalf of the Committee and on my own behalf, I would like to convey my sincere thanks to Sarvashri I. C. Jain, P.N. Shah; J. E. Dastur, S. C. Bafna and N.T. Dalal for their unstinted co-operation and assistance at various stages in finalizing the Guidance Note which, it is expected, will be found useful by the members.*

New Delhi  
30-5-1986

**A. H. Dalal**  
Chairman  
Company Law Committee

### ***Section 293A of the Companies Act and the Auditor***

1. The hitherto complete ban on any contribution by companies to any political party or for any political purpose was relaxed to a great extent by the Companies (Amendment) Act, 1985, by which the provisions of the then existing Section 293A of the Companies Act, 1956 were totally substituted with effect from 24.5.1985, the day on which the said Amendment Act of 1985 received the assent of the President of India.

2. For ready reference, the old Section 293A as well as the new one are reproduced in an Annexure to this Guidance Note.

3. The new Section 293A provides that –

- (a) A company (other than a government company) which has been in existence for less than three financial years or any Government company shall not contribute any amount directly or indirectly to any political party or for any political purpose to any person;
- (b) A company other than the above is permitted to contribute to any political party or for any political purpose to any person provided that the aggregate of the amounts so contributed by it, directly or indirectly, in any financial year does not exceed 5% of its average net profits determined in accordance with the provisions of Sections 349 and 350 of the Act during the three immediately preceding financial years;
- (c) No such contribution shall be made by a company unless a resolution authorising the making of such contribution is passed at a meeting of its Board of Directors.

4. It will thus be seen that the blanket ban on making of contributions referred to above is continued so far as government companies and those companies which have been in existence for less than three financial years are concerned. It may be noted that Government companies will not include companies governed by Section 619B. Any other company is, however, permitted to make such contributions in the aggregate in any financial year, not exceeding 5% of average net profits of the company computed in accordance with Sections 349 and 350 of the Companies Act, 1956, during the immediately preceding three financial years provided the Board of Directors of the company at a meeting authorises the making of the same by a resolution.

4.1 It may be pointed out that the second proviso to Section 293A(2) provides that no such contribution shall be made by a company unless a

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resolution authorising the making of such contribution is passed at a meeting of the Board of Directors.

4.2. The point for consideration is whether an *ex-post facto* resolution of the Board of Directors would regularise a contribution already made. In this connection, attention may be drawn to the interpretation given; to the word "unless", as appearing in Section 372 (4) by the Calcutta High Court in the case of Mathura Prasad Saraf vs. Company Law Board (1979) 49 Comp. Cas. 371 wherein the Court has interpreted the said expression to mean in the context of the Central Government's approval referred to therein that it could be obtained even after the investment is made. If this analogy is applied, it is possible to take the view that an *ex-post facto* resolution of the Board of Directors would have the effect of regularising the contribution. A practical difficulty, however, will arise in such a case if the Board refuses to pass such a resolution after a contribution is already made, in retrieving the amount donated.

5. The said limit of 5% of average net profits has to be considered with reference to the aggregate amount or amounts of such contributions made directly or indirectly in a given financial year of the company. However, it is provided that where a portion of the financial year of any company falls before the commencement of the Companies (Amendment) Act of 1985, i. e. before 24.5.85 and a portion falls after such commencement, then the latter portion shall be deemed to be a financial year for this purpose. This would mean that even if a small period of the current financial year of the company falls after the date on which the new Section 293A came into force, namely 24<sup>th</sup> May, 1985 (e.g. in the case of a company, whose accounting year ends on 31<sup>st</sup> May, 1985), during this short period the company could make contribution to the extent of full 5% of the said average net profits.

6. Section 293A makes certain specific provisions so as to remove several ambiguities relating to the extent and sweep of the situations/dealings which were intended to be covered in the ambit of this Section and to control certain practices which had been employed in the past to circumvent the previous restrictions. The use of the words "directly or indirectly" (which were absent in the old Section) after the words 'contributes any amount or amounts, appearing in sub-sections (1) and (2) of the new Section appear to cover these several practices, which came to be employed earlier. And though the word 'amount' is not defined even in the new Section, yet taking the provisions made as a whole, it should not be difficult to judge the

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dealings which will be hit by this new Section. In this context, the Committee is of the view that the expression "amount" used in this Section is not necessarily linked with money. Anything capable of quantification can be expressed as "amount". Consequently, any assistance, donation and contribution to a political party or for a political purpose, made through means other than money, but which is quantifiable and capable of being expressed in monetary terms is also covered by Section 293A.

7. The Section clarifies what will be considered to be a political purpose. Any donation or subscription or payment made or caused to be given by or on behalf of a company to a person who is carrying on any activity which can reasonably be regarded as likely to effect public support for a political party shall be deemed to be a contribution to such person for a 'political purpose' [Sub-section (3) (a)]\*

8. The Section also expressly provides that expenditure incurred directly or indirectly on advertisements for the advantage of a political party will be deemed to be a contribution of the kind covered by this Section. And if the advertisement is in any publication by or on behalf of a political party, the expenditure thereon will be deemed to be a contribution to such political party. Where such publication is not by or on behalf of a 'political party' as such, but, for the advantage of a political party then the expenditure on advertisement will be deemed to be a contribution for a political purpose' to the person publishing it. Therefore, such expenditure should also be included in reckoning whether the limit of 5% of average net profit is exceeded or not. It may be noted that Section 293A(3)(b) applies to advertisement in any publication, being the publication in the nature of a souvenir, brochure, tract, pamphlet or the like, but will not include a newspaper. Therefore, if an advertisement is given in a newspaper run by a political party and a genuine *quid pro quo* is evident in the transaction, the payment for the advertisement should be treated as being outside the ambit of the prohibition. The auditor will have to exercise his judgment regarding the element of "*quid pro quo*" based on the facts and circumstances of the case.

9. Any amount/amounts contributed by a company which fall under this Section, i.e., amounts contributed to any political party or for political

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\* It may be mentioned that the explanation of the term "political purpose" in sub- Section (3) (a) largely conforms to the opinion expressed by the Institute earlier (vide paragraph 17 of the previous edition of the guidance note on the subject).

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purposes, are required to be disclosed separately in its profit and loss account, giving particulars of the total amount contributed and the name of the party or the person to which or to whom such amount has been contributed.

10. The penal consequences for a company for making any contributions in contravention of these provisions are severe as it will be liable to be punished with a fine which may extend to three times the amount contributed in contravention of the Section (as against the limit of Rs. 5,000/- in the old Section). However, the punishment for every officer in default is the same as in the old Section, namely, that he or they shall be liable to imprisonment for a term which may extend to three years in addition to fine.

11. Though the language of the revised Section 293A is clear to convey the broad intention of the Legislature, the following terms, phrases and expressions (some of which did not exist in the earlier Section) used therein require a careful study and examination to comprehend the implications of its provisions as a whole.

### **(a) 'Political Party'**

The Election Commission in exercise of the powers conferred on it by Article 324 of the Constitution of India read with rule 5 and rule 10 of the Conduct of Election Rules, 1961 (framed under the Representation of People Act, 1951) has made an order defining 'Political party' under paragraph 2(h) of the Election Symbols (Reservation and Allotment) Order, 1968.

"Political party" means an association or body of individual citizens of India registered with the Commission as a political party under paragraph 3 and includes a political party deemed to be registered with the Commission under the proviso to sub-paragraph (2) of that paragraph."

### **(b) 'Political Purpose'**

The term 'Political Purpose' is explained in sub-section (3) as under:

Any activity which can reasonably be regarded as likely to effect public support for a political party will be deemed to be political purpose. Any payment therefore made to a person who carries on such activity will be a contribution for political purpose.

### **(c) 'Directly or Indirectly'**

These words are added as suffix to the words "contribute any amount or

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amounts” in sub-sections (1) and (2). These words were not there in the old Section 293A. It is, therefore, necessary to analyse the significance thereof. Several practices of helping political parties or political purposes, monetarily or non-monetarily which were being followed till now, will fall within the ambit of this Section due to the word “indirect” used herein. The following items will be covered now by the Section due to the addition of the words “directly or indirectly” and the same should be aggregated to determine whether the contributions covered by this Section are within the permissible limits:

- (i) Contribution made directly to a political party whether in cash or in other form.
- (ii) Expenditure incurred on printing and distribution of posters and leaflets, either directly concerned or connected with elections or otherwise for a political purpose.
- (iii) Contribution made directly to a political party whether in cash or in other form for running an educational institution or for undertaking philanthropic activities.
- (iv) A donation, contribution, or other form of support to a Trust, Society or Association in any of the under noted circumstances:
  - (a) If the Trust, Society or Association has any political objectives either wholly or even partially.
  - (b) If the Trust, Society or Association is formed for any political purpose either wholly or even partially.
  - (c) If the Trustees or Governing Council or Committee of the Trust, Society or Association have the discretion of using the funds wholly or partially for a political purpose or in furtherance of a political objective. On the other hand, the mere fact that some of the objects of a particular Trust, Society or Association are similar to the objects of a particular political party but are not of a political nature should not act as a disqualification.
- (v) Expenditure incurred on remuneration (including other benefits) to employees or on other establishment where the services of the employees are made available in connection with the activities of some political party, such as elections to legislative assembly, Parliament, etc.



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- (vi) Making available vehicles owned by the company to any political party or to any candidate seeking election to any local authority, assembly, Parliament, etc., either free of cost, or at less than market rate.

### **(d) 'Person'**

The word 'Person' has now been used in sub-section (1) (b) (ii) and (2) (b) instead of the words 'individual or body' used in the corresponding provisions of the old Section 293 A. It appears that the word 'Person' is intended to cover a wider area of recipients than what could be covered in the words 'individual or body'.

### **(e) 'Average Net Profits'**

These words used in the first proviso to sub-section (2) do not need much explanation. Profits determined in accordance with Sections 349 and 350 of the Act for the immediately preceding three financial years, would have to be averaged. The companies which write off 'Depreciation' on a basis other than that as per Section 350 would have to recompute depreciation and consequently the net profits for this purpose. In this connection, a doubt which is likely to arise is whether in view of the 'Explanation' below the first proviso to sub-section (2) and as noted in para (5) herein above, the latter portion of the financial year which falls after the date 24-5-1985, and which is to be deemed to be a financial year, will be taken as one full financial year for averaging net profits. The problem may arise at the time of considering such contributions made during the financial year ending in 1988. The proper view, however, in this context, would be that for the purpose of calculating average net profits, three complete financial years should be taken into account.

12. If any kind of service or facility is made available to a political party or for a political purpose, no element of political contribution should be deemed to arise if a charge is made for the service or facility on a reasonable basis. If, on the other hand, no charge is made or the charge is patently or grossly unreasonable, the shortfall should be regarded as a political contribution and treated accordingly. In determining a reasonable charge for the service or facility made available to a political party or for a political purpose, regard shall be had only to the direct cost of providing such service or facility. No attempt need ordinarily be made to determine the comprehensive cost of facility or service by including a part of the company's normal overheads.

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### **Auditor's Duties**

13. The Committee is of the view that when an auditor is satisfied that political contribution has been made in excess of the limit prescribed in Section 293A, he should bring this to the attention of the shareholders by qualifying his audit report and making a mention of the excess amount involved, if ascertainable. This is because making a donation in excess of the prescribed limit amounts to an illegal application of the company's funds.

14. Where the limit laid down under Section 293A is adhered to and the facts are properly disclosed then the auditor has no further duty. Where, however, the facts regarding such contributions are not properly disclosed, then the auditor should qualify his report and state the facts therein. Where he has a genuine doubt regarding the applicability of the Section, he should ensure that the fact is properly disclosed in his audit report.

15. If, on the facts of a particular contribution, the company has obtained legal opinion indicating that it does not contravene the provisions of this Section and the auditor in the exercise of his judgment accepts that opinion, no need of disclosure should arise, provided that the matter is one which is not covered by this Guidance Note. If, on the other hand, the matter is covered by the Institute's Guidance Note, the auditor should insist upon disclosure, even though the client has obtained a contrary legal opinion, and should qualify his report. The same position would also arise in the case where even though the matter is not covered by the Institute's Guidance Note, the auditor, in the exercise of his judgment, is unable to accept the legal opinion. In such a case, he should ensure that the facts are disclosed in an adequate manner and should also qualify his audit report.

16. It will be advisable to obtain a certificate from the company's Board of Directors to the effect that all amounts of contributions to political parties or for any political purpose to any person falling under the provisions of Section 293A have been brought into the books of account of the company and that no amounts of such nature other than those so included in the books have been paid/given directly or indirectly.

17. An auditor's duty, as such is to examine and report on the accounts of the company in accordance with the requirements of Section 227 of the Companies Act. The auditor, therefore, has no specific duty to make any special enquiry to unearth cases of unauthorised political contributions if they are not readily apparent from the examination of the accounts made in the

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normal course of the audit. If any unauthorised political contribution (or such contribution in excess of the permissible limit, as the case may be) has been skillfully concealed by a company or it has not come to the notice of the auditor in the normal course of his audit, an auditor would be responsible only to the extent it can be established that in the conduct of that audit he acted without reasonable care and skill.

## **Section 293A of the Companies Act and the Auditor**

### **Annexure**

#### **Section 293A before amendment**

(1) Notwithstanding anything contained in any other provision of this Act, neither a company in general meeting nor its Board of Directors shall after the commencement of the Companies (Amendment) Act, 1969, contribute any amount or amounts –

- (a) to any political party, or
- (b) for any political purpose to any individual or body.

(2) If a company contravenes the provisions of sub-section (1), then-

- (i) the company shall be punishable with fine which may extend to five thousand rupees; and
- (ii) every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine.

#### **Section 293A after amendment**

(1) Notwithstanding anything contained in any other provision of this Act –

- (a) no Government Company; and
- (b) no other company which has been in existence for less than three financial years; shall contribute any amount or amounts directly or indirectly –
  - (i) to any political party; or
  - (ii) for any political purpose to any person.

(2) A company, not being a company referred to in clause (a) or clause (b) of sub-section (1), may contribute any amount or amounts, directly or indirectly –

- (a) to any political party
- (b) for any political purpose to any person;

Provided that the amount or, as the case may be, the aggregate of the amounts which may be so contributed by a company in any financial year shall not exceed five per cent of its average net profits determined in accordance with the provisions of sections 349 and 350 during the three immediately preceding financial years.

**Explanation** - Where a portion of a financial year of the company falls before the commencement of the Companies (Amendment) Act, 1985, and a portion falls after such commencement, the latter portion shall

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be deemed to be a financial year within the meaning, and for the purposes, of this sub-section;

Provided further that no such contribution shall be made by a company unless a resolution authorising the making of such contribution is passed at a meeting of the Board of Directors and such resolution shall, subject to the other provisions of this section, be deemed to be justification in law for the making and the acceptance of the contribution authorised by it.

(3) Without prejudice to the generality of the provisions of sub- sections (1) and (2) –

- (a) a donation or subscription or payment caused to be given by a company on its behalf or on its account to a person who, to its knowledge, is carrying on any activity which at the time at which such donation or subscription or payment was given or made, can reasonably be regarded as likely to effect public support for a political party shall also be deemed to be contribution of the amount of such donation, subscription or payment to such person for a political purpose;
- (b) the amount of expenditure incurred directly or indirectly by a company on advertisement in any publication (being a publication in the nature of a souvenir, brochure, tract, pamphlet or the like) by or on behalf of a political party or for its advantage shall also be deemed—

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- (i) where such publication is by or on behalf of political party, to be a contribution of such amount to such political party, and
  - (ii) where such publication is not by or on behalf of but for the advantage of a political party, to be a contribution for a political purpose of the person publishing it.
- (4) Every company shall disclose in its Profit and Loss Account, any amount or amounts contributed by it to any political party or for any political purpose to any person during the financial year to which that account relates, giving particulars of the total amount contributed and the name of the party or person to which or to whom such amount has been contributed.
- (5) If a company makes any contribution in contravention of the provisions of this section,
  - (a) the company shall be punishable with fine which may extend to three times the amount so contributed; and
  - (b) every officer of the company who is in default, shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine.