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INTER CA CORPORATE AND OTHER LAWS

[AS PER NEW SYLLABUS NOTIFIED BY
THE ICAI FROM 01.07.2023]



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PREFACE

Hello Friends,

Team Ednovate at the very outset extends its warm Welcome to You ALL in the Magical world of Chartered Accountancy.

This Enriching journey will be sometimes Tiring, sometimes Lengthy, sometimes Complex but it's our promise to you that it will Certainly be Enjoyable and Worthy of your time and efforts.

Through this book and lectures we intend to provide you with:

1. Exam oriented Exhaustive, Amended and Easy to understand Content.
2. Questions are selected from ICAI material and past examination.
3. Seamless Conceptual Understanding of the subject with Real Life Practical Examples.

As per a Famous Saying,

“A journey of a Thousand miles begins with a Single Step”

So let's take our First step towards unwinding CA INTER and come out of it as a PRO.

Wish you all the Best

Team Ednovate

Advice to students before starting LAW subject



BEFORE YOU JUDGE ME, MAKE SURE THAT
YOU ARE PERFECT

Why
So
Serious?

SOME PEOPLE WANT TO SEE YOU FAIL.
DISAPPOINT THEM.



Dilon mein tum apni betaabiyen leke
chal rahe ho toh zinda ho tum,
Nazar mein khwabon ki bijliyan leke
chal rahe ho toh zinda ho tum...

Hawa ke jhokon ke jaise aazad rehna seekho,
Tum ek dariya ke jaise lehren mein behna seekho ...
Har ek lamhe se tum milo khole apni baahen,
Har ek pal ek naya samha dekhe yeh nigaahen...

Jo apni aankhon mein hairaniyan
leke chal rahe ho toh zinda ho tum,
dilon mein tum apni betaabiyen
leke chal rahe ho toh zinda ho tum



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Part A

CORPORATE LAW

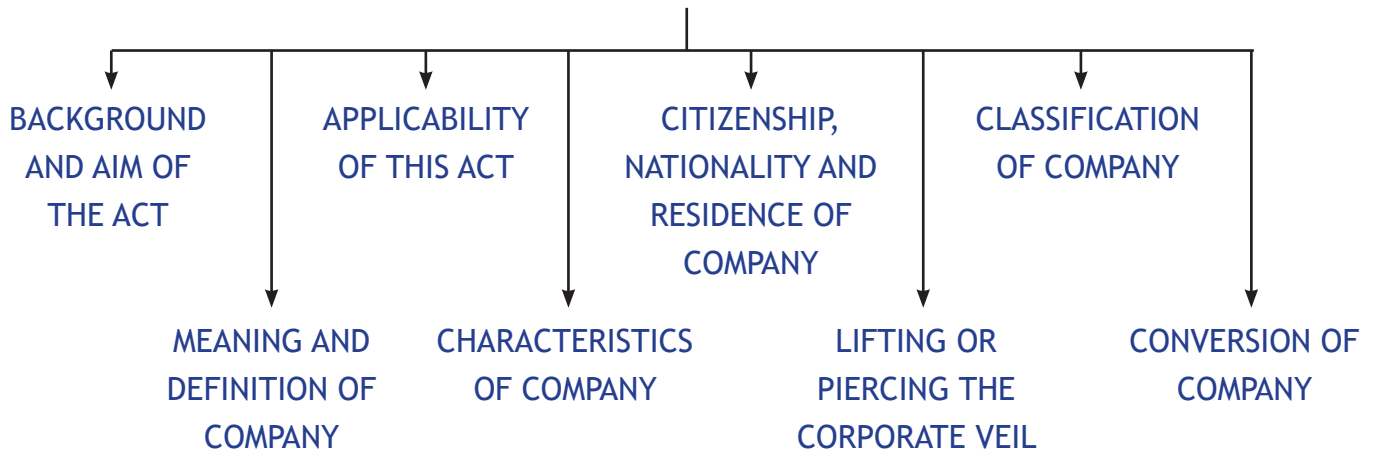




01

PRELIMINARY

CHAPTER OVERVIEW



BACKGROUND AND AIM OF THE ACT

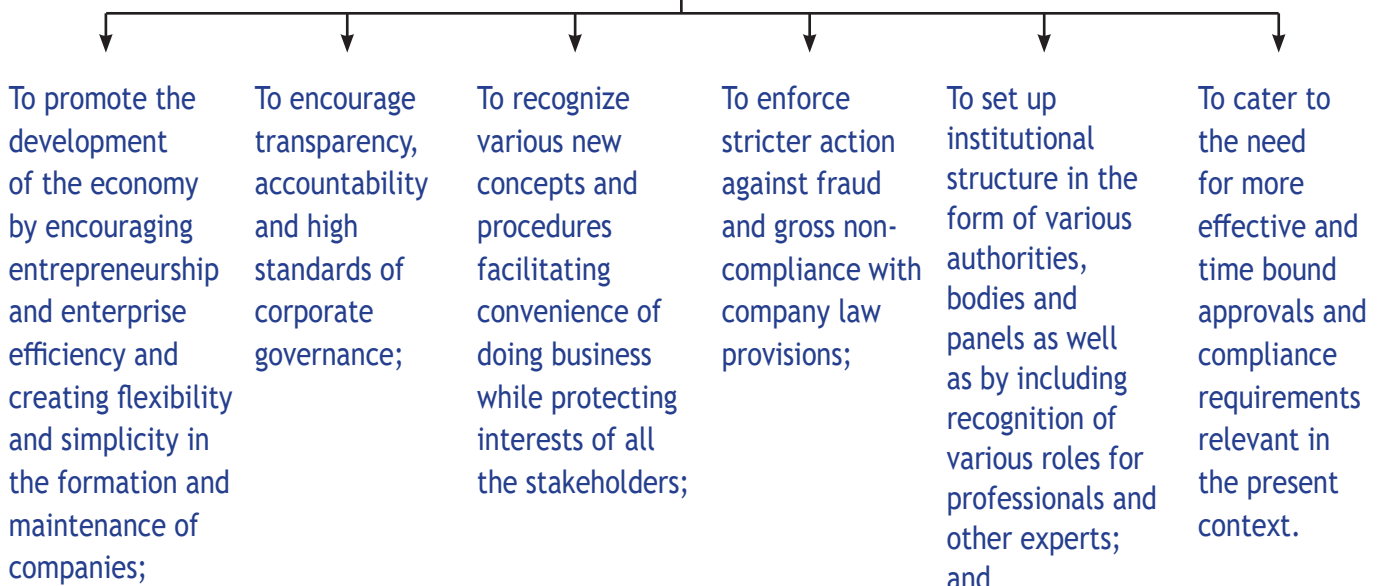
It came into existence at once from the date of notification in the Official Gazette i.e., from **30th August, 2013**, however, the remaining provisions of the Act shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint and different dates may be appointed for different provisions of this Act.

It extends to the **whole of India**.

Structure of the Act, 2013

470 Sections (covered in 29 Chapters) and 7 Schedules

Purpose/ Objective of the Act





COMPANY

MEANING OF COMPANY

The word 'company' is derived from the Latin words (com= with or together; and panis = bread or meal); and originally referred to an association of persons who took their meals together.

DEFINITION OF COMPANY

The term 'company' has been defined under Section 2(20) of the Companies Act, 2013. As per this, 'company' means a company incorporated under Companies Act, 2013 or under any of the previous laws relating to companies.

It may be noted the term 'Company' shall be used in the sense as defined above for the entire Companies Act, 2013, unless the context otherwise requires.

ACT APPLICABLE TO:

Short title, extent, commencement and application Section 1

It extends to the whole of India. The provisions of this Act shall apply to-	companies incorporated under this Act or under any previous company law;	insurance companies, except in so far as the said provisions are inconsistent with the provisions of the Insurance Act, 1938 or the Insurance Regulatory and Development Authority Act, 1999;	banking companies, except in so far as the said provisions are inconsistent with the provisions of the Banking Regulation Act, 1949;	companies engaged in the generation or supply of electricity, except in so far as the said provisions are inconsistent with the provisions of the Electricity Act, 2003;	any other company governed by any special Act for the time being in force, except in so far as the said provisions are inconsistent with the provisions of such special Act; and	such body corporate, incorporated by any Act for the time being in force, as the Central Government may, by notification, specify in this behalf, subject to such exceptions, modifications or adaptation, as may be specified in the notification.



CHARACTERISTICS/FEATURES OF COMPANY

1

Separate legal entity: A company is an artificial person having a personality which is distinct from the members constituting it. Thus, a company has got an entity which is separate from its members. And since this separate entity concept is conferred by law, it is said that a company has got a separate legal entity.

1. **Salomon v. Salomon & Co. Ltd.**

Salomon had, for some years, carried on a prosperous business as a leather merchant and boot manufacturer. He formed a limited company consisting of himself, his wife and a daughter, and his 4 sons as the shareholders, all of whom subscribed for one share of 1 pound each. Salomon was the managing director and two of his sons were other directors.

Salomon sold his business (which was perfectly solvent at that time) to the Company for the sum of 38,782 £. He got the following consideration:-

10,000	Secured Debentures of 1£ each
20,000	Fully - paid Shares of 1 £ each
8,782	Cash

The company soon ran into difficulties and the debenture holders appointed a receiver and the company went into liquidation. The total assets of the company amounted to 6,050£, its liabilities were 10,000£ secured debentures and 8,000£ owing to unsecured trade creditors. The unsecured trade creditors claimed the whole of the company's assets, viz. 6,050 £ on the ground that as the company was a mere agent for Salomon and thus they were entitled to payment of their debts in priority to debentures.

The House of Lords rejected these contentions and held that a company, on registration, has its own existence or personality separate and distinct from its members and, as a result, a shareholder cannot be equated with a company, even if he holds virtually the entire share capital of the company.

2

Limited liability: A company limited by shares is a registered company having the liability of its members limited to the amount, if any, unpaid on the shares respectively held by them. If his shares are fully paid - up, he has nothing more to pay.

3

Perpetual Succession: An incorporated company never dies. Perpetual succession, therefore, means that the membership of a company may keep changing from time to time but does not affect its continuity. Members may come and go but the company will continue forever.

4

Separate Property: No member can claim himself to be the owner of the company's properties either during its existence or in its winding up. A member does not even have an insurable interest in the property of the company.

5

Transferability of Shares: The capital of a company is divided into parts called shares. The shares are said to be movable property and subject to certain conditions, freely transferable for that. No shareholder is permanently or necessarily wedded to a company. It may be noted that this right of shareholder is restricted in the case of a private company.

**6**

Common Seal: Since a company has no physical existence, it must act through its agents. All the important documents of a company must be under the seal of the company. The common seal, thus, acts as the official signature of a company. The Companies (Amendment) Act, 2015 has made the common seal optional by omitting the words “and a common seal” from Section 9 so as to provide an alternative mode of authorization for companies who opt not to have a common seal. Reason for this amendment is that common seal is considered as an old concept now.

7

Capacity to sue and be sued: A company, being a body corporate, can sue and be sued in its own name.

8

Separate Management: The members of a company may derive profits without being burdened with the management of the company. The company is administered and managed by its own managerial personnel.

9

Voluntary Association for Profit: A company is a voluntary association for profit. It is formed for the accomplishment of some public goals and whatsoever profit is gained is divided among its shareholders.

IMPORTANT CONCEPTS

IS COMPANY A
CITIZEN?

Although, a company is regarded as a legal person (though artificial), it is not a citizen either under the Constitution of India or the Citizenship Act, 1955.

HAS COMPANY A NATIONALITY
AND RESIDENCE?

It is established through judicial decisions that a company cannot be a citizen, yet it has nationality, domicile and residence.

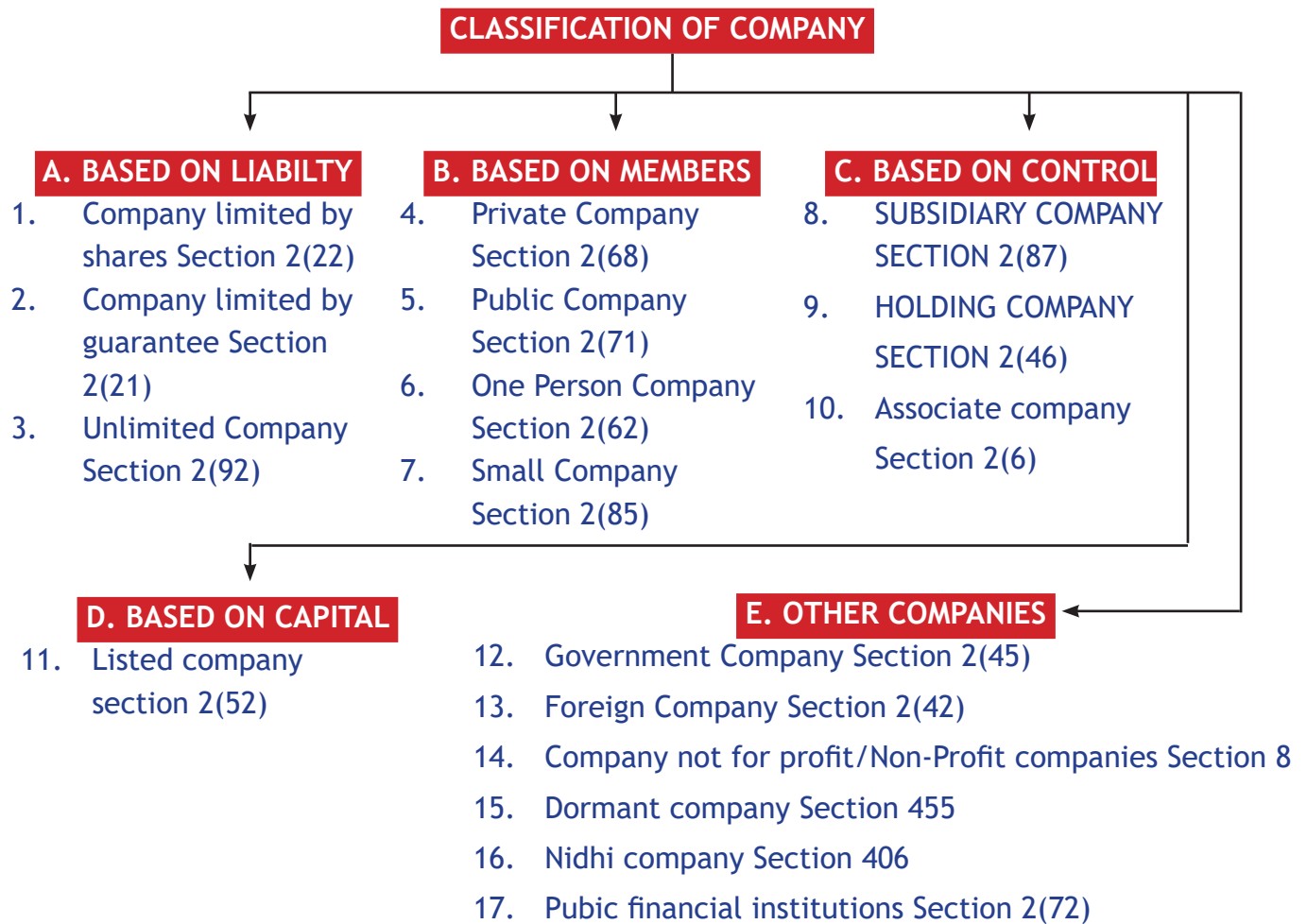
LIFTING OR PIERCING THE
CORPORATE VEIL

Corporate veil: It refers to a separate legal existence enjoyed by the company which is distinct from people who own & manage it.

It is an artificial curtain created by law which separates the company from the people who own and manage it.

Effect of corporate veil: Only Company is liable for the acts/defaults done in name of company, even though directors/employees acted on behalf of company.

Lifting of corporate veil: It means looking behind the company as a legal person, i.e., disregarding the corporate entity and paying regard, instead, to the realities behind the legal facade. Where the Courts ignore the company and concern themselves directly with the members or managers, the corporate veil may be said to have been lifted. Only in appropriate circumstances, the **Courts shall lift the corporate veil.**



A. BASED ON LIABILITY

1. Company limited by shares Section 2(22) :

As per Section 2(22), A company limited by shares is a registered company having the liability of its members limited to the amount, if any, unpaid on the shares respectively held by them. The unpaid amount can be called anytime. If his shares are fully paid - up, he has nothing more to pay.

2. Company limited by guarantee Section 2(21):

1. As per Section 2(21), a company limited by guarantee or a “guarantee company” is a company having the liability of its members limited to such an amount as the members may respectively thereby undertake, by the memorandum of association of the company, to contribute to the assets of the company.
2. A special feature of this type of company is that the liability of members to pay their guaranteed amounts arises only when the company has gone into liquidation and not when it is a going concern.
3. Clubs, trade associations and societies for promoting different objects are examples of companies limited by guarantee.
4. A **guarantee company without share capital** does not obtain its initial and working funds, from its members, but from some other source or sources e.g. grants, endowments, fees, subscriptions and the like.



5. But a **guarantee company having a share capital** raises its initial capital from its members, while the normal working funds would be provided from other sources, such as fees, charges, subscriptions.
If a guarantee company has share capital, the shareholders have two-fold liability; to pay the amount which remains unpaid on their share whenever called upon to pay, and secondly, to pay the amount payable under the guarantee when the company goes into liquidation.
6. The voting power of a guarantee company having a share capital is determined by the shareholding and not by the guarantee.

3. Unlimited Company Section 2(92) :

1. As per Section 2(92), unlimited company is a company not having any limit on the liability of its members. In such a company the liability of a member ceases when he ceases to be a member.
2. Thus, the maximum liability of the members of such a company could extend to their entire personal property to meet the debts and obligations of the company.
3. The members of an unlimited company are not liable directly to the creditors of the company, unlike in the case of partners of a firm. The liability of the members is only towards the company, so long it is a going concern; and in the event of its being wound up, only the Liquidator can ask the members to contribute to the assets of the company.

B. BASED ON MEMBERS

4. Private Company Section 2(68) :

As per Section 2(68), private company is a company which by its articles,—

- (i) restricts the right to transfer its shares;
 - (ii) limits the number of its members to two hundred (except in case of One Person Company):
- The clause provides that where two or more persons hold one or more shares in a company jointly, they shall be treated as a single member:

However following shall not be included in the number of members:

1. persons who are in the employment of the company; and
 2. persons who, having been formerly in the employment of the company, were members of the company while in that employment and have continued to be members after the employment ceased.
- (iii) prohibits any invitation to the public to subscribe for any securities of the company.

There should be at least two persons to form a private company i.e., the minimum no. of members in a private company is two. A private company should have at least two directors. The name of a private limited company must end with the words “Private Limited”.

5. Public Company Section 2(71) :

As per Section 2(71), public company is a company which-

1. is not a private company and
2. Seven or more members are required to form the company.
3. a private company which is a subsidiary of a public company shall also be deemed to be a public company for the purposes of this Act, even where such subsidiary company continues to be a private company in its articles (three restrictions).



There should be at least seven persons to form a public company i.e., the minimum no. of members in a public company is seven. A public company should have at least three directors. The name of a public limited company must end with the word “Limited”.

SEVERALLY LIABLE IN CERTAIN CASES - SECTION 3A

If at any time the number of members of a company is reduced, in the case of a public company, below seven, in the case of a private company, below two, and the company carries on business for **more than six months** while the number of members is so reduced, every person who is a member of the company during the time that it so carries on business after those six months and is cognisant of the fact that it is carrying on business with less than seven members or two members, as the case may be, shall be severally liable for the payment of the whole debts of the company contracted during that time, and may be severally sued there for.”

6. One Person Company Section 2(62):

Definition: As per Section 2(62), one person company is a company which- One Person Company’ means a company which has only one person as a member.

It is basically a private company with some unique features.

As regards the name of a One Person Company, the Act provides that the words “One Person Company” or ‘OPC’ shall be mentioned in brackets below the name of such Company, wherever its name is printed, affixed or engraved.

Relaxation for OPC:

- a) An OPC is primarily a private company. However, certain provisions which are applicable to a private company will not apply to an OPC. For instance, only one director is sufficient (as against two in the case of private company).
- b) OPC is not required to hold annual general meeting.
- c) Information to be provided in the directors’ report has been significantly reduced (as compared to a private company).
- d) Annual return in other companies shall be signed by director and company secretary and in case of no company secretary by a practicing company secretary whereas in the case of OPC annual return shall be signed by company secretary and in case of his absence it will be signed by director of the company.
- e) The requirement of a minimum number of Board meetings to be convened shall not apply to an OPC having one director. However, in case of OPC having more than one director, the OPC shall hold at least one meeting of the Board of directors in each half of calendar year and the gap between two meetings is not less than ninety days.
- f) One Person Company need not have a Cash Flow Statement.

Law with respect to formation of OPC provides that—

1. The memorandum of OPC shall indicate the name of the other person, who shall, in the event of the subscriber’s death or his incapacity to contract, become the member of the company.
2. The other person whose name is given in the memorandum shall give his prior written consent in prescribed form and the same shall be filed with Registrar of companies at the time of incorporation.



3. Such other person may be given the right to withdraw his consent.
4. The member of OPC may at any time change the name of such other person by giving notice to the company and the company shall intimate the same to the Registrar.
5. Any such change in the name of the person shall not be deemed to be an alteration of the memorandum.
6. Only a natural person who is an Indian citizen and resident in India or even a Non-resident (person who has stayed in India for a period of not less than 120 days during the immediately preceding one financial year)-
 - a) Shall be eligible to incorporate a OPC;
 - b) Shall be a nominee for the sole member of a OPC.

Amendment by Finance Act, 2021
7. A natural person shall not be a member of more than a OPC at any point of time and the said person shall not be a nominee of more than a OPC.
8. No minor shall become member or nominee of the OPC or can hold share with beneficial interest.
9. Such Company cannot be incorporated or converted into a company under section 8 of the Act. Though it may be converted to private or public companies in certain cases.
10. Such Company cannot carry out Non-Banking Financial Investment activities including investment in securities of anybody corporate.
11. An OPC can voluntarily convert itself into any kind of company at any time without meeting any of the criteria's as to paid up share capital and average annual turnover.

Amendment by Finance Act, 2021
12. The requirement of compulsory conversion on exceeding the specified turnover or paid-up capital is done away with and now the One Person Company can grow without any restriction.

Amendment by Finance Act, 2021

7. Small Company Section 2(85):

Definition: As per Section 2(85), small company means a company, other than a public company, -

- (i) Paid-up share capital of which does not exceed 4 crores rupees or such higher amount as may be prescribed which shall not be more than ten crore rupees;
and
- (ii) Turnover of which as per as per profit and loss account for the immediately preceding financial year does not exceed 40 crores rupees or such higher amount as may be prescribed which shall not be more than one hundred crore rupees.

Provided that nothing in this clause shall apply to--

- (i) a holding company or a subsidiary company;
- (ii) a company registered under section 8; or
- (iii) a company or body corporate governed by any special Act. It is basically a private company meeting prescribed threshold.

Following are some of the important relaxations provided to a small company:

- (i) Financial statements of small company may not include the cash flow statement.
- (ii) Small company shall be deemed to have complied with the provisions relating to Board meeting if at least one meeting of the Board of directors has been conducted in each half of a calendar year and the gap between the two meetings is not less than ninety days.
- (iii) Merger or amalgamations between two or more small companies have been simplified without the requirement of court process.



C. BASED ON CONTROL

Holding & Subsidiary Company

8. SUBSIDIARY COMPANY SECTION 2(87)

1. As per Section 2(87) provides that a company shall be a subsidiary of another, if any of the following conditions are satisfied :-
 - (a) that other controls the composition of its Board of Directors;
 - (b) that other exercises or-controls more than one-half of the total voting power either on its own or together with one or more of its subsidiary companies; or
 - (c) the first-mentioned company is a subsidiary of any company which is that other's subsidiary.

Provided that such class or classes of holding companies as may be prescribed shall not have layers of subsidiaries beyond such numbers as may be prescribed.
2. For the purpose of clause (a) above, the control of the composition of the Board of directors of a company means that the holding company has power, at its discretion, to appoint or remove all or majority of the directors of the subsidiary company without the consent of the other persons.
3. It should be noted that holding and subsidiary companies are incorporated companies and each is a separate legal entity.
4. For the purpose of this clause, the term 'company' includes any body corporate. Thus, holding and subsidiary relationship can be established between an Indian Company and a Foreign Company.

9. HOLDING COMPANY SECTION 2(46)

As per Section 2(46), 'Holding Company', in relation to one or more other companies, means a company of which such companies are subsidiary companies.

Subsidiary company not to hold shares in its holding company Section 19 :

Section 19 deals with the restrictions on the subsidiary company with respect to holding of shares in its holding company and no holding company shall allot or transfer its shares to any of its subsidiaries companies and any such allotment or transfer of shares of a company to its subsidiary company shall be void.

Following are the exceptions -

- (a) where the subsidiary company holds such shares as the legal representative of a deceased member of the holding company; or
- (b) where the subsidiary company holds such shares as a trustee; or
- (c) where the subsidiary company is a shareholder even before it became a subsidiary company of the holding company.

The subsidiary company referred to in the above exceptions shall have a right to vote at a meeting of the holding company only in respect of the shares held by it as a legal representative or as a trustee, as referred to in clause (a) or clause (b) of the said exceptions.



10. Associate company Section 2(6)

1. As per Section 2(6), In relation to another company, means a company in which that other company has a significant influence, but which is not a subsidiary company of the company having such influence and includes a joint venture company.
2. The expression “significant influence” means control of at least twenty per cent. of total voting power, or control of or participation in business decisions under an agreement;
3. The expression “joint venture” means a joint arrangement whereby the parties that have joint control of the arrangement have rights to the net assets of the arrangement;

D. BASED ON CAPITAL

11. Listed company section 2(52):

As per the definition given in the section 2(52), it is a company which has any of its securities listed on any recognised stock exchange.

Provided that such class of companies, which have listed or intend to list such class of securities, as may be prescribed in consultation with the Securities and Exchange Board, shall not be considered as listed companies

Companies Amendment Act, 2020

Unlisted company: Means a company other than listed company.

E. OTHER COMPANIES

12. Government Company Section 2(45)

As per Section 2(45), government company means any company in which not less than fifty-one per cent. of the paid-up share capital is held by-

- (i) the Central Government, or
- (ii) by any State Government or Governments, or
- (iii) partly by the Central Government and partly by one or more State Governments,

And the section includes a company which is a subsidiary company of such a Government company;

13. Foreign Company Section 2(42)

As per Section 2(42), foreign company means any company or body corporate incorporated outside India which-

- (i) has a place of business in India whether by itself or through an agent, physically or through electronic mode; and
- (ii) conducts any business activity in India in any other manner

14. Company not for profit/Non-Profit companies Section 8

1. **Object of formation of Section 8 Company :** Section 8 of the Companies Act, 2013 deals with the formation of companies which are formed to promote the charitable objects of commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment etc.
2. **Restrictions on such company:**
 - (i) Such company is prohibited from declaring any dividend to its members
 - (ii) Such company has to apply its surplus only in promoting its objects



3. **Power of Central government to issue the license :**
 - (i) This section allows the Central Government to register such person or association of persons as a company with limited liability **without the addition of words 'Limited' or 'Private limited' to its name, by issuing licence** on such conditions as it deems fit. The registrar shall on application register such person or association of persons as a company under this section.
 - (ii) **Central Government has delegated its powers to the ROC.** The Central Government may revoke such delegation of powers or may itself exercise the powers & functions, if in its opinion, such course of action is necessary in the public interest.
4. **Privileges of Limited Company:** On registration the company shall enjoy same privileges and obligations as of a limited company.
5. **A firm may be a member** of the company registered under section 8.
6. **Alteration of Memorandum and Articles:** A company registered under this section shall not alter the provisions of its memorandum or articles except with the previous approval of the Central Government.
7. **Conversion into any other kind of Company:** A company registered under this section may convert itself into company of any other kind only after complying with such conditions as may be prescribed. A company registered under section 8 which intends to convert itself into a company of any other kind shall pass a special resolution at a general meeting for approving such conversion.
8. A company registered under this section shall amalgamate only with another company registered under this section and having similar objects.

Revocation of license:

- (i) The Central Government may by order revoke the licence of the company where the company contravenes any of the requirements or the conditions of this sections subject to which a licence is issued or where the affairs of the company are conducted fraudulently, or violative of the objects of the company or prejudicial to public interest, and on revocation the Registrar shall put 'Limited' or 'Private Limited' against the company's name in the register.
- (ii) But before such revocation, the **Central Government must give it a written notice of its intention to revoke the licence and opportunity to be heard** in the matter.
- (iii) The **Central Govt. has delegate to the Regional Directors**, subject to the condition that the Central Govt. may revoke such delegation of powers or may itself exercise the powers & functions under this section if in its opinion, such course of action is necessary in the public interest.
- (iv) Such order shall be made only after the company is given a reasonable opportunity of being heard.
- (v) Where a licence is revoked, the Central Government may, by order, if it is satisfied that it is essential in the public interest, **direct that:**



The company has to convert its status and change its name
The company be wound up under this Act



↓

If on the winding up or dissolution of a company registered under this section, after the satisfaction of its debts and liabilities if any asset remains, they may be transferred to another company registered under this section and having similar objects, subject to such conditions as the Tribunal may impose, or may be sold and proceeds thereof credited to the Insolvency and Bankruptcy Fund formed under section 224 of the Insolvency and Bankruptcy Code, 2016

The company be amalgamated with another company registered under this section

↓

Where a licence is revoked and where the Central Government is satisfied that it is essential in the public interest that the company registered under this section should be amalgamated with another company registered under this section and having similar objects, then, the Central Government may, by order, provide for such amalgamation to form a single company with such constitution, properties, powers, rights, interest, authorities and privileges and with such liabilities, duties and obligations as may be specified in the order.

Penalty/ punishment in contravention:

If a company makes any default in complying with any of the requirements laid down in this section, the company shall, be punishable with fine varying from ten lakh rupees to one crore rupees and the directors and every officer of the company who is in default shall be punishable or with fine of twenty- five lakh rupees. And where it is proved that the affairs of the company were conducted fraudulently, every officer in default shall be liable for action under section 447.

Companies Amendment Act, 2020

Exceptions :

- (i) Can call its general meeting by giving a clear 14 days notice instead of 21 days.
- (ii) Requirement of minimum number of directors, independent directors etc. does not apply.
- (iii) Need not constitute Nomination and Remuneration Committee and Shareholders Relationship Committee.

15. Dormant company Section 455:

1. Where a company is formed and registered under this Act for a future project or to hold an asset or intellectual property and has no significant accounting transaction, such a company or an inactive company may make an application to the Registrar in such manner as may be prescribed for obtaining the status of a dormant company.
2. “Significant accounting transaction” means any transaction other than—
 - (i) payment of fees by a company to the Registrar;
 - (ii) payments made by it to fulfil the requirements of this Act or any other law;



- (iii) allotment of shares to fulfil the requirements of this Act; and
- (iv) payments for maintenance of its office and records.

16. Nidhi company Section 406 :

As per Section 406, a company which has been incorporated as a nidhi with the object of cultivating the habit of thrift (cost cutting) and savings amongst its members, receiving deposits from, and lending to, its members only, for their mutual benefits and which complies with such rules as are prescribed by the Central Government for regulation of such class of companies.

17. Public financial institutions Section 2(72)

As per Section 2(72), following institutions are to be regarded as public financial institutions.

- (i) The Life Insurance Corporation of India, established under the Life Insurance Corporation Act, 1956;
- (ii) The Infrastructure Development Finance Company Limited,
- (iii) Specified company referred to in the Unit Trust of India (Transfer of Undertaking and Repeal) Act, 2002;
- (iv) Institutions notified by the Central Government under section 4A(2) of the Companies Act, 1956 so repealed under section 465 of this Act;
- (v) Such other institution as may be notified by the Central Government in consultation with the Reserve Bank of India:

Provided that no institution shall be so notified unless—

- (A) it has been established or constituted by or under any Central or State Act other than this Act or the previous company law; or
- (B) not less than fifty-one per cent of the paid-up share capital is held or controlled by the Central Government or by any State Government or Governments or partly by the Central Government and partly by one or more State Governments



CONVERSIONS OF PRIVATE COMPANY INTO PUBLIC COMPANY AND VICE VERSA (Section 18)

1. Conversion of a Private Company into a Public Company:

1. Pass special resolution for alteration of its articles thereby deleting the three restrictions of a private company
2. Pass special resolution for alteration of its memorandum for changing its name thereby deleting the word 'private' from its name
3. File following documents with ROC within 15 days:
 - (i) Copy of altered Articles
 - (ii) Copy of altered Memorandum
4. File copy of the special resolution with the Registrar of Companies within thirty days from the date of passing such resolution in **Form No. MGT. 14**.
5. The Registrar of Companies shall register and issue fresh certificate of incorporation
6. Further, if the number of members is below 7, steps should be taken to increase the number of members to at least 7 and that the number of directors should be increased to at least 3, if they are only 2 directors.

2. Conversion of a Public Company into a Private Company:

1. Pass special resolution for alteration of its articles thereby adding the three restrictions of a private company + **Obtain Central Government Approval**
2. Pass special resolution for alteration of its memorandum for changing its name thereby adding the word 'private' from its name
3. File following documents with ROC within 15 days:
 - (i) Copy of altered Articles
 - (ii) Copy of altered Memorandum
 - (iii) **Copy of CG Approval**
4. File copy of the special resolution with the Registrar of Companies within thirty days from the date of passing such resolution in **Form No. MGT. 14**.
5. Registrar of Companies shall register and issue fresh certificate of incorporation
6. Further, if the number of members exceeds 200 then steps should be taken to reduce the number of members to 200.



CONVERSIONS OF PRIVATE COMPANY INTO PUBLIC COMPANY AND VICE VERSA (Section 18)

3. CONVERSION OF OPC TO PRIVATE/ PUBLIC COMPANY (Section 18)

Voluntary conversion

1. OPC can get itself converted into a Private or Public company after increasing the minimum number of members to 2/7 and directors to 2/3 as the case may be.
2. Pass resolutions for alteration of memorandum and articles
3. File an application to the Registrar
4. The Registrar, who shall after satisfying himself that the provisions applicable for registration of companies have been complied with, close the former registration of the company and issue fresh certificate of incorporation

4. CONVERSION OF PRIVATE COMPANY TO OPC (Section 18)

1. A private company other than a company registered under section 8 (non-profit company) of the Act by passing a **special resolution** in the general meeting.
2. Obtain No objection in writing from members and creditors.
3. File copy of the special resolution with the Registrar of Companies within thirty days from the date of passing such resolution in **Form No. MGT. 14**.
4. The company shall file an application in **Form No. INC.6** for its conversion into One Person Company along with fees as provided in the Companies (Registration offices and fees) Rules, 2014, by attaching the following documents, namely:-
 - (i) The directors of the company shall give a declaration by way of affidavit duly sworn in confirming that all members and Creditors of the company have given their consent for conversion,
 - (ii) The list of members and list of creditors;
 - (iii) The latest Audited Balance Sheet and the Profit and Loss Account; and
5. On being satisfied and complied with requirements stated herein the Registrar shall issue the Revised Certificate of Incorporation, mentioning that now it has become a One Person Company.



QUESTION & ANSWERS



Question 1.

MNP Private Ltd. is a company registered under the Companies Act, 2013 with a paid-up share capital of ₹ 70 lakh and turnover of ₹ 30 crores. Explain the meaning of the “Small Company” and examine the following in accordance with the provisions of the Companies Act, 2013:

- (i) Whether the MNP Private Ltd. can avail the status of small company?
- (ii) What will be your answer if the turnover of the company is ₹ 15 crore?



Solution:

Small Company: According to Section 2(85) of the Companies Act, 2013, Small Company means a company, other than a public company,—

- (1) paid-up share capital of which does not exceed fifty lakh rupees or such higher amount as may be prescribed which shall not be more than ten crore rupees; and
- (2) turnover of which as per its last profit and loss account does not exceed two crore rupees or such higher amount as may be prescribed which shall not be more than one hundred crore rupees.

Nothing in this clause shall apply to—

- (A) a holding company or a subsidiary company;
- (B) a company registered under section 8; or
- (C) a company or body corporate governed by any special Act.

As per the Companies (Specification of Definitions Details) Rules, 2014, for the purposes of sub-clause (i) and sub-clause (ii) of clause (85) of section 2 of the Act, paid up capital and turnover of the small company shall not exceed rupees two crores and rupees twenty crores respectively.

- (i) In the present case, MNP Private Ltd., a company registered under the Companies Act, 2013 with a paid up share capital of ₹ 70 lakh and having turnover of ₹ 30 crore. Since only one criteria of share capital not exceeding ₹ 2 crores is met, but the second criteria of turnover not exceeding ₹ 20 crores is not met and the provisions require both the criteria to be met in order to avail the status of a small company, MNP Ltd. cannot avail the status of small company.
- (ii) If the turnover of the company is ₹ 15 crore, then both the criteria will be fulfilled and MNP Ltd. can avail the status of small company.



Question 2.

Flora Fauna Limited was registered as a public company. There are 230 members in the company as noted below:

- (a) Directors and their relatives 50
- (b) Employees 15
- (c) Ex-Employees (Shares were allotted when they were employees) 10
- (d) 5 couples holding shares jointly in the name of husband and wife (5*2) 10
- (e) Others 145



The Board of Directors of the company propose to convert it into a private company. Also advise whether reduction in the number of members is necessary.



Solution:

According to section 2(68) of the Companies Act, 2013, “Private company” means a company having a minimum paid-up share capital as may be prescribed, and which by its articles, except in case of One Person Company, limits the number of its members to two hundred. However, where two or more persons hold one or more shares in a company jointly, they shall, for the purposes of this clause, be treated as a single member.

It is further provided that -

- (A) persons who are in the employment of the company; and
- (B) persons who, having been formerly in the employment of the company, were members of the company while in that employment and have continued to be members after the employment ceased, shall not be included in the number of members. In the instant case, Flora Fauna Limited may be converted* into a private company only if the total members of the company are limited to 200. Total Number of members
 - (i) Directors and their relatives 50
 - (ii) 5 Couples (5x1) 5
 - (iii) Others 145Total 200

Therefore, there is no need for reduction in the number of members since existing number of members are 200 which does not exceed maximum limit of 200. *The provisions relating to conversion of public company to private company is covered in the Chapter 2 - Incorporation of Company and Matters incidental thereto.



Question 3.

XYZ Ltd. Has a subsidiary company LMN Ltd. The Directors of LMN Ltd want to purchase shares of its Holding Company XYZ Ltd. In light of the provisions contained in companies Act, 2013 you are required to advise the Directors of LMN Ltd on the said issue.



Solution:

Section 19



Question 4.

Asd Bank Ltd. Is a banking Company set up under the Banking regulations Act, 1949. The promoters of the said bank seek your advice whether they are supposed to follow the provisions of the companies Act, 2013 also?



Solution:

Yes as per Section 1 of companies Act, 2013.



Question 5:

S Ltd acquired 10% paid up share capital of H Ltd on 15th March 2017. H Ltd acquired 55% paid up share capital of S Ltd on 10th March 2018. H Ltd. on 25th September, 2020 decided to issue bonus shares in the ratio of 1:1 to the existing shareholders. Accordingly, bonus shares were allotted to S



Ltd. Examine under the provisions of the Companies Act, 2013 and decide

- (i) the validity of holding of shares by S Ltd. in H Ltd.
- (ii) allotment of Bonus shares by H Ltd. to S Ltd.

(4 Marks)



Solution:

As per Section 19 of the Companies Act, 2013, no company shall, hold any shares in its holding company and no holding company shall allot or transfer its shares to any of its subsidiary companies and any such allotment or transfer of shares of a company to its subsidiary company shall be void. However, this shall not apply where the subsidiary company is a shareholder even before it became a subsidiary company of the holding company.

In the given case, H Ltd. has acquired 55% paid up share capital of S Ltd. on 10th March 2018. Whereas, S Ltd. has been holding 10% paid up share capital of H Ltd. since 15th March, 2017. The said instance as asked in the question falls under the exception stated above.

Therefore -

- (i) Holding of shares by S Ltd. in H Ltd. is valid in view of the proviso (c) to sub-section(1) of section 19 of the Act, which states that the restrictions of provisions of section 19(1) will not be applicable where the subsidiary company is a shareholder even before it became a subsidiary company of the holding company.
- (ii) Allotment of bonus shares by H Ltd. to S Ltd. is also valid in view of the above proviso.



Question 6:

The information extracted from the audited Financial Statement of Smart Solutions Private Limited as at 31st March, 2020 is as below:

- (1) Paid-up equity share capital ₹ 50,00,000 divided into 5,00,000 equity shares (carrying voting rights) of ₹ 10 each. There is no change in the paid-up share capital thereafter.
- (2) The turnover is ₹ 2,00,00,000.

It is further understood that Nice Software Limited, which is a public limited company, is holding 2,00,000 equity shares, fully paid-up, of Smart Solutions Private Limited. Smart Solutions Private Limited has filed its Financial Statement for the said year with the Registrar of Companies (ROC) excluding the Cash Flow Statement within the prescribed time line during the financial year 2020-21. The ROC has issued a notice to Smart Solutions Private Limited as it has failed to file the cash flow statement along with the Balance Sheet and Profit and Loss Account. You are to advise on the following points explaining the provisions of the Companies Act, 2013:

- (i) Whether Smart Solutions Private Limited shall be deemed to be a small company whose significant equity shares are held by a public company?

(6 Marks)



Solution:

According to section 2(85) of the Companies Act, 2013, small company means a company, other than a public company, having-

- (A) paid-up share capital not exceeding 4 crore rupees or such higher amount as may be prescribed which shall not be more than ten crore rupees; and
- (B) turnover as per profit and loss account for the immediately preceding financial year not exceeding 40 crore rupees or such higher amount as may be prescribed which shall not be more than one hundred crore rupees:

Provided that nothing in this clause shall apply to a holding company or a subsidiary company.



Also, according to section 2(87), subsidiary company, in relation to any other company (that is to say the holding company), means a company in which the holding company exercises or controls more than one-half of the total voting power either at its own or together with one or more of its subsidiary companies.

In the given question, Nice Software Limited (a public company) holds 2,00,000 equity shares of Smart Solutions Private Limited (having paid up share capital of 5,00,000 equity shares @ ₹ 10 totalling ₹ 50 lakhs). Hence, Smart Solutions Private Limited is not a subsidiary of Nice Software Limited and hence it is a private company and not a deemed public company.

Further, the paid up share capital (₹ 50 lakhs) and turnover (₹ 2 crores) is within the limit as prescribed under section 2(87), hence, Smart Solutions Private Limited can be categorised as a small company.

CHAPTER WISE - CLASS TEST



Question 1:

State Cricket Club was formed as a Limited Liability Company under Section 8 of the Companies Act, 2013 with the object of promoting cricket by arranging introductory cricket courses at district level and friendly matches. The club has been earning surplus. Of late, the affairs of the company are conducted fraudulently and dividend was paid to its members. Mr. Cool, a member decided make a complaint with Regulatory Authority to curb the fraudulent activities by cancelling the licence given to the company.

- (i) Is there any provision under the Companies Act, 2013 to revoke the licence? If so, state the provisions.
- (ii) Whether the Company may be wound up?
- (iii) Whether the State Cricket Club can be merged with M/s. Cool Net Private Limited, a company engaged in the business of networking?

(5 Marks)



Solution:

- (i) According to Section 8(6) of the Companies Act, 2013, the Central Government may by order revoke the licence of the company where the company contravenes any of the requirements or the conditions of section 8 subject to which a licence is issued or where the affairs of the company are conducted fraudulently, or in violation of the objects of the company or prejudicial to public interest, and on revocation, the Registrar shall put 'Limited' or 'Private Limited' against the company's name in the register. But before such revocation, the Central Government must give it a written notice of its intention to revoke the licence and opportunity to be heard in the matter.

Hence, in the instant case, the Central Government can revoke the license given to State Cricket Club as section 8 company, as the affairs of the company are conducted fraudulently and dividend was paid to its members which is in contravention to the conditions given under section 8.

- (ii) Where a licence is revoked, the Central Government may, by order, if it is satisfied that it is essential in the public interest, direct that the company be wound up under this Act or amalgamated with another company registered under this section.

However, no such order shall be made unless the company is given a reasonable opportunity of being heard. [Section 8(7)] Hence, the stated company may be wound up.



- (iii) A company registered under this section shall amalgamate only with another company registered under this section and having similar objects. [Section 8(10)]
In the instant case, State Cricket Club cannot be merged with Cool Net Private Limited as the objects of both the companies are different and not similar.

MCQs



Question 1:

Green Ltd. is incorporated on 3rd January, 2022. As per the Companies Act, 2013, what will be the financial year for the company:

- (a) 31st March, 2022
- (b) 31st December, 2022
- (c) 31st March, 2023
- (d) 30th September, 2023



Solution:

- (c) 31st March, 2023



Question 2.

Roma along with her six friends has incorporated Roma Trading Ltd. in May 2021. The paid-up share capital of the company is ₹ 2 crore. Further, in April 2022, she noticed that in the last financial year, the turnover of the company was well below ₹ 40 crore. Advise whether the company can be treated as a 'small company'.

- (a) Roma Trading Ltd. is definitely a 'small company' since its paid-up capital is much below ₹ 4 crore and also its turnover has not exceeded the threshold limit of ₹ 40 crore.
- (b) The concept of 'small company' is applicable only in case of a private limited company/ OPC and therefore, despite meeting the criteria of 'small company' it being a public limited company it cannot enjoy benefits of 'small company'.
- (c) Unlike a private limited company/OPC which automatically becomes a 'small company' as soon as it meets the criteria of 'small company', Roma Trading Ltd. being a public limited company has to maintain the norms applicable to a 'small company' continuously for two years so that, thereafter, it will be treated as a 'small company'.
- (d) If all the shareholders of Roma Trading Ltd. give an undertaking to the ROC stating that they will not let the paid-up share capital and also turnover exceed the limits applicable to a 'small company' in the next two years, then it can be treated as a 'small company'.



Solution:

- (b) The concept of 'small company' is applicable only in case of a private limited company/ OPC and therefore, despite meeting the criteria of 'small company' it being a public limited company cannot enjoy benefits of 'small company'.



Question 3.

Abhilasha and Amrita have incorporated a 'not for profit' private limited company which is registered under Section 8 of the Companies Act, 2013. One of their friends has informed them that their company can be categorized as a 'small company' because as per the last profit and loss account for the year ending 31st March, 2022, its turnover was less than ₹ 40 crore and its paid up share capital was less than ₹ 4 crore. Advise.

- (a) A section 8 company, which meets the criteria of 'turnover' and 'paid-up share capital' in the last financial year, can avail the status of 'small company' only if it acquires at



least 5% stake in another 'small company' within the immediately following financial year.

- (b) If the acquisition of minimum 5% stake in another 'small company' materializes in the second financial year (and not in the immediately following financial year) after meeting the criteria of 'turnover' and 'paid-up share capital' then with the written permission of concerned ROC, it can acquire the status of 'small company'.
- (c) The status of 'small company' cannot be bestowed upon a 'not for profit' company which is registered under Section 8 of the Companies Act, 2013.
- (d) A section 8 company, if incorporated as a private limited company (and not as public limited company) can avail the status of 'small company' with the permission of concerned ROC, after it meets the criteria of 'turnover' and 'paid-up share capital'.



Solution:

- (c) The status of 'small company' cannot be bestowed upon a 'not for profit' company which is registered under Section 8 of the Companies Act, 2013.



Question 4.

Kaveri Goods Carriers Private Limited (KGCPL) issued 9% Non-convertible Debentures worth ₹ 10 lakhs and thereafter, the directors contemplated to get them listed. After due formalities, these privately placed non-convertible debentures of ₹ 10 lakhs were listed. Which of the following options is applicable in the given situation:

- (a) KGCPL shall be considered as a listed company.
- (b) KGCPL shall not be considered as a listed company.
- (c) KGCPL shall be considered as a listed company only when minimum amount of listed privately placed non-convertible debentures is ₹ 15 lakhs.
- (d) KGCPL shall be considered as a listed company only when minimum amount of listed privately placed non-convertible debentures is minimum ₹ 20 lakhs.



Solution:

- (b) KGCPL shall not be considered as a listed company.



Question 5.

"Associate company", in relation to another company, means a company in which that other company has a significant influence, but which is not a subsidiary company of the company having such influence and includes a joint venture company. Here, the words 'significant influence' means:

- (a) Control of at least 10% of total voting power
- (b) Control of at least 15% of total voting power
- (c) Control of at least 20% of total voting power
- (d) Control of at least 25% of total voting power



Solution:

- (c) Control of at least 20% of total voting power

“

**NEVER FORGET
WHAT YOU ARE.
THE REST OF THE
WORLD WILL NOT.
WEAR IT LIKE ARMOR,
AND IT CAN NEVER BE
USED TO HURT YOU.**

-TYRION LANNISTER





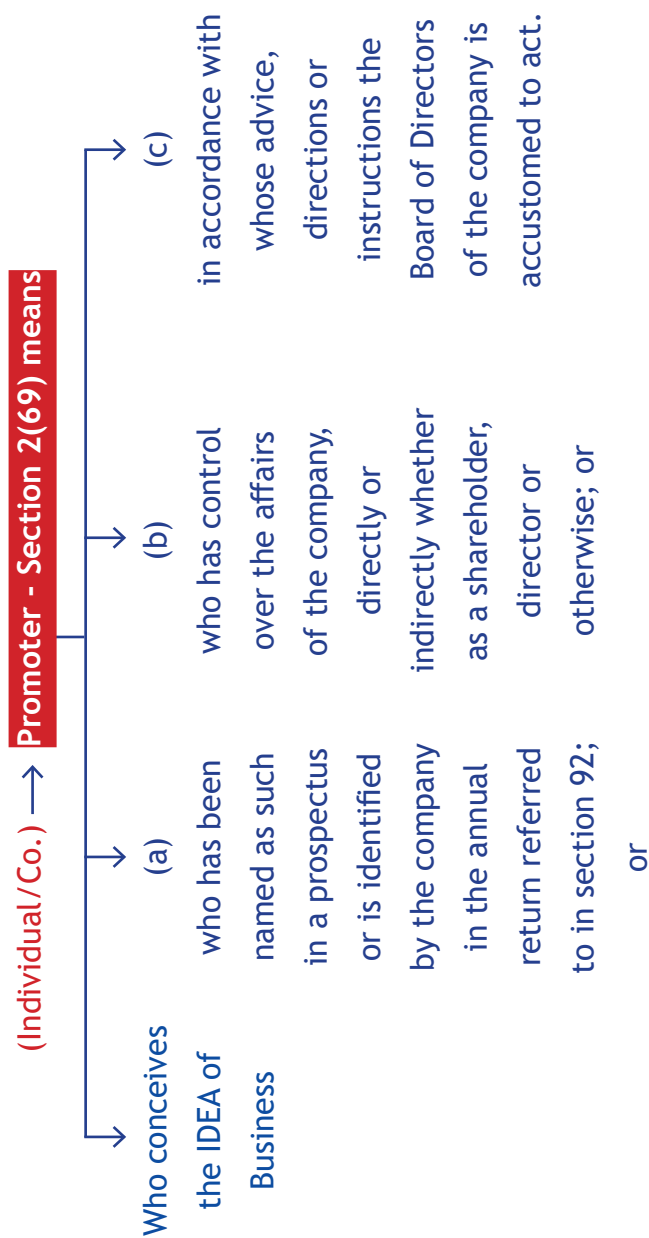
02

INCORPORATION OF COMPANY AND MATTERS INCIDENTAL THERETO



PROMOTER

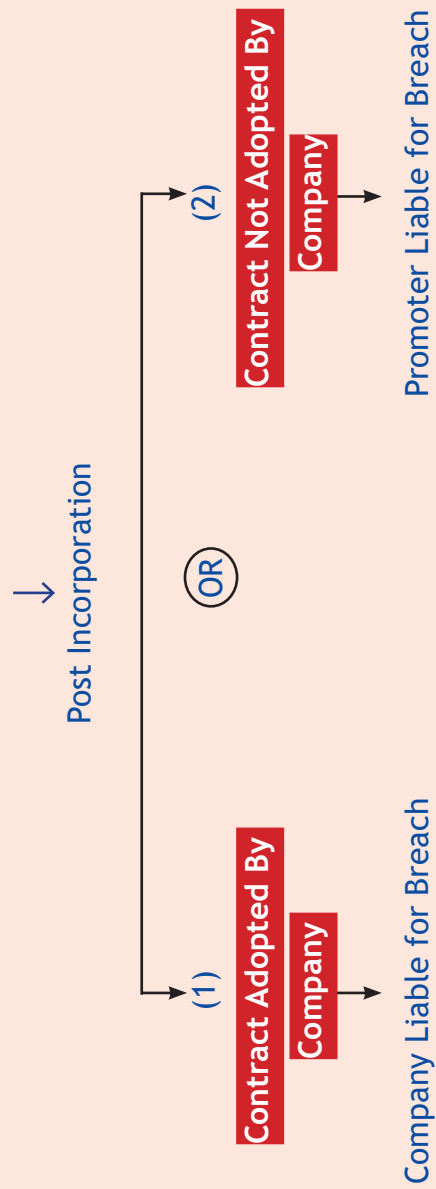
Meaning: A promoter is a one (i.e. individual firm, company etc.) who performs the preliminary duties necessary to bring the company into being and float it, i.e. who brings the company into existence.



A person who merely acts in a professional capacity on behalf of the promoter, such as a solicitor or an accountant and who is paid by him is not a promoter.

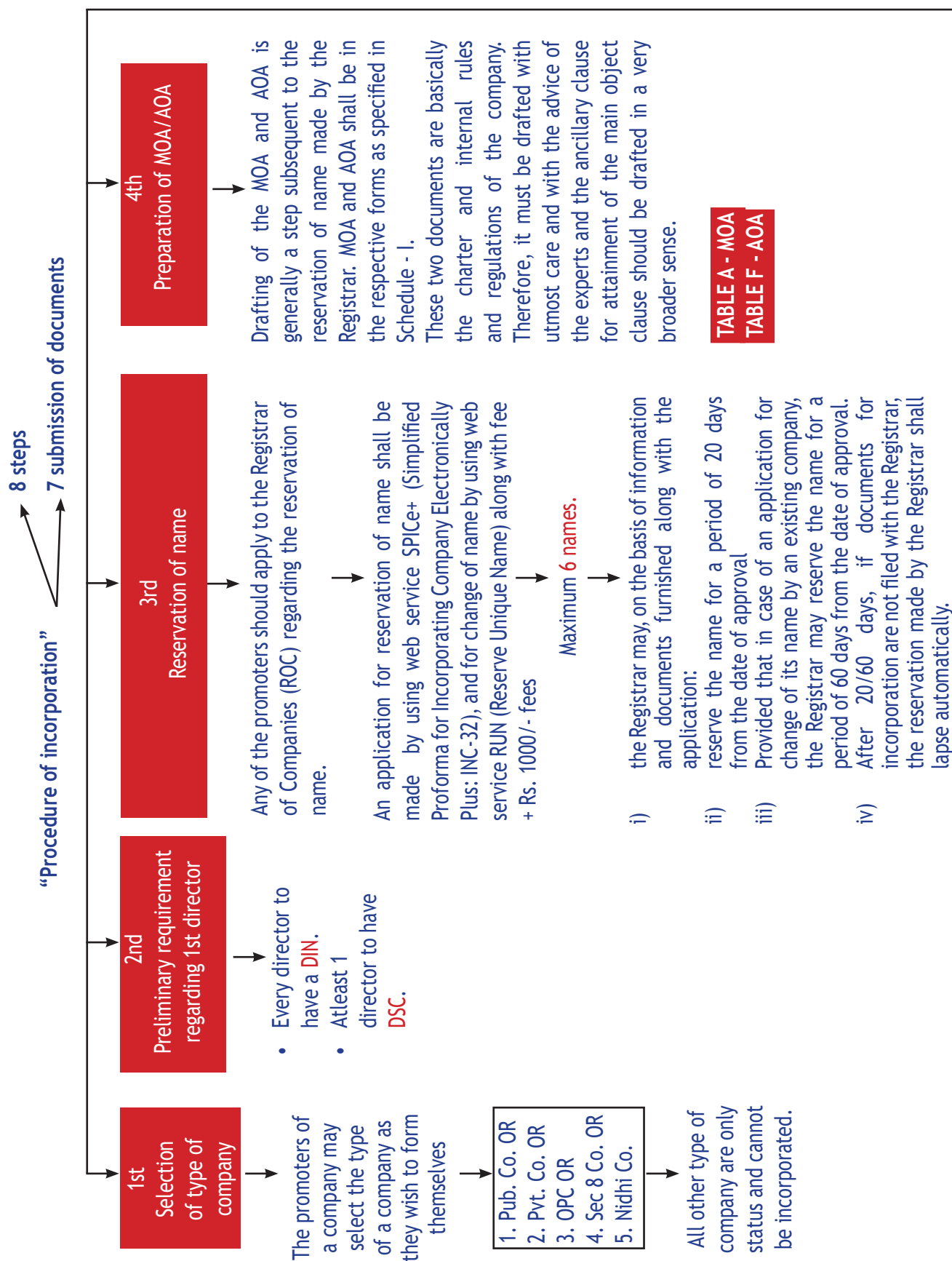
PRE – INCORPORATION / PRELIMINARY / PROMOTERS' CONTRACT

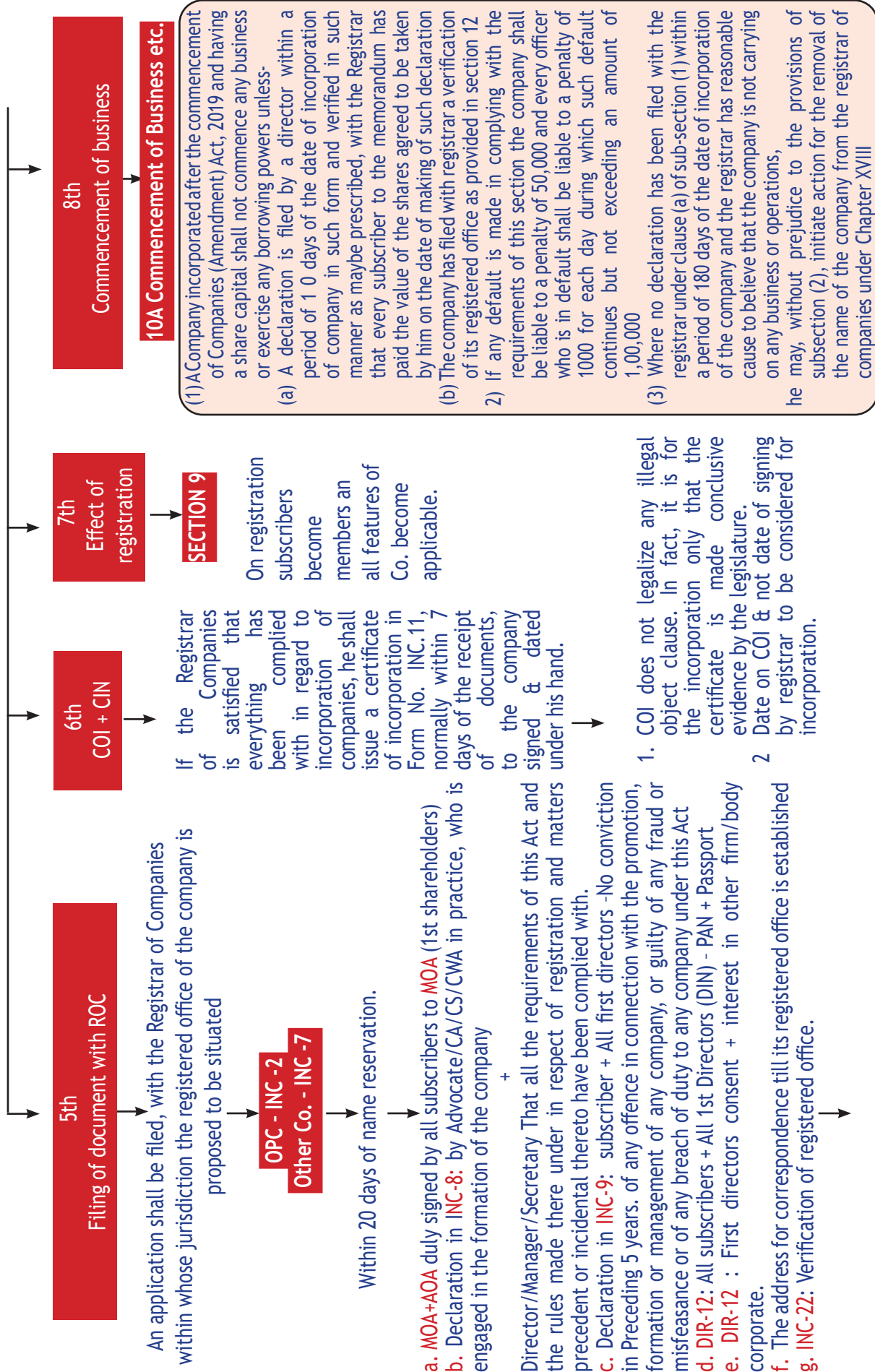
Pre-incorporation Contracts are contracts purported to be made on behalf of a company before its incorporation. Before incorporation, a company is non-existent and has no capacity to contract.





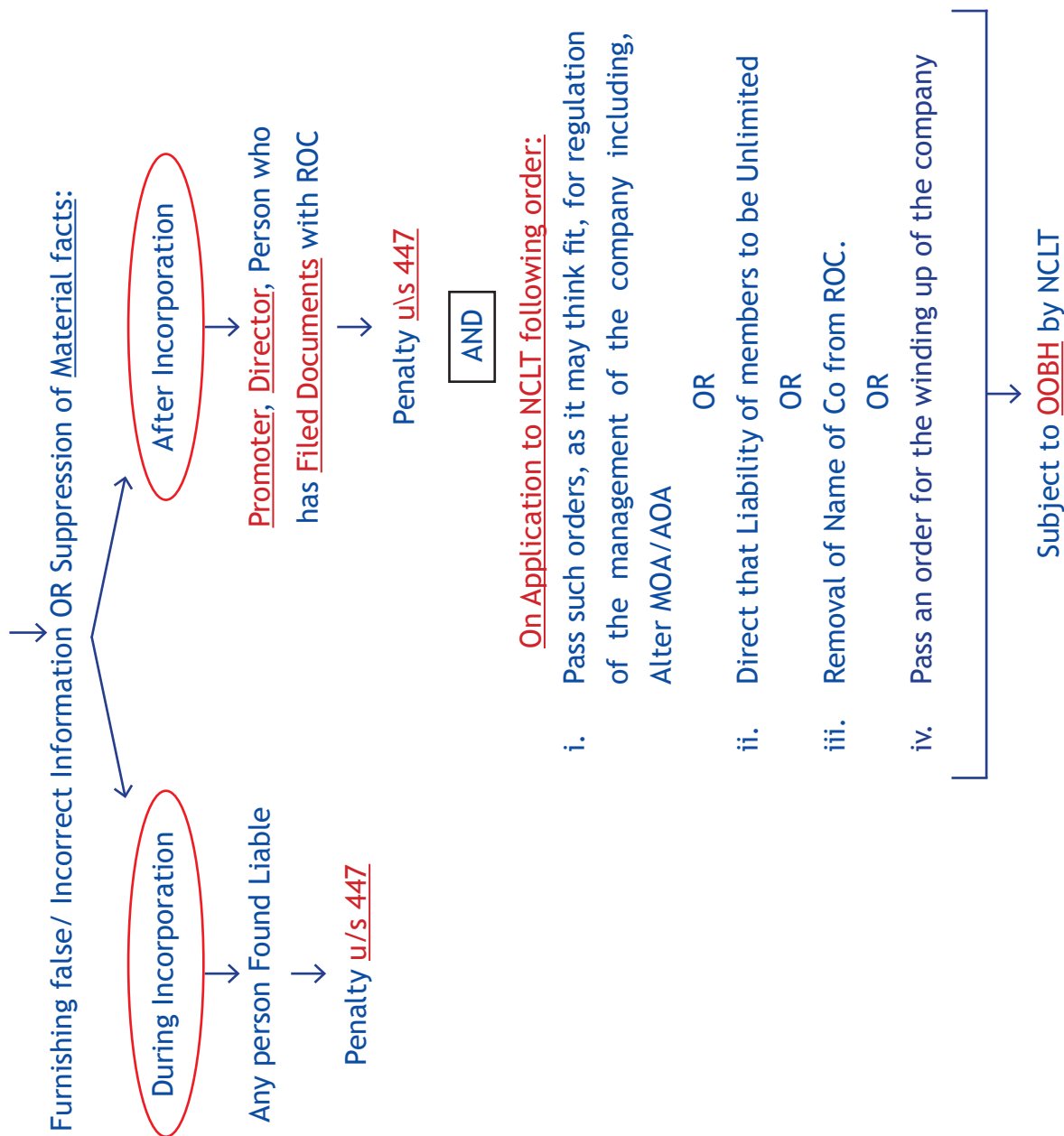
INCORPORATION OF COMPANIES [SECTION 7 READ WITH COMPANIES (INCORPORATION) RULES, 2014]







EFFECT OF FURNISHING OF FALSE OR INCORRECT INFORMATION OR SUPPRESSION OF MATERIAL FACT [Section 7]





MEMORANDUM OF ASSOCIATION

Definition and Meaning of Memorandum: Section 2(56) of the Companies Act, 2013.	“Memorandum” means memorandum of association of a company as originally framed or as altered from time to time in pursuance of any previous companies’ law or of this Act.

The memorandum of association is a document, which contains the fundamental provisions of the company’s constitution. It defines as well as confines the powers of the company. It not only shows the objects of formation but also determines the utmost possible scope of its operations beyond which its action cannot go.

Purpose of Memorandum:	The purpose of memorandum is two-fold. 1. The Prospective shareholder who contemplates the investment of his savings, should know the field in, or the purpose for which it is going to be used and what risk he is taking in making the investment. 2. Outsiders or Creditors dealing with the company will know without reasonable doubt whether the contractual relation into which he contemplates entering with the company is one relating to a matter within its corporate objects.

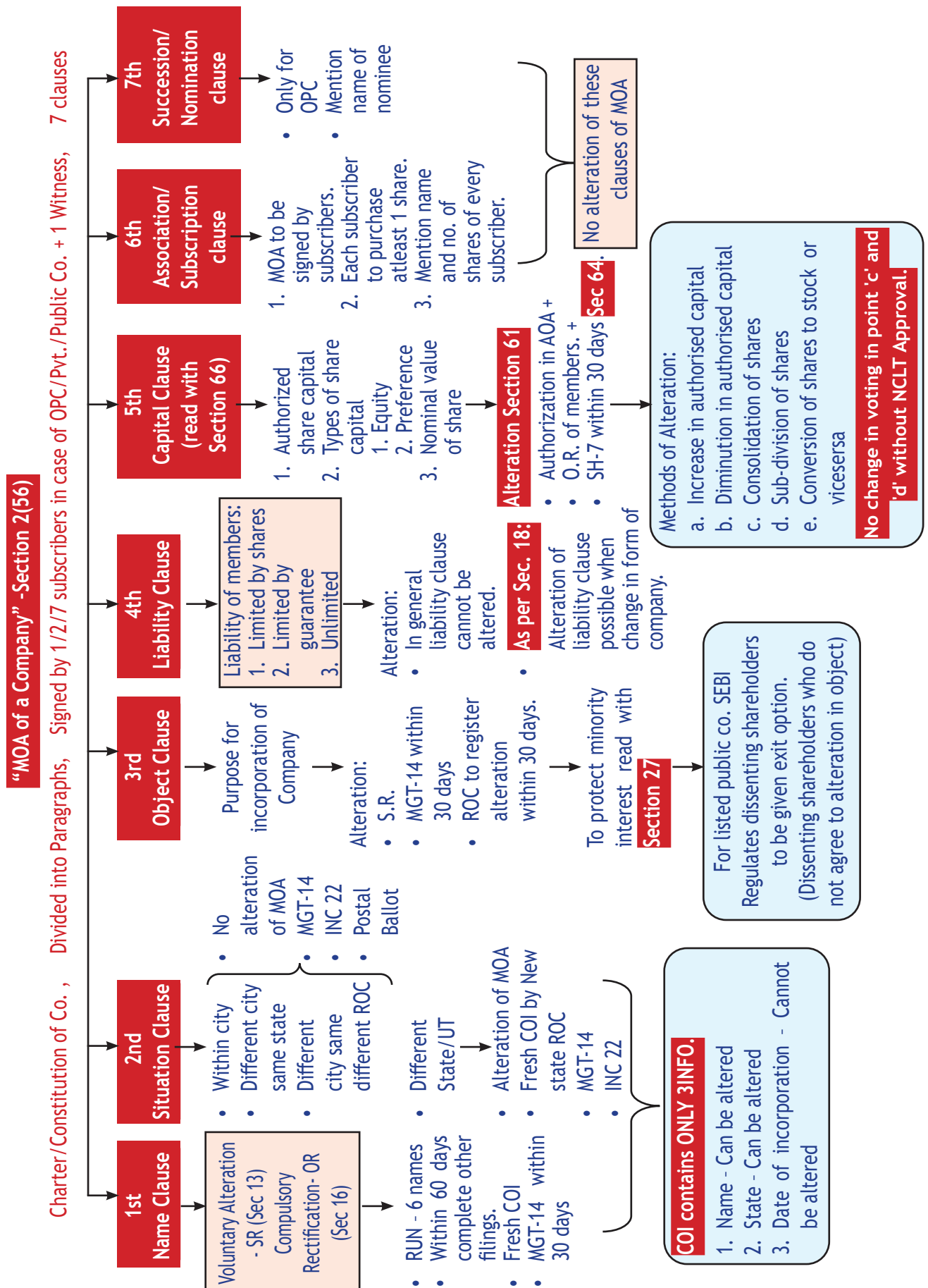
Form of Memorandum [Section 4]:	• Table A = companies limited by shares; • Table B = companies limited by guarantee and not having a share capital; • Table C = the companies limited by guarantee and having a share capital; • Table D = unlimited companies and not having a share capital; • Table E = unlimited companies and having a share capital.

Printing and Signing of Memorandum [Section 4]: The memorandum of association must be

- a. Printed,
 - b. Divided into paragraphs, numbered consecutively and Signed by each subscriber (7 in the case of a public company; 2 in the case of a private company and 1 in the case of OPC) in the presence of at least one witness who shall attest the signatures of the subscribers.
- Both artificial and natural persons can subscribe to memorandum.

Contents of Memorandum: Section 4 of the Companies Act provides that the memorandum of association of every company must contain the following clauses:-

1. Name Clause
2. Situation or Registered Office Clause
3. Objects Clause
4. Liability Clause
5. Capital Clause (only in the case of a company having a share capital)
6. Association Clause/Subscription Clause
7. Succession Clause (only in the case of OPC)





NAME CLAUSE

1. The first clause in the memorandum must state the name by which a company is known.
2. It may be noted that the name of a company shall not be identical with or too nearly resembles the name of an existing company.
3. It further provides that no company shall have a name which, in the opinion of the Central Government, is undesirable.
4. The name should not be such that its use by the company will constitute an offence under any law.
5. The object is to prevent the use of name likely to mislead the public. For example, a company will not be allowed to use a name, which is prohibited under the Emblems and Names (Prevention of Improper Use) Act, 1950.
6. Unless the previous approval of the Central Government is obtained, a company shall not be registered with a name which contains any word or expression which suggest of any connection with Government or of State patronage or which contain such word or expression, as may be prescribed.

Change of Name [Section 13] :

1. The name of the company can be changed by a special resolution and with the written approval of the Central Government.
2. The powers of the Central Government for approving change in the name have been delegated to the Registrar of Companies.
3. Approval of the Central Government is not necessary if the change relates to the addition/ deletion of the word 'private' to the name.
4. Form MGT.14 shall be filed to the Registrar of Companies within 30 days of passing the special resolution. Further, a copy of the approval of the Central Government shall also be filed with ROC.
5. Because of the aforesaid reasons, for adopting the new name, the company shall have to follow the same procedure as is applicable for reservation of name at the time of incorporation of a company.
6. In case of an application for reservation of name or for change of its name by an existing company, the Registrar may reserve the name for a period of 60 days from the date of approval



Rectification of Name (Sec. 16)

16(1)(a) Central Government gives directions to the company **suomoto** to rectify its name if in its opinion, the name registered is identical with or too nearly resembles the name, by which a company in existence has been previously registered.

↓
The company- shall change its name within a period of **3 months** from the issue of such directions after passing an **ordinary resolution**.

16(1)(b) The registered proprietor of a trade mark that the name is identical with or too nearly resembles to an existing trade mark makes an application to Central Government.

↓
Central Government gives directions to company to rectify the name on the basis of application received

↓
The company- shall change its name within a period of **3 months** from the issue of such directions after passing an **ordinary resolution**.

Companies Amendment Act, 2020

A registered trade mark owner has to file an application to the Central Government for rectification of name which is similar to name of its trade mark within **3 years** of incorporation of company or change of name.

16(2) Where a company changes its name or obtains a new name, it shall within a period of **15 days** from the date of such change, give notice of the change to the Registrar along with the order of the Central Government, who shall carry out necessary changes in the certificate of incorporation and the memorandum.

16(3) If a company is in default in complying with any direction given under sub-section (1), the Central Government shall allot a new name to the company in such manner as may be prescribed and the Registrar shall enter the new name in the register of companies in place of the old name and issue a fresh certificate of incorporation with the new name, which the company shall use thereafter: Provided that nothing in this sub-section shall prevent a company from subsequently changing its name in accordance with the provisions of section 13."

Companies Amendment Act, 2020

It may be noted that whenever there is a change in the name of accompany because of any reason whatsoever, the new name becomes effective, only after the issue of revised or fresh certificate of incorporation by the ROC.



SITUATION OR REGISTERED OFFICE CLAUSE

The name of the State in which the registered office of the company is to be situated must be given in the memorandum. But the exact address of the registered office is not required to be stated therein.

As per **Section 12**, a company shall, on and from the 30th day of its incorporation, shall have a registered office.

The company shall furnish to the Registrar verification of its registered office within a period of **30 days** of its incorporation.

Methods of shifting of Registered Office within same state:

Change within the local limits of same town
[Sec. 12]: A company can change its registered office from one place to another within the local limits of the city, town or village, where it is situated by passing a **Board Resolution**.

Form No. MGT.14 shall be filed to the Registrar of Companies within 30 days of passing the BOARD resolution.

A notice of the change is to be given to the Registrar of Companies in Form INC.22 within 30 days of such change. This change of registered office does not involve alteration of memorandum.

Change from one city to another within the same State and which does not involve the change of jurisdiction of Registrar of Companies, [Sec. 12]:

A **special resolution** has to be passed in the general meeting of the company. The special Resolution shall be passed by Postal Ballot in case of public company.

Form No. MGT.14 shall be filed to the Registrar of Companies within 30 days of passing the special resolution.

Also within 30 days of the change of the registered office, a notice to the Registrar should be given of the new location of the office in **Form No. INC.22**.

This change of registered office also does not involve alteration of memorandum.

Change from one city to another within the same State involving change of jurisdiction of Registrar of Companies [Sec. 12]:
A **special resolution** has to be passed in the general meeting of the company.

Apply to Regional Director for approval

Regional Director shall communicate within a period of 30 days from the date of receipt of application

The company shall file the confirmation with the Registrar within a period of 60 days of the date of confirmation

ROC shall register the same and certify the registration within a period of 30 days from the date of filing of such confirmation.

Form No. MGT.14 shall be filed to the Registrar of Companies within 30 days of passing the special resolution.

Also within 30 days of the change of the registered office, a notice to the Registrar should be given of the new location of the office in Form No. INC.22. This change of registered office also does not involve alteration of memorandum.



Change from one State to another State [Sec. 13]

Step 1.

A **special resolution** has to be passed in the general meeting of the company.

Step 2.

Apply to Central Government for approval

Step 3.

Central Government shall communicate within a period of 60 days from the date of receipt of application

The Central Government, before passing its order, may satisfy itself that the alteration has the consent of the creditors, debenture-holders and other persons concerned with the company or that the sufficient provision has been made by the company either for the due discharge of all its debt and obligations or that adequate security has been provided for such discharge.

Step 4.

\File following documents with Registrar of both states:

- a) A certified copy of the order of the Central Government approving the alteration for change.
- b) Altered copy of MOA

Step 5.

The ROC of the State where the registered office is being shifted to, shall issue a fresh certificate of incorporation indicating the alteration.

Step 6.

Also **Form No. MGT.14** shall be filed to the Registrar of Companies within 30 days of passing the special resolution. Also within 30 days of the change of the registered office, a notice to the Registrar should be given of the new location of the office in **Form No. INC.22**.

Step 7.

This change of registered office **INVOLVES** alteration of memorandum.



Important Judgments

A State Government cannot oppose shifting of the registered office of a company from one state to another on the ground that by this change the State would be deprived of its revenue. The question of loss of revenue to one state would have to be considered in the context of total revenue of the Republic of India and in the interest of the country as a whole.

It was held that employees' union, which is a registered body and which represents quite a number of the employees employed at a registered office of the company, has the right to appear and to oppose the application made to the Central Government u/s 13 on the ground that their interests would be likely to be prejudicially affected if such special resolution would be confirmed by the Central Government

OBJECT CLAUSE

It determines the purpose and the capacity of the company. It indicates the purpose for which the company has been set up and its actual capability, besides its sphere of activities.

The object clause of memorandum shall state “the objects for which the company is proposed to be incorporated and any matter considered necessary in furtherance thereof”.

The subscribers to the memorandum of association enjoy almost unrestricted freedom to choose the objects. The only restriction is that objects should not be illegal and against the provisions of the Companies Act, 2013.

Alteration of Object Clause (Section 13)

A **special resolution** has to be passed in the general meeting of the company. The special Resolution shall be passed by Postal Ballot in case of public company.



Form No. MGT.14 shall be filed to the Registrar of Companies within 30 days of passing the special resolution + Altered Memorandum



The ROC shall register the same and certify the registration under his hand **within 30 days** from the date of filing of such documents. The effective date of alteration of object clause is the date when the Registrar of Companies registers the alteration.

Read with Section 27 (Listed Public Company Only)

To protect the minority interest, restriction has been imposed on the change of object clause. Now a company, which has raised money from public through prospectus and still has any unutilized amount out of the money so raised, shall not change its object for which it raised the money through prospectus unless:

- (i) a special resolution is passed by the company,
- (ii) An **exit option is given to the dissenting shareholders** in terms of the regulations prescribed by SEBI and
- (iii) Prescribed details are published in one English and one vernacular language newspapers which is in circulation at a place where registered office of the company is situated and also placed on company's website indicating justification for such change.



LIABILITY CLAUSE

The fourth clause of memorandum of every company must state whether the liability of its members is limited by shares or limited by guarantee or is unlimited.

In a company limited by shares, no member can be called upon to pay more than what remains unpaid. If his shares are fully paid-up, his liability is nil.

In a company limited by guarantee, the liability clause will state the amount, which each member should undertake to contribute to the assets of the company in the event of liquidation of the company. He cannot be called upon to pay anything before the company goes into liquidation.

In an unlimited company, the clause shall specify that the liability of members is unlimited and can extend to personal assets of the members.

Alteration of Liability Clause

In general, liability clause of a company cannot be altered.

However, Section 18 permits a company of any class registered under this Act to convert itself in some other class of company by altering its memorandum and articles of association.

By using these provisions, if an unlimited company gets converted into a limited company or vice-versa, the liability of the members will be changed and thereby leading to alteration of liability Clause of memorandum.

CAPITAL CLAUSE(ONLY IN THE CASE OF A COMPANY HAVING A SHARE CAPITAL):

This clause must state the amount of the capital with which the company is registered.

The shares into which the capital is divided must be of fixed value, which is commonly known as the nominal value of the share.

The capital is variously described as “nominal”, “authorised” or “registered”.

Power of Limited Company to alter its share capital (Section 61)

(1) A limited company having a share capital may, if so authorised by its articles, alter its memorandum in its general meeting to-

- (a) increase its authorised share capital by such amount as it thinks expedient;
- (b) consolidate and divide all or any of its share capital into shares of a larger amount than its existing shares:

Provided that no consolidation and division which results in changes in the voting percentage of shareholders shall take effect unless it is approved by the Tribunal on an application made in the prescribed manner;

- (c) convert all or any of its fully paid-up shares into stock, and reconvert that stock into fully paid-up shares of any denomination;
- (d) sub-divide its shares, or any of them, into shares of smaller amount than is fixed by the memorandum, so, however, that in the sub-division the proportion between the amount paid and the amount, if any, unpaid on each reduced share shall be the same as it was in the case of the share from which the reduced share is derived;



- (e) cancel shares which, at the date of the passing of the resolution in that behalf, have not been taken or agreed to be taken by any person, and diminish the amount of its share capital by the amount of the shares so cancelled.
- (2) The cancellation (Diminution) of shares under sub-section (1) shall not be deemed to be a reduction of share capital under section 66.

ASSOCIATION CLAUSE AND SUBSCRIPTION CLAUSE

In this clause, the persons (includes a body corporate) subscribing to the memorandum declare their desire to be formed into a company and agree to take the shares indicated opposite their respective names.

Following are the statutory requirements regarding subscription of memorandum:-

- (i) The memorandum must be signed by each subscriber in the presence of at least one witness who must attest the signatures;
- (ii) Each subscriber must take at least one share; if any and
- (iii) Each subscriber must write opposite his name the number of shares (if any) which he agrees to take.

SUCCESSION CLAUSE (ONLY IN THE CASE OF OPC):

This clause shall state the name of the person who, in the event of the death of the subscriber, shall become the member of the company.

Any such change in the name of the person shall not be deemed to be an alteration of the memorandum as the whole process of alteration of memorandum is not required to be followed.

The above clauses are compulsory and are designated by the Companies Act as "conditions", on the basis of which alone a company is incorporated



Reduction of share capital - Section 66 “AND REDUCED” written in B/s

As a principle of sound financial management, a company is required to keep its capital intact. At times, however, it may become necessary for the company to bring about a reduction in its capital. Accumulated business losses, assets of reduced or doubtful value like unsound investments proving bad or having paid-up capital in excess of the requirements of the company or surplus capital which cannot be employed gainfully, require corrective measures to be taken to keep the financial health of the company in a reasonably well position. Accordingly, the company may find it necessary to reduce its share capital. Section 66 deals with the reduction of share capital. The provisions are stated as under:

Reduction of Share Capital by Special Resolution to be confirmed by Tribunal:

Section 66 (1) provides that subject to confirmation by the Tribunal on an application by the company, a company limited by shares or limited by guarantee and having a share capital may, by a special resolution, reduce the share capital in any manner and in particular, may—

(a) extinguish or reduce the liability on any of its shares in respect of the share capital not paid-up;

Example : In respect of a share of ₹ 10, a company has called only ₹ 7 per share and the same has been paid by all the shareholders. The company decides not to call remaining ₹ 3 per share and reduces its shareholders' liability. If done, the company is said to have reduced its share of ₹ 10 to ₹ 7 as fully paid-up share.

(b) either with or without extinguishing or reducing liability on any of its shares,—

- (i) cancel any paid-up share capital which is lost or is unrepresented by available assets; or
- (ii) pay off any paid-up share capital which is in excess of the wants of the company,

The company shall also alter its memorandum by reducing the amount of its share capital and of its shares accordingly. Reduction not permitted: Section 66 (1) further Provides that no such reduction shall be made if the company is in arrears in the repayment of any deposits accepted by it, either before or after the commencement of this Act, or the interest payable thereon.

Approvals:

1. S.R. of members + MGT-14 within 30 days.
2. NCLT Approval. **Sec 66(3)**

NCLT shall give notice to: **Sec 66(2)**

3. CG
4. Registrar (ROC)
5. SEBI (in case of listed company)
6. Creditors

To give representation to NCLT within 3 months

If no reply assumed, no objection



7. Approval of NCLT to publish in newspaper. **Sec 66(4)**
8. **Exemption to Buy-Back:** According to Section 66 (6), nothing in this section shall apply to buy-back of its own securities by a company under Section 68.
9. **No Liability of Members:** Section 66 (7) states that a member of the company, past or present, shall not be liable to any call or contribution in respect of any share held by him exceeding the amount of difference, if any, between the amount paid on the share, or reduced amount, if any, which is to be deemed to have been paid thereon, as the case may be, and the amount of the share as fixed by the order of reduction.
10. **In case where Creditor is entitled to object but was not included in the list of Creditors:** According to Section 66 (8), where the name of any creditor entitled to object to the reduction of share capital under this section is, by reason of his ignorance of the proceedings for reduction or of their nature and effect with respect to his debt or claim, not entered on the list of creditors, and after such reduction, the company commits a default, within the meaning of section 6 of the Insolvency and Bankruptcy Code, 2016, in respect of the amount of his debt or claim—
- (a) every person, who was a member of the company on the date of the registration of the order for reduction by the Registrar, shall be liable to contribute to the payment of that debt or claim, an amount not exceeding the amount which he would have been liable to contribute if the company had commenced winding up on the day immediately before the said date; and
 - (b) if the company is wound up, the Tribunal may, on the application of any such creditor and proof of his ignorance as aforesaid, if it thinks fit, settle a list of persons so liable to contribute, and make and enforce calls and orders on the contributories settled on the list, as if they were ordinary contributories in a winding up.
11. **Liability of Officers:** Section 66 (10) deals with the liability of defaulting officers. Accordingly, if any officer of the company—
- (a) knowingly conceals the name of any creditor entitled to object to the reduction;
 - (b) knowingly misrepresents the nature or amount of the debt or claim of any creditor; or
 - (c) abets or is privy to any such concealment or misrepresentation as aforesaid, he shall be liable under Section 447.



Difference between diminution of share capital and reduction of share capital:

Diminution of share capital(Sec 61)	Reduction of share capital (Sec 66)
1. Affects Authorised share capital	1. Affects Paid up share capital
2. Ordinary Resolution	2. Special Resolution
3. No NCLT Approval required	3. NCLT Approval required
4. Balance Sheet is not affected	4. Balance Sheet is affected
5. Interest of creditors is not affected	5. Interest of creditors is affected
6. The words “And reduced” are not be used	6. The words “And reduced” are to be used

Notice to be given to Registrar for Alteration of share capital (Section 64)

(1) Where-

- (a) A company has power to Alter its Capital Clause as per Section 61
- (b) As per order of CG under Section 62 to Convert Debentures/Loans into Shares of a Company
- (c) Redemption of Preference Shares as per section 55

Company Shall file with ROC form SH -7 within 30 days Along with Altered MOA

(2) Where any company fails to comply with the provisions of sub-section (1), such company and every officer who is in default shall be liable to a penalty of 500 rs for each day during which such default continues subject to a maximum of five lakh rupees in case of a company and one lakh rupees in case of an officer who is in default.

Companies Amendment Act, 2020



ARTICLES OF ASSOCIATION

The articles of a company are its by – laws or rules and regulations that govern the management of its internal affairs and the conduct of its business. The articles of a company are sub–ordinate to and are controlled by the memorandum of association. The memorandum lays down the scope and powers of the company and the articles govern the ways in which the objects of the company are to be carried out.

Definition and Meaning of Articles Section 2(5) of the Companies Act, 2013:

'Articles' means the articles of association of a company as originally framed or as altered from time to time in pursuance of any previous companies law or of this Act.

Form and Contents of Articles [Section 5]:	Schedule I
	Table F = companies limited by shares;
	Table G= is applicable to companies limited by guarantee and having a share capital;
	Table H = companies limited by guarantee and not having a share capital;
	Table I= unlimited companies and having a share capital;
	Table J = unlimited companies and not having a share capital.

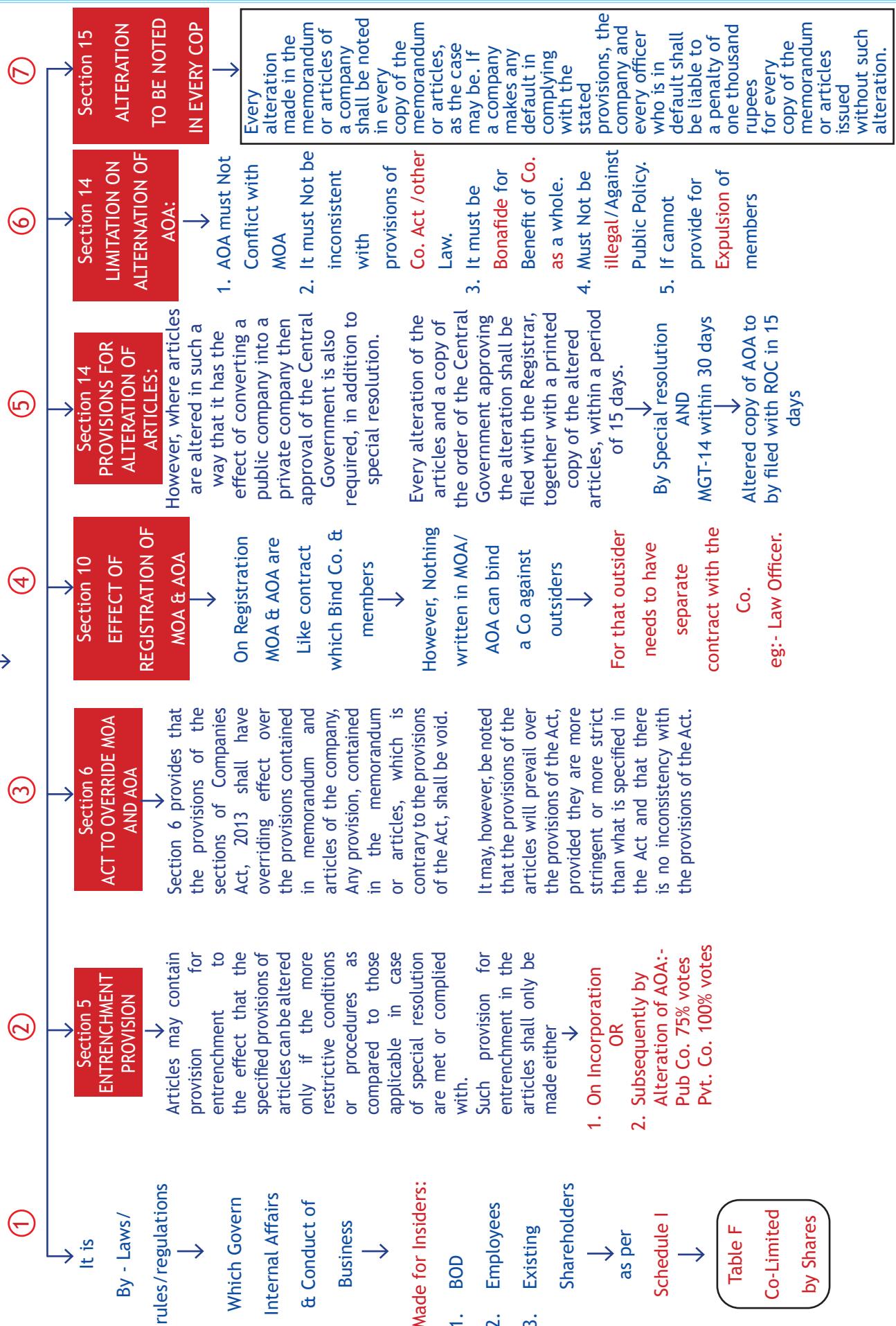
COPIES OF MEMORANDUM, ARTICLES, ETC., TO BE GIVEN TO MEMBERS (SECTION 17)

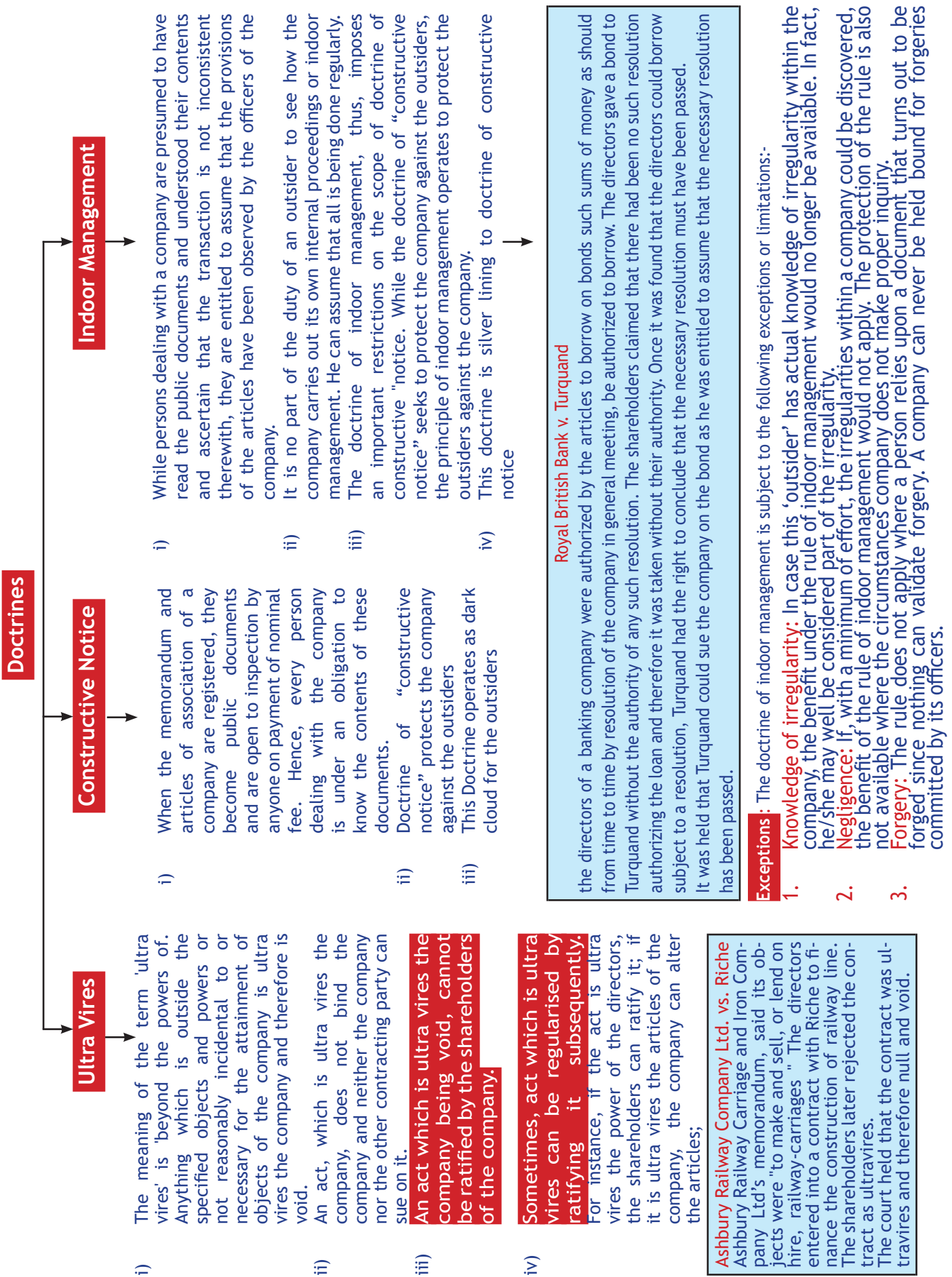
According to section 17 every company on being so requested by a member, shall send copies of the following documents within seven days of the request on the payment of fees—

- the memorandum;
- the articles; and
- every agreement and every resolution referred in section 117 (Resolutions and agreements to be filed), if and in so far as they have not been embodied in the memorandum or articles. In case of default, the company and every officer who is in default shall be liable for each default, to a penalty of one thousand rupees for each day during which such default continues or one lakh rupees, whichever is less.



Articles of Association (AOA):







SERVICE OF DOCUMENTS [SECTION 20]

Section 20 of the Companies Act, 2013, provides the mode in which documents may be served on the company, on the members and also on the registrars.

(1) Serving of document to company:

A document may be served on a company or an officer thereof by sending it to the company or the officer at the **registered office** of the company by-

1. **registered post**, or
2. **speed post**, or
3. **courier service**, or
4. **leaving** it at its registered office, or
5. means of such **electronic or other mode** as may be prescribed:

However, where securities are held with a depository, the records of the beneficial ownership may be served by such depository on the company by means of electronic or other mode.

(2) Serving of document to registrar or member:

Save as provided in this Act or the rules made there under for filing of documents with the Registrar in electronic mode, a document may be served on Registrar or any member by sending it to him by—

1. **registered post**, or
2. **speed post**, or
3. **courier**, or
4. by **delivering** at his office or address, or
5. by such **electronic or other mode** as may be prescribed:

However, a member may request for delivery of any document through a particular mode, for which he shall pay such fees as may be determined by the company in its annual general meeting.

Exemption-Section 20 (2) shall apply to a **Nidhi Company**, subject to the modification that in the case of a Nidhi, the document may be served only on members who hold shares of more than ₹ 1,000 in face value or more than 1%, of the total paid-up share capital of the Nidhis whichever is less.

For other shareholders, document may be served by a public notice in newspaper circulated in the district where the Registered Office of the Nidhi is situated; and publication of the same on the notice board of the Nidhi. [Notification dated 5th June, 2015.]



AUTHENTICATION OF DOCUMENTS, PROCEEDINGS AND CONTRACTS [SECTION 21]

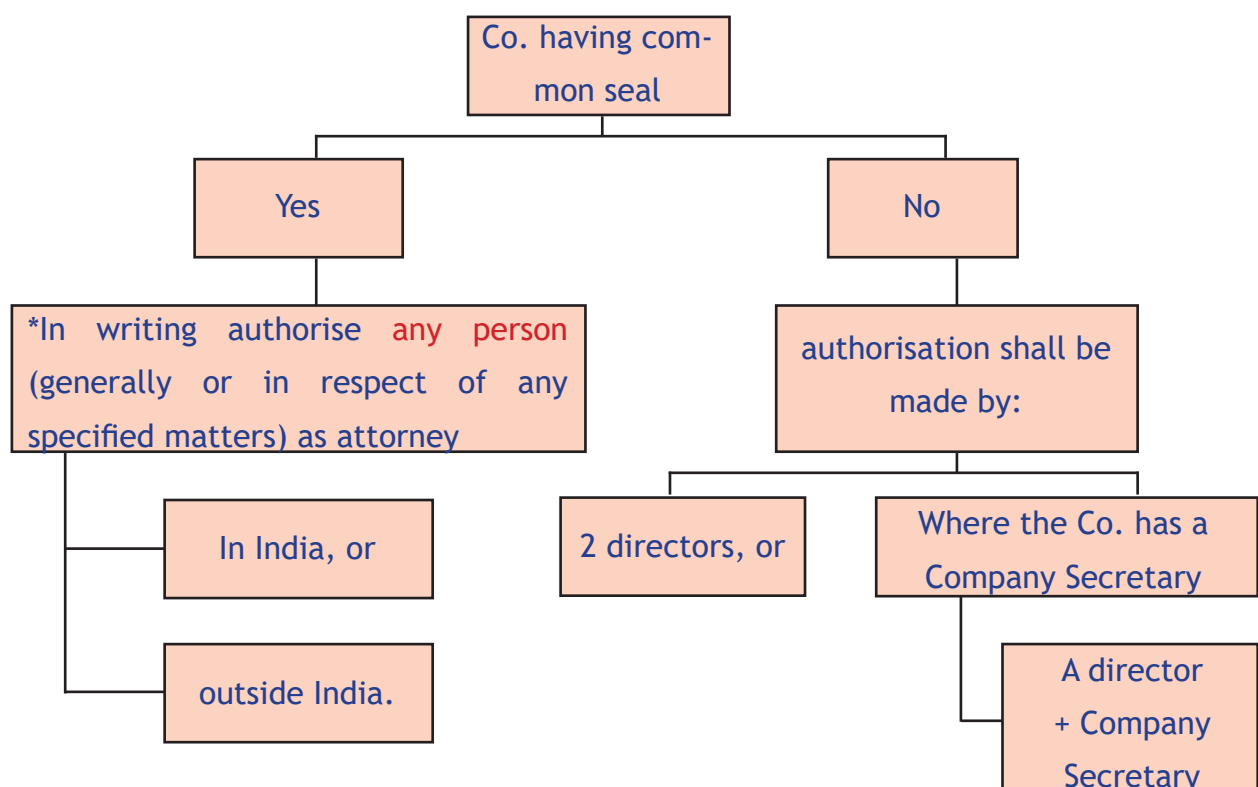
As per Sec.21 these may be signed by any "key managerial personnel" or an officer or employee of the company duly authorised by the Board in this behalf.

As per Sec.2(51) -Key managerial personnel, in relation to a company, means–

- (i) the CEO or the MD or the manager;
- (ii) the company secretary;
- (iii) the whole-time director;
- (iv) the CFO;
- (v) such other officer, not more than one level below the directors who is in whole-time employment, designated as key managerial personnel by the Board; and
- (vi) such other officer as may be prescribed;

EXECUTION OF BILLS OF EXCHANGE, ETC. [SECTION 22]

- (1) A bill of exchange, hundi or promissory note shall be deemed to have been made, accepted, drawn or endorsed on behalf of a company if made, accepted, drawn, or endorsed in the name of, or on behalf of or on account of, the company by any person acting under its authority, express or implied.
- (2) A company may, by writing under its common seal, if any, authorise any person, either generally or in respect of any specified matters, as its attorney to execute other deeds on its behalf in any place either in or outside India.
However, in case a company does not have a common seal, the above authorisation shall be made by 2 directors or by a director and the Company Secretary, wherever the company has appointed a Company Secretary.
- (3) A deed signed by such an attorney on behalf of the company and under his seal shall bind the company.





QUESTION & ANSWERS



Question 1:

The object clause of the Memorandum of Vivek Industries Limited., empowers it to carry on real-estate business and any other business that is allied to it. Due to a downward trend in real-estate business, the management of the company has decided to take up the business of Food processing activity. The company wants to alter its Memorandum, so as to include the Food Processing Business in its objects clause. Examine whether the company can make such change as per the provisions of the Companies Act, 2013?



Solution:

Alteration of Objects Clause of Memorandum The Companies Act, 2013 has made alteration of the memorandum simpler and more flexible. Under section 13(1) of the Act, a company may, by a special resolution after complying with the procedure specified in this section, alter the provisions of its Memorandum.

In the case of alteration to the objects clause, section 13(6) requires the filing of the Special Resolution by the company with the Registrar. Section 13 (9) states that the Registrar shall register any alteration to the Memorandum with respect to the objects of the company and certify the registration within a period of thirty days from the date of filing of the special resolution by the company. Section 13 (10) further stipulates that no alteration in the Memorandum shall take effect unless it has been registered with the Registrar as above. Hence, the Companies Act, 2013 permits any alteration to the objects clause with ease. Vivek Industries Limited can make the required changes in the object clause of its Memorandum of Association



Question 2:

Manglu and friends got registered a company in the name of Taxmann advisory private limited. Taxmann is a registered trademark. After 5 years when the owner of trademark came to know about the same, it filed an application with relevant authority. Can the company be compelled to change its name by the owner of trademark? Can the owner of registered trademark request the company and then company changes its name at its discretion?



Solution:

According to section 16 of the Companies Act, 2013 if a company is registered by a name which,—

- in the opinion of the Central Government, is identical with the name by which a company had been previously registered, it may direct the company to change its name. Then the company shall by passing an ordinary resolution change its name within 3 months.
- is identical with a registered trade mark and owner of that trade mark apply to the Central Government within three years of incorporation of registration of the company, it may direct the company to change its name. Then the company shall change its name by passing an ordinary resolution within 6 months.



Company shall give notice to ROC along with the order of Central Government within 15 days of change. In case of default company and defaulting officer are punishable.

In the given case, owner of registered trade- mark is filing objection after 5 years of registration of company with a wrong name. While it should have filed the same within 3 years. Therefore, the company cannot be compelled to change its name.

As per section 13, company can anytime change its name by passing a special resolution and taking approval of Central Government. Therefore, if owner of registered trademark request the company for change of its name and the company accepts the same then it can change its name voluntarily by following the provisions of section 13.



Question 3:

Shri Laxmi Electricals Ltd. (S) is a company in which Hanuman power suppliers Limited (H) is holding 60% of its paid up share capital. One of the shareholder of H made a charitable trust and donated his 10% shares in H and ₹ 50 crores to the trust. He appoint S as the trustee. All the assets of the trust are held in the name of S. Can a subsidiary hold shares in its holding company in this way?



Solution:

According to section 19 of the Companies Act, 2013 a company shall not hold any shares in its holding company either by itself or through its nominees. Also, holding company shall not allot or transfer its shares to any of its subsidiary companies and any such allotment or transfer of shares of a company to its subsidiary company shall be void.

Following are the exceptions to the above rule –

(a) where the subsidiary company holds such shares as the legal representative of a deceased member of the holding company; or

(b) where the subsidiary company holds such shares as a trustee; or

where the subsidiary company is a shareholder even before it became a subsidiary company of the holding company but in this case, it will not have a right to vote in the meeting of holding company.

In the given case, one of the shareholders of holding company has transferred his shares in the holding company to a trust where the shares will be held by subsidiary company. It means now subsidiary will hold shares in the holding company. But it will hold shares in the capacity of a trustee. Therefore, we can conclude that in the given situation S can hold shares in H.



Question 4:

Parag Constructions Limited is a leading infrastructure company. One of the directors of the company Mr. Parag has been signing all construction contracts on behalf of company for many years. All the parties who ever deal with the company know Mr. Parag very well. Company has got a very important construction contract from a renowned software company. Parag constructions will do construction for this site in partnership with a local contractor Firozbhai. Mr. Parag signed partnership deed with Firozbhai on behalf of company because he has an implied authority. Later in a dispute company denied to accept liability as a partner. Can the company deny its liability as a partner?



Solution:

As per section 22 of the Companies Act, 2013 a company may authorise any person as its attorney to execute deeds on its behalf in any place either in or outside India. But common seal should be affixed on his authority letter or the authority letter should be signed by two directors of the company or it should be signed by one director and secretary. This authority may be either general for any deeds or it may be for any specific deed.

A deed signed by such an attorney on behalf of the company and under his seal shall bind the company as if it were made under its common seal. In the present case company has not neither given any written authority nor affixed common seal of the authority letter. It means that Mr. Parag is not legally entitled to execute deeds on behalf of the company. Therefore, deeds executed by him are not binding on the company. Therefore, company can deny its liability as a partner.



Question 5:

Ashok, a director of Gama Electricals Ltd. gave in writing to the company that the notice for any general meeting and of the Board of Directors' meeting be sent to him only by registered post at his residential address at Kanpur for which he deposited sufficient money. The company sent notice to him by ordinary mail under certificate of posting. Ashok did not receive this notice and could not attend the meeting and contended that the notice was improper.

Decide:

- (i) Whether the contention of Ashok is valid.
- (ii) Will your answer be the same if Ashok remains in U.S.A. for one month during the notice of the meeting and the meeting held?



Solution:

According to section 20(2) of the Companies Act, 2013, a document may be served on Registrar or any member by sending it to him by post or by registered post or by speed post or by courier or by delivering at his office or address, or by such electronic or other mode as may be prescribed.

Provided that a member may request for delivery of any document through a particular mode, for which he shall pay such fees as may be determined by the company in its annual general meeting.

Thus, if a member wants the notice to be served on him only by registered post at his residential address at Kanpur for which he has deposited sufficient money, the notice must be served accordingly, otherwise service will not be deemed to have been effected.

Accordingly, the questions as asked may be answered as under:

- (i) The contention of Ashok shall be tenable, for the reason that the notice was not properly served.
- (ii) In the given circumstances, the company is bound to serve a valid notice to Ashok by registered post at his residential address at Kanpur and not outside India.



Question 6:

Nov. 2001, May, 2013

K Ltd. was in the process of incorporation. Promoters of the company signed an agreement for the purchase of certain furniture for the company and payment was to be made to the suppliers of furniture by the company after incorporation. The company was incorporated and the furniture was received and used by it. Shortly after incorporation, the company went into liquidation and the debt could not be paid by the company for the purchase of the above furniture. As a result supplier sued the promoters of the company for the recovery of money. Examine whether promoters can be held liable for the payment under the following situation:

1. When the company has already adopted the contract after incorporation?
2. When the company makes a fresh contract with the suppliers in substitution of pre-incorporation contract?



Solution:

1. If the company adopts the contract after incorporation
 - The company shall be liable for the payment of furniture used by it;
2. If the company makes a fresh contract
 - The answer shall remain same as in (i) above.



Question 7:

May 2013

The articles of association of a limited company provided that 'X' shall be the law officer of the company and he shall not be removed except on the ground of proved misconduct. The company removed him even though he was not guilty of misconduct. Decide, whether company's action is valid?



Solution:

Company's action is valid, and 'X' has no remedy against the company

- Since the memorandum and articles do not bind a company to the outsiders (Sec. 10);
- Since, unless 'X' proves a contract independent of the articles, he cannot enforce any right against the company as he has no right to rely on the articles



Question 8:

Nov. 1997

The objects clause of the Memorandum of Association of the XYZ (Pvt.) Ltd. New Delhi, authorized to do trading in mangoes. The company, however, entered into partnership with Mr. A and traded in mangoes and incurred liabilities to Mr A. The company, subsequently, refused to admit the liability to 'A' on the ground of 'ultra vires' the Company'.

Advice whether stand of the company is legally valid and if so, gives reasons in support of your answer.



Solution:

The company is not liable to A

- since the partnership agreement for trading in mangoes is an ultra vires contract, and an ultra vires contract is void ab initio, and is not binding on the company or the other party;
- since the power to enter into partnership is not an ancillary or incidental power;
- since such power can be legally exercised by the company only if the object clause of memorandum expressly authorizes the company to enter into partnership.



Question 9:

Nov. 2006

The principal business of XYZ Company Ltd. was the acquisition of vacant plots of land and to erect the houses. In the course of transacting the business, the Chairman of the Company acquired the knowledge of arranging finance for the development of land. The XYZ Company introduced a financier to another company ABC Ltd. and received an agreed fee of Rs. 2 lakhs for arranging the finance. The Memorandum of Association of the company authorizes the company to carry on any other trade or business which can in the opinion of the board of directors, be advantageously carried on by the company in connection with the company's general business. Referring to the provisions of the Companies Act, examine the validity of the contract carried out by XYZ Company Ltd. with ABC Ltd.



Solution:

Arranging finance or financier is an ultra vires act.

- since it falls outside the object clause of memorandum;
- since an object contained in the object clause is not valid if authorizes the company to carry on any other trade or business which can be advantageously carried on by the company.

The contract entered into by the company is ultra vires

- since the company has no power to arrange finance or financier;
- since the board cannot take the defence that the memorandum authorizes the company to carry on any business which can be advantageously carried on in connection with company's present business (since, it is a 'specified purpose' given u/s 17 for alteration of object clause, but it cannot be the ground or basis for carrying on a business which is outside the object clause);
- Unless the memorandum is first altered by complying with the requirements of Sec. 17, and afterwards the business of arranging finance is carried on.



Question 10:

Nov. 2016

The Articles of Association of XYZ Ltd. provides the Board of Directors has authority to issue bonds provided such issue is authorized by the shareholders by a necessary resolution in the general meeting of the company. The company was in dire need of funds and therefore, it issued the bonds to Mr. X without passing any such resolution in general meeting. Can Mr. X recover the money from the company? Decide referring the relevant provisions of the Companies Act, 2013.



Solution:

The company is bound to Mr. X

- since the lender, Mr. X, had lent the money to the company assuming that the company was authorized to borrow money after obtaining authorization from the members in GM;
- since, on the same facts, the Court held in Royal British Bank v Turquand that the outsiders dealing with the company were not required to inquire into the internal management of the company, and the outsiders were entitled to assume that as far as internal proceedings of the company were concerned, everything had been done regularly (termed as doctrine of indoor management).



Question 11.

XY Ltd. has its registered office at Mumbai in the State of Maharashtra. For better administrative conveniences the company wants to shift its registered office from Mumbai to Pune (within the State of Maharashtra, but from Mumbai ROC to Pune ROC). What formalities the company has to comply with under the provisions of the Companies Act, 2013 for shifting its registered office as stated above? Explain.

(ICAI Module, Nov'19 Mock Test)



Solution:

The Companies Act, 2013 under section 13 provides for the process of altering the Memorandum of a company. Since the location or Registered Office clause in the Memorandum only names the state in which its registered office is situated, a change in address from Mumbai to Pune, does not result in the alteration of the Memorandum and hence the provisions of section 13 (and its sub sections) do not apply in this case.

However, under Section 12, following procedure is to be followed:

1. A special resolution has to be passed in the general meeting of the company.
2. Apply to Regional Director for approval.
3. Regional Director shall communicate within a period of 30 days from the date of receipt of application.
4. The company shall file the confirmation with the Registrar within a period of 60 days of the date of confirmation.
5. ROC shall register the same and certify the registration within a period of 30 days from the date of filing of such confirmation.
6. Form No. MGT.14 shall be filed to the Registrar of Companies within 30 days of passing the special resolution.
7. Also within 30 days of the change of the registered office, a notice to the Registrar should be given of the new location of the office in Form No. INC.22.



Question 12.

The persons (not being members) dealing with the company are always protected by the doctrine of indoor management. Explain. Also, explain when doctrine of Constructive Notice will apply.

(ICAI Module, Nov'18- 6 Marks)



Solution: Doctrine of Indoor Management

According to this doctrine, persons dealing with the company need not inquire whether internal proceedings relating to the contract are followed correctly, once they are satisfied that the transaction is in accordance with the memorandum and articles of association.

Stakeholders need not enquire whether the necessary meeting was convened and held properly or whether necessary resolution was passed properly. They are entitled to take it for granted that the company had gone through all these proceedings in a regular manner.

The doctrine helps to protect external members from the company and states that the people are entitled to presume that internal proceedings are as per documents submitted with the Registrar of Companies.

The doctrine of indoor management is opposite to the doctrine of constructive notice. Whereas the doctrine of constructive notice protects a company against outsiders, the doctrine of indoor management protects outsiders against the actions of a company. This doctrine also is



a safeguard against the possibility of abusing the doctrine of constructive notice.

Exceptions to Doctrine of Indoor Management (Applicability of doctrine of constructive notice)

- (i) Knowledge of irregularity: In case an 'outsider' has actual knowledge of irregularity within the company, the benefit under the rule of indoor management would no longer be available. In fact, he/she may well be considered part of the irregularity.
- (ii) Negligence: If, with a minimum of effort, the irregularities within a company could be discovered, the benefit of the rule of indoor management would not apply. The protection of the rule is also not available where the circumstances surrounding the contract are so suspicious as to invite inquiry, and the outsider dealing with the company does not make proper inquiry.
- (iii) Forgery: The rule does not apply where a person relies upon a document that turns out to be forged since nothing can validate forgery. A company can never be held bound for forgeries committed by its officers.



Question 13.

Yadav dairy products Private limited has registered its articles along with memorandum at the time of registration of company in December, 2014. Now directors of the company are of the view that provisions of articles regarding forfeiture of shares should not be changed except by a resolution of 90% majority. While as per section 14 of the Companies Act, 2013 articles may be changed by passing a special resolution only. One of the directors said that they cannot make a provision against the Companies Act. You are required to advise the company on this matter.

(ICAI Module, May'20 RTP)



Solution:

As per section 5 of the Companies Act, 2013 the article may contain provisions for entrenchment to the effect that specified provisions of the articles may be altered only if more restrictive conditions than a special resolution, are met.

The provisions for entrenchment shall only be made either on formation of a company, or by an amendment in the articles agreed to by all the members of the company in the case of a private company and by a special resolution in the case of a public company.

Where the articles contain provisions for entrenchment, whether made on formation or by amendment, the company shall give notice to the Registrar of such provisions in prescribed manner.

In the present case, Yadav dairy products Private Limited is a private company and wants to protect provisions of articles regarding forfeiture of shares. It means it wants to make entrenchment of articles, which is allowed. But the company will have to pass a resolution taking permission of all the members and it should also give notice to ROC regarding entrenchment of articles.



Question 14.

Anushka security equipments limited is a manufacturer of CCTV cameras. It has raised ₹100 crores through public issue of its equity shares for starting one more unit of CCTV camera manufacturing. It has utilized 10 crores rupees and then it realized that its existing business has no potential for expansion because government has reduced customs duty on import of CCTV camera hence imported cameras from china are cheaper than its own manufacturing.



Now it wants to utilize remaining amount in mobile app development business by adding a new object in its memorandum of association.

Does the Companies Act allow such change of object. If not then what advise will you give to company. If yes, then give steps to be followed.

(ICAI Module, Nov'19 RTP)



Solution:

According to section 13 of the Companies Act, 2013 a company, which has raised money from public through prospectus and still has any unutilised amount out of the money so raised, shall not change its objects for which it raised the money through prospectus unless a special resolution is passed by the company and—

- (i) the details in respect of such resolution shall also be published in the newspapers (one in English and one in vernacular language) which is in circulation at the place where the registered office of the company is situated and shall also be placed on the website of the company, if any, indicating therein the justification for such change;
- (ii) the dissenting shareholders shall be given an opportunity to exit by the promoters and shareholders having control in accordance with SEBI regulations.

Company will have to file copy of special resolution with ROC and he will certify the registration within a period of thirty days. Alteration will be effective only after this certificate by ROC.

Looking at the above provision we can say that company can add the object of mobile app development in its memorandum and divert public money into that business. But for that it will have to comply with above requirements.



Question 15.

The Board of Directors of Sindhu Limited wants to make some changes and to alter some Clauses of the Articles of Association which are to be urgently carried out, which include the increase in Authorized Capital of the company, issue of shares, increase in borrowing limits and increase in the number of directors.

Discuss about the provisions of the Companies Act, 2013 to be followed for alteration of Articles of Association.

(Nov'18 RTP)



Solution: Alteration in Articles of Association:

Section 14 of the Companies Act, 2013, vests companies with power to alter or add to its articles. The law with respect to alteration of articles is as follows:

- (1) Alteration by special resolution: Subject to the provisions of this Act and the conditions contained in its memorandum, if any, a company may, by a special resolution alter its articles.
- (2) Filing of alteration with the registrar: Every alteration of the articles and a copy of the order of the Tribunal approving the alteration, shall be filed with the Registrar, together with a printed copy of the altered articles, within a period of fifteen days in such manner as may be prescribed, who shall register the same.
- (3) Any alteration made shall be valid: Any alteration of the articles registered as above shall, subject to the provisions of this Act, be valid as if it were originally contained in the articles.
- (4) Alteration noted in every copy: Every alteration made in articles of a company shall be



noted in every copy of the articles, as the case may be. If a company makes any default in complying with the stated provisions, the company and every officer who is in default shall be liable to a penalty of one thousand rupees for every copy of the articles issued without such alteration. [Section 15].



Question 16.

XY Ltd. has its registered office at Mumbai in the State of Maharashtra. For better administrative conveniences the company wants to shift its registered office from Mumbai to Nashik (within the State of Maharashtra). What formalities the company has to comply with under the provisions of the Companies Act, 2013 for shifting its registered office as stated above? Explain.

(May'19 Mock Test)



Solution:

The Companies Act, 2013 under section 13 provides for the process of altering the Memorandum of a company. Since the location or Registered Office clause in the Memorandum only names the state in which its registered office is situated, a change in address from Mumbai to Nashik, does not result in the alteration of the Memorandum and hence the provisions of section 13 (and its sub sections) do not apply in this case.

However, under section 12 (5) of the Act which deals with the registered office of company, the change in registered office from one town or city to another in the same state, must be approved by a special resolution of the company. Further, presuming that the Registrar will remain the same in the above case, there will be no need for the company to seek the confirmation to such change from the Regional Director.

CHAPTER WISE - CLASS TEST



Question 1.

The Directors of Mars India Ltd. desire to alter capital clause of Memorandum of Association of their company. Advise them, under the provisions of the Companies Act, 2013 about the ways in which the said clause may be altered.

(Nov'19 Mock Test)



Solution:

Z Alteration of Capital: Under section 61(1) of the Companies Act, 2013, a limited company having a share capital may, if authorized by its Articles, alter its Memorandum in its general meeting to:

- (i) increase its authorized share capital by such amount as it thinks expedient;
- (ii) consolidate and divide all or any of its share capital into shares of a larger amount than its existing shares
However, no consolidation and division which results in changes in the voting percentage of shareholders shall take effect unless it is approved by the Tribunal on an application made in the prescribed manner.
- (iii) convert all or any of its paid-up shares into stock and reconvert that stock into fully paid shares of any denomination
- (iv) sub-divide the whole or any part of its shares into shares of smaller amount than is fixed by the Memorandum
- (v) cancel shares which, at the date of the passing of the resolution in that behalf, have not been taken or agreed to be taken by any person, and diminish the amount of its share



capital by the amount of the shares so cancelled.

Further, under section 64, where a company alters its share capital in any of the above mentioned ways, the company shall file a notice in the prescribed form with the Registrar within a period of thirty days of such alteration or increase or redemption, as the case may be, along with an altered memorandum.



Question 2.

The directors of Smart Computers limited borrowed a sum of money from Mr. Tridev. The company's articles provided that the directors may borrow on bonds such sums as may, from time to time, be authorized by resolution passed at a general meeting of the company. The shareholders claimed that there had been no such resolution authorizing the loan, and therefore, it was taken without their authority and the company is not bound to repay the loan to Tridev. In the light of the contention of shareholders, decide whether the company is bound to pay the loan.

(May'20 Mock Test)



Solution: Doctrine of Indoor Management:

According to this doctrine, persons dealing with the company need not enquire whether internal proceedings relating to the contract are followed correctly, once they are satisfied that the transaction is in accordance with the memorandum and articles of association. Stakeholders need not enquire whether the necessary meeting was convened and held properly or whether necessary resolution was passed properly. They are entitled to take it for granted that the company had gone through all these proceedings in a regular manner.

The doctrine helps to protect external members from the company and states that the people are entitled to presume that internal proceedings are as per documents submitted with the Registrar of Companies.

Thus,

1. What happens internal to a company is not a matter of public knowledge. An outsider can only presume the intentions of a company, but not know the information he/she is not privy to.
2. If not for the doctrine, the company could escape creditors by denying the authority of officials to act on its behalf.

In the given question, Mr. Tridev being a person external to the company, need not enquire whether the necessary meeting was convened and held properly or whether necessary resolution was passed properly. Even if the shareholders claim that no resolution authorizing the loan was passed, the company is bound to pay the loan to Mr. Tridev.



MCQs



Question 1:

Entrenchment enhance the protection. Modern Furniture Limited, an existing private company willing to insert the provisions for entrenchment; it

- (a) Can amend the article by passing an ordinary resolution
- (b) Can amend the article by passing a special resolution
- (c) Can amend the article agreed by all the members
- (d) Can't amend article to made the provisions for entrenchment



Solution:

- (c) Can amend the article agreed by all the members



Question 2.

Today, it's May 2023. Mr. Nilanjan Chattopadhyay a 24 years old Indian youngster, who returned back to India in January month of 2023 after completing his education in bio-nutrient and willing to form an OPC; but not sure about the requirements or pre-conditions regarding eligibility. He read some articles on provisions related to OPC and concluded;

- (i) OPC can be formed by Indian Citizen only
 - (ii) He can't form OPC because in immediate previous year he was not resident in India
- (a) Both the conclusions are valid
 - (b) None of the conclusion is valid
 - (c) First conclusion is invalid
 - (d) Second conclusion is invalid



Solution:

- (d) Second conclusion is invalid



Question 3.

In case of an application for reservation of name or for change of its name by an existing company, the Registrar may reserve the name for a period of from the date of approval

- (a) 90 days (b) 60 days (c) 30 days (d) 20 days



Solution:

- (b) 60 days



Question 4.

Modern Furniture incorporated on 30th June 2022, its directors filled a declaration under section 10A (1)(a) regarding receipt of payment i.e. value of share (against share subscribed by subscriber) to registrar on 18th April 2023. The company and its officers (officers who are in default) shall be charged with penalty of:

- (a) ₹ 1,11,000 and ₹ 1,11,000 respectively
- (b) ₹ 50,000 and ₹ 1,11,000 respectively
- (c) ₹ 1,11,000 and ₹ 50,000 respectively
- (d) ₹ 50,000 and ₹ 1,00,000 respectively



Solution:

(d) ₹ 50,000 and ₹ 1,00,000 respectively



Question 5.

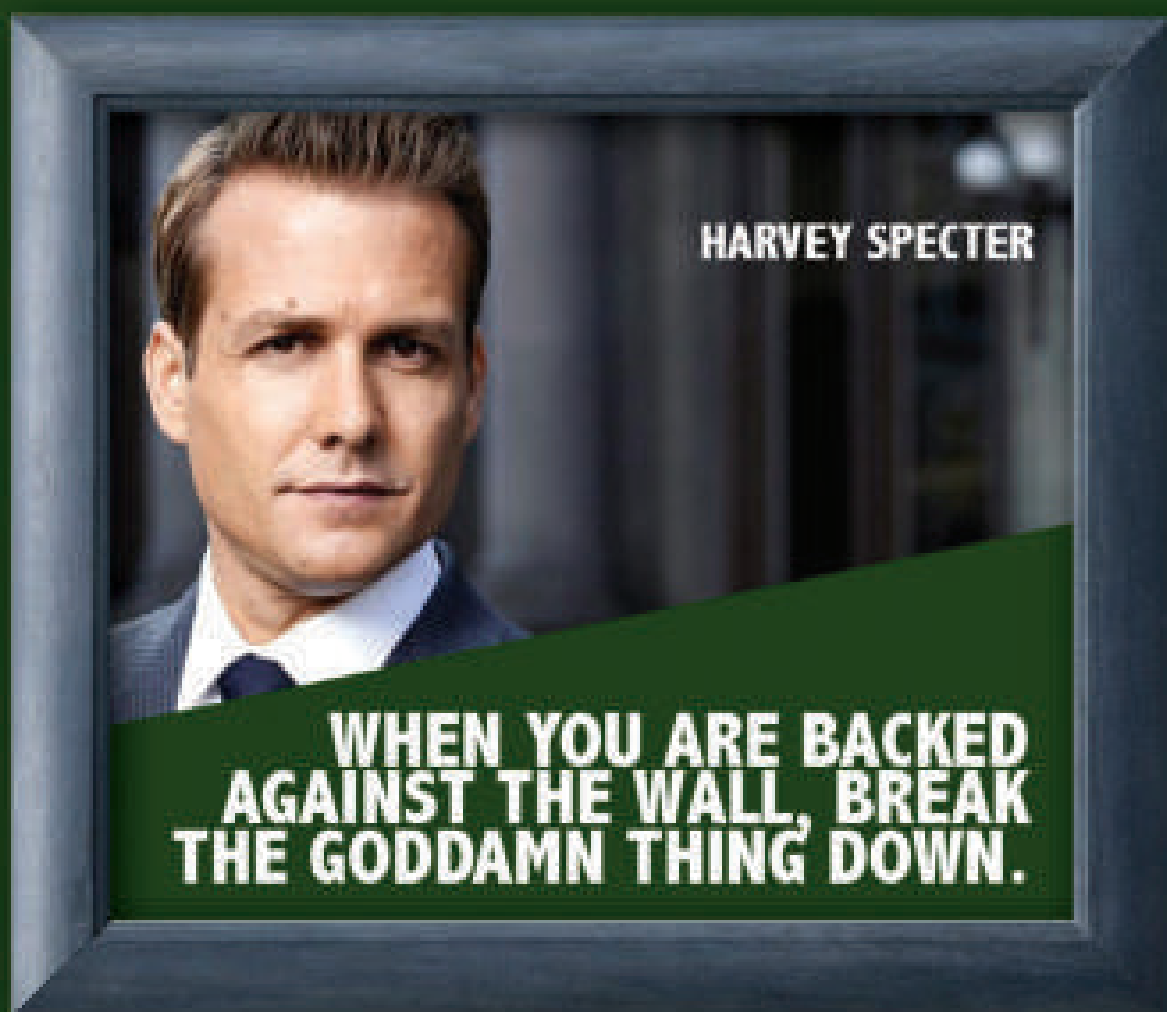
I.T.C limited changed its name to ITC limited. Company and officers thereof made default by failing to make alteration in every issued copy of memorandums and articles. In this context you are required to pick incorrect statements out of followings

- (i) Alteration shall be made to every copy of MOA/AOA because these are considered as public document.
 - (ii) Alteration shall be made to every copy be it in electronic form or otherwise.
 - (iii) Penalty shall be rupees one thousand for every copy of the articles issued without such alteration.
- (a) (ii) only
 - (b) (iii) only
 - (c) (ii) and (iii) only
 - (d) None of (i), (ii) and (iii)



Solution:

(d) None of (i), (ii) and (iii)



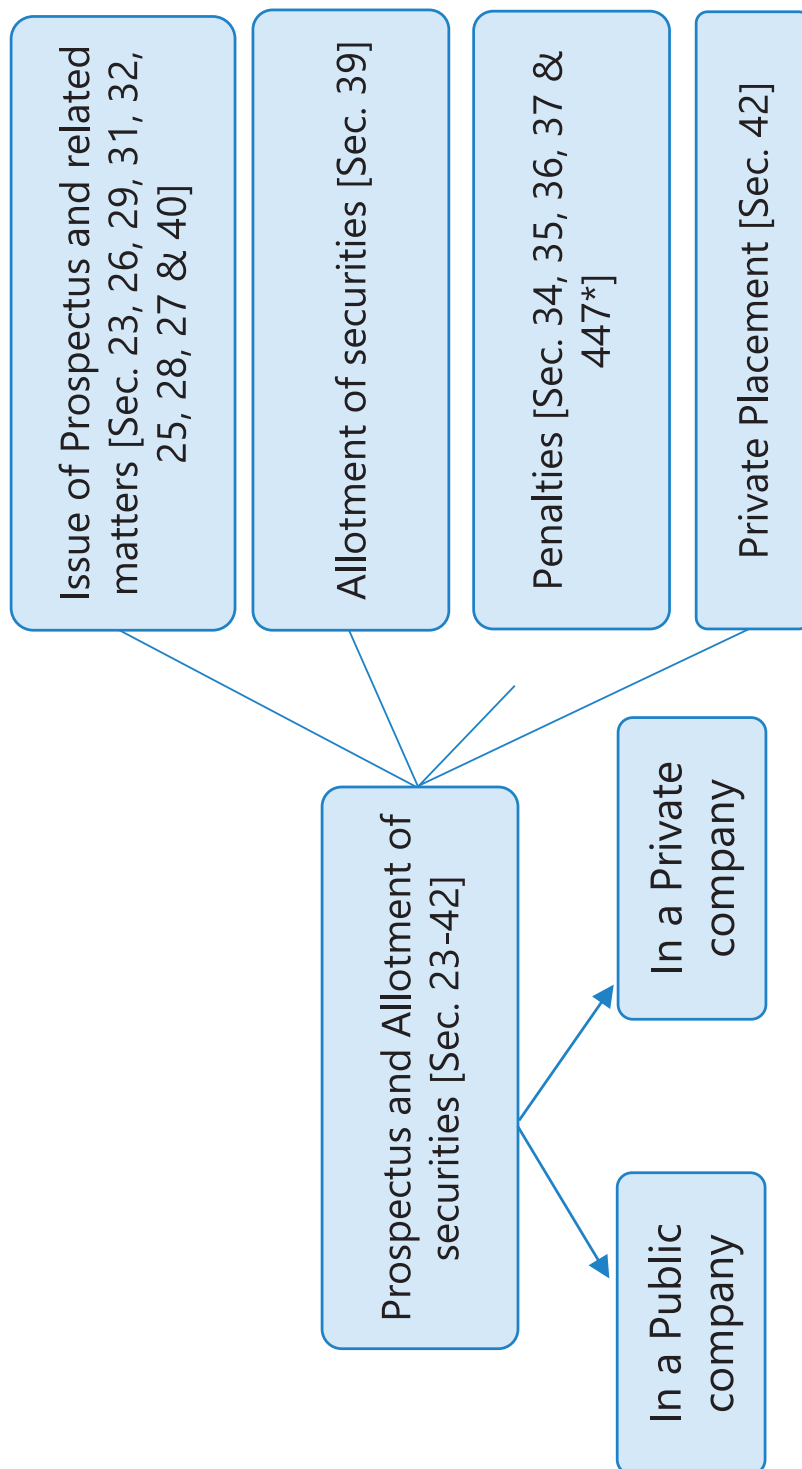
HARVEY SPECTER

**WHEN YOU ARE BACKED
AGAINST THE WALL, BREAK
THE GODDAMN THING DOWN.**



03

PROSPECTUS AND ALLOTMENT OF SECURITIES





SEC 23 - ISSUE OF SECURITIES BY A COMPANY (PUBLIC OFFER AND PRIVATE PLACEMENT)

Fund Raising process by a company



Public Company Section 23(1)

Private Company Section 23(2)

Summary of modes (for issue of securities)

Mode of Issue	Public Company	Private Company
Public Offer (including IPO, FPO or OFS)	Yes	No
Private Placement	Yes	Yes
Rights issue / Bonus Issue	Yes	Yes
Compliance with SEBI rules & regulations	Yes*	No

*For a listed company or a company proposed to be listed.

As per Section 23(3), Such class of public companies may issue such class of securities for the purposes of listing on permitted stock exchanges in permissible foreign jurisdictions or such other jurisdictions, as may be prescribed.

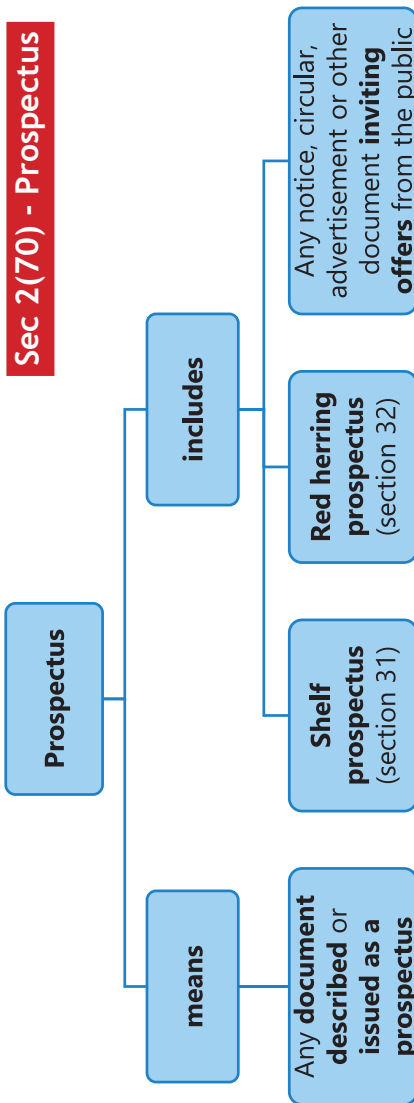
As per Section 23(4), The Central Government may, by notification, exempt any class or classes of public companies referred to in sub-section (3) from any of the provisions of this Chapter, Chapter IV, section 89, section 90 or section 127 and a copy of every such notification shall, as soon as may be after it is issued, be laid before both Houses of Parliament. "

Companies Amendment Act, 2020

[FM Nirmala Sitaraman has given an Approval for DIRECT LISTING of INDIAN COMPANIES on Foreign Stock Exchanges - JULY 2023]



Sec 2(70) - Prospectus



Out of four constituents of prospectus definition, first three are quite clear; but the fourth one i.e. **document inviting offer from the public** (considered as deemed prospectus or prospectus by implication) need to be decoded further that too in context to section 25 and landmark judicial pronouncements.

Contents u/s 26(1)

According to Section 26 (1), every prospectus issued by or on behalf of a public company either with reference to its formation or subsequently, or by or on behalf of any person who is or has been engaged or interested in the formation of a public company, shall be dated and signed and shall state such information and set out such reports on financial information as may be specified by the Securities and Exchange Board in consultation with the Central Government.

26(3)

Subject to sub-section (2), the provisions of sub-section (1) shall apply to a prospectus or a form of application, whether issued on or with reference to the formation of a company or subsequently. The date indicated in the prospectus shall be deemed to be the date of its publication.

Types of Prospectus

1. Red Herring Prospectus (Section 32)
2. Shelf (Section 31)
3. Deemed (Section 25 r.w. Section 28)
4. Abridged Prospectus

Section 26(2) Prospectus NOT to be issued in the following situation

1. Rights Issue of shares/debentures to existing members
2. Issue of shelf prospectus (For 1 year period)

1. It shall be dated
2. Signed as per Section 21
3. General Information of Company
4. Financial Information of Company
5. Statutory Information of Company
6. Details of Promoters
7. Details of Directors
8. Consent of :
Directors + Experts + L/A + u/w

9. Prospectus shall state such information and set out such reports on financial information as may be specified by the SEBI in consultation with the CG:
Provided that until the SEBI specifies the information and reports on financial information under this sub-section, the regulations made by the SEBI under SEBI Act, 1992, in respect of such financial information or reports on financial information shall apply.

Punishment for contravention of Section 26(9)

Company
Penalty - $\geq 50,000/-$ $\leq 3,00,000/-$

Every person knowingly party to issue of prospectus
Penalty - $\geq 50,000/-$ $\leq 3,00,000/-$

Companies Amendment Act, 2020

Section 29

- (1) Notwithstanding anything contained in any other provisions of this Act, -
 - (a) every company making public offer; and
 - (b) Every unlisted public company
 shall issue the securities only in dematerialised form by complying with the provisions of the Depositories Act, 1996 and the regulations made thereunder.
- (2) Any company, other than a company mentioned in sub-section (1), may convert its securities into dematerialised form or issue its securities in physical form in accordance with the provisions of this Act or in dematerialised form in accordance with the provisions of the Depositories Act, 1996 and the regulations made thereunder.

Rule 9A (11) states that Rule 9A shall not apply to an unlisted public company which is:

 - (a) a Nidhi;
 - (b) a Government company; or
 - (c) a wholly owned subsidiary.

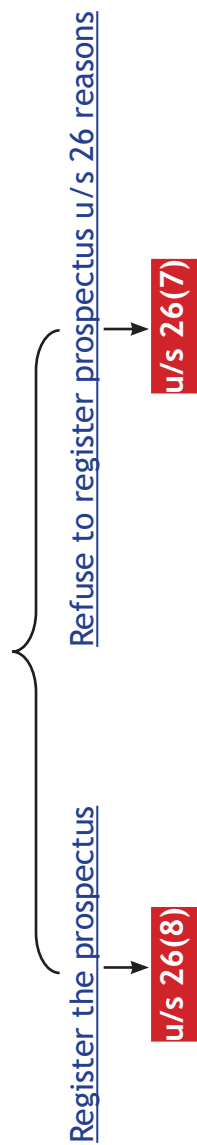
It is to be noted that only unlisted public companies (subject to exceptions) are covered by Rule 9A and therefore, it is not necessary for a private limited company to get its securities dematerialised.





Flow of IPO/FPO

- 1st** BOD of the company along with the help of merchant bank (example:- JP Morgan) shall prepare a “Draft prospectus”
- 2nd** Draft prospectus to be filed 1st with SEBI for approval **Power of CG u/s 24 is Delegated to SEBI.**
- May grant OR May reject
- 3rd** Prospectus approved by SEBI to be filed with ROC u/s 26 for Registration **Sec 26(4) (5) & (6)**
- 26(4)** No prospectus shall be issued by or on behalf of a company or in relation to an intended company unless on or before the date of its publication, there has been delivered to the Registrar for registration, a copy thereof signed by every person who is named therein as a director or proposed director of the company or by his duly authorised attorney
- 26(5)** A prospectus issued under sub-section (1) shall not include a statement purporting to be made by an expert unless the expert is a person who is not, and has not been, engaged or interested in the formation or promotion or management, of the company and has given his written consent to the issue of the prospectus and has not withdrawn such consent before the delivery of a copy of the prospectus to the Registrar for registration and a statement to that effect shall be included in the prospectus.
- 26(6)** Every prospectus issued under sub-section (1) shall, on the face of it—
- (a) state that a copy has been delivered for registration to the Registrar as required under sub-section (4); and
 - (b) specify any documents required by this section to be attached to the copy so delivered or refer to statements included in the prospectus which specify these documents.



4th

1. Issue to general public within 90 days of registration with ROC
2. No prospectus shall be valid if it is issued more than ninety days after the date on which a copy thereof is delivered to the Registrar under sub-section (4).
After 90 days it shall be deemed as issue made without prospectus

The Registrar shall not register a prospectus unless the requirements of this section with respect to its registration are complied with and the prospectus is accompanied by the consent in writing of all the persons named in the prospectus.

1. It is not dated
2. It does not have prescribed content
3. Director of company acts as an expert in prospectus
Expert meaning - CA/CS/cost accountant/Valuer in prospectus
4. It does not contain consent from: - Director/Expert/L.A. / U.W

5th

After Prospectus is issued to general public they shall make an application for subscription of shares or security. For making application 3 days

6th

On the basis of subscription received, company to decide the issue price of shares (book building method used)

7th

On the basis of issue price decided, company to do allotment of securities u/s 39

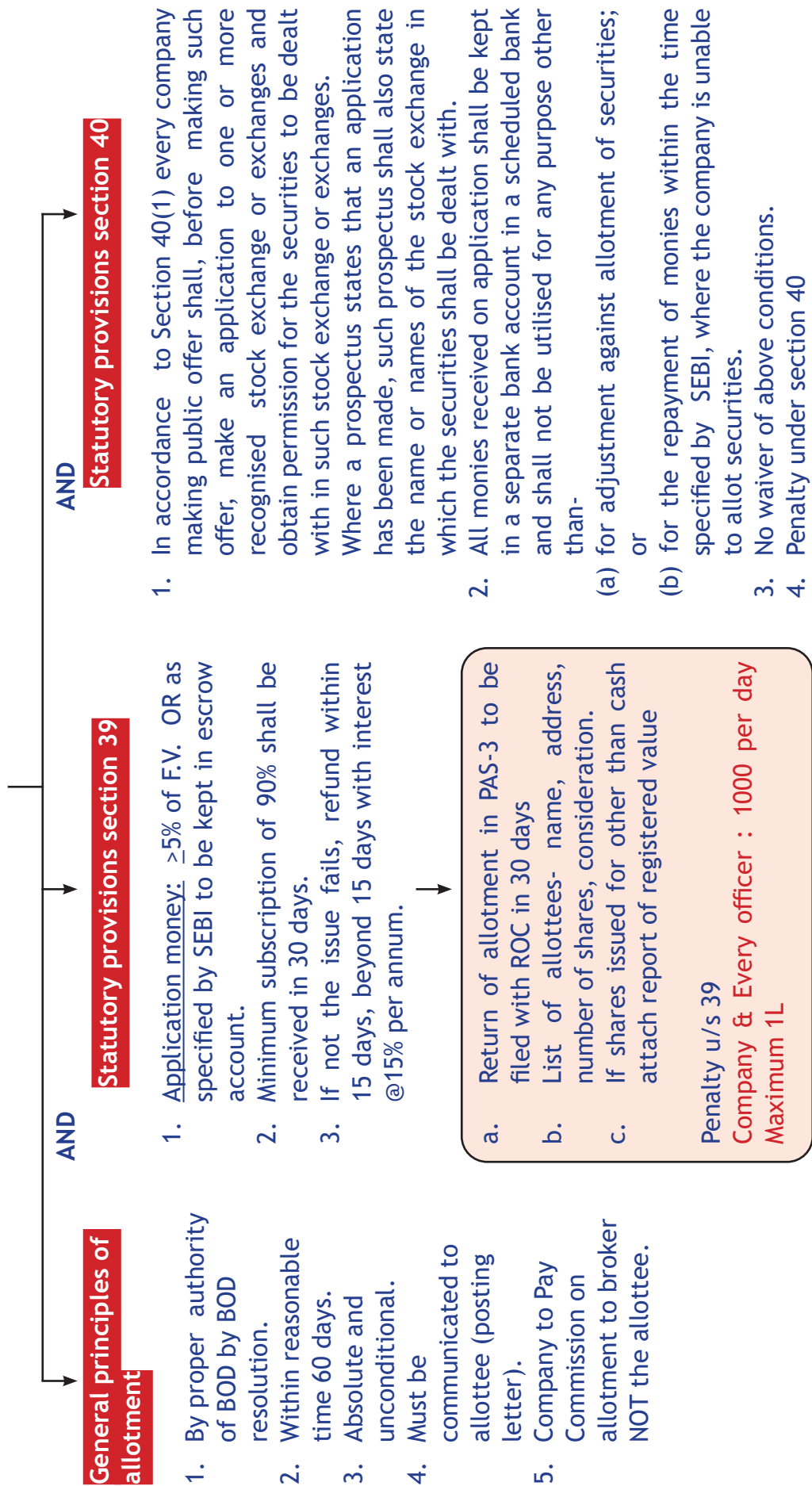
Abridged Prospectus

The term 'Abridged Prospectus' has been defined by Section 2 (1). According to it, 'Abridged Prospectus' means a memorandum containing such salient features of a prospectus as may be specified by the Securities and Exchange Board by making regulations in this behalf. In fact, 'Abridged Prospectus' is a summarised form of actual prospectus.



Allotment means apportionment by BOD of the un-apportioned capital

“Allotment” means the appropriation out of previously un-appropriated capital of a company, of a certain number of shares to a person. Till such allotment, the shares do not exist as such. It is on allotment that the shares come into existence.



Company = $\geq 5L$ $\leq 50L$
Officer = fine = $\geq 50K$ $\leq 3L$



Underwriting(U/W) commission - Section 40(6)

- It is Insurance of Public Issue

- Company may appoint 1 or more U/W
- Commission to be paid once contract entered into irrespective of under/over subscription

Payment of commission: A company may pay commission to any person in connection with the subscription to its securities, whether absolute or conditional.

Conditions for the payment of commission:

- the payment of such commission shall be authorized in the company's articles of association;
- the commission may be paid out of proceeds of the issue or the profit of the company or both;
- Rate of commission:** Following is the rate of commission to be paid to the person:

in case of shares	in case of debentures
shall not exceed 5% of the price at which the shares are issued, or	shall not exceed 2.5% of the price at which the debentures are issued, or
a rate authorised by the articles	as specified in the company's articles,
whichever is less	whichever is less

(d) **Disclosure of the particulars:** the prospectus of the company shall disclose the following particulars -

- the name of the underwriters;
- the rate and amount of the commission payable to the underwriter; and
- the number of securities which is to be underwritten or subscribed by the underwriter absolutely or conditionally.



Shelf Prospectus - Section 31

Meaning of Shelf Prospectus [explanation to section 31]

The expression “shelf prospectus” means a prospectus in respect of which the securities or class of securities included therein are issued for subscription in one or more issues over a certain period without the issue of a further prospectus.

Need of Shelf Prospectus

A company is required to issue a prospectus each time it accesses the capital market. It leads to unnecessary repetition for a company which makes more than one offer of securities in a year to mobile funds from the public. A way out is shelf prospectus which remains valid (on the shelf) for a specified time period during which offers for securities may be made by a company to the public without going through the arduous exercise of issuing fresh prospectus every time.

Filing of shelf prospectus with the Registrar [Sub-section 1]

Shelf prospectus may be filled with the Registrar at the stage of first offer of securities, by class or classes of companies as the Securities and Exchange Board of India may provide by regulations in this behalf.

It has to indicate a period not exceeding one year as the period of validity of such shelf prospectus.

The period of validity is to commence from the date of opening of the first offer of securities under such prospectus. In respect of any second or subsequent offer of such securities issued during the period of validity of such prospectus, no further prospectus is required.

Filing of ‘Information Memorandum’ with the Shelf Prospectus [Sub-section 2]

A company filing a shelf prospectus shall be required to file an information memorandum with the Registrar within the prescribed time, prior to the issue of a second or subsequent offer of securities under the shelf prospectus containing;

- All material facts relating to new charges created,
- Changes in the financial position of the company as have occurred between the first offer of securities or the previous offer of securities and the succeeding offer of securities, and
- Such other changes as may be prescribed,

Proviso to Sub-section 2, provides a safeguard (in case of changes) to applicants who made payment in advance. It is provided that where a company or any other person has received applications for the allotment of securities along with advance payments of subscription before the making of any such change, the company or other person shall intimate the changes to such applicants and if they express a desire to withdraw their application, the company or other person shall refund all the monies received as subscription within fifteen days thereof.

Procedural Aspects

Rule 10 of the Companies (Prospectus and Allotment of Securities) Rules, 2014 The information memorandum shall be prepared in Form PAS-2.

It shall be filed with the Registrar along with the fee as provided in the Companies (Registration Offices and Fees) Rules, 2014 within one month prior to the issue of a second or subsequent offer of securities under the shelf prospectus.

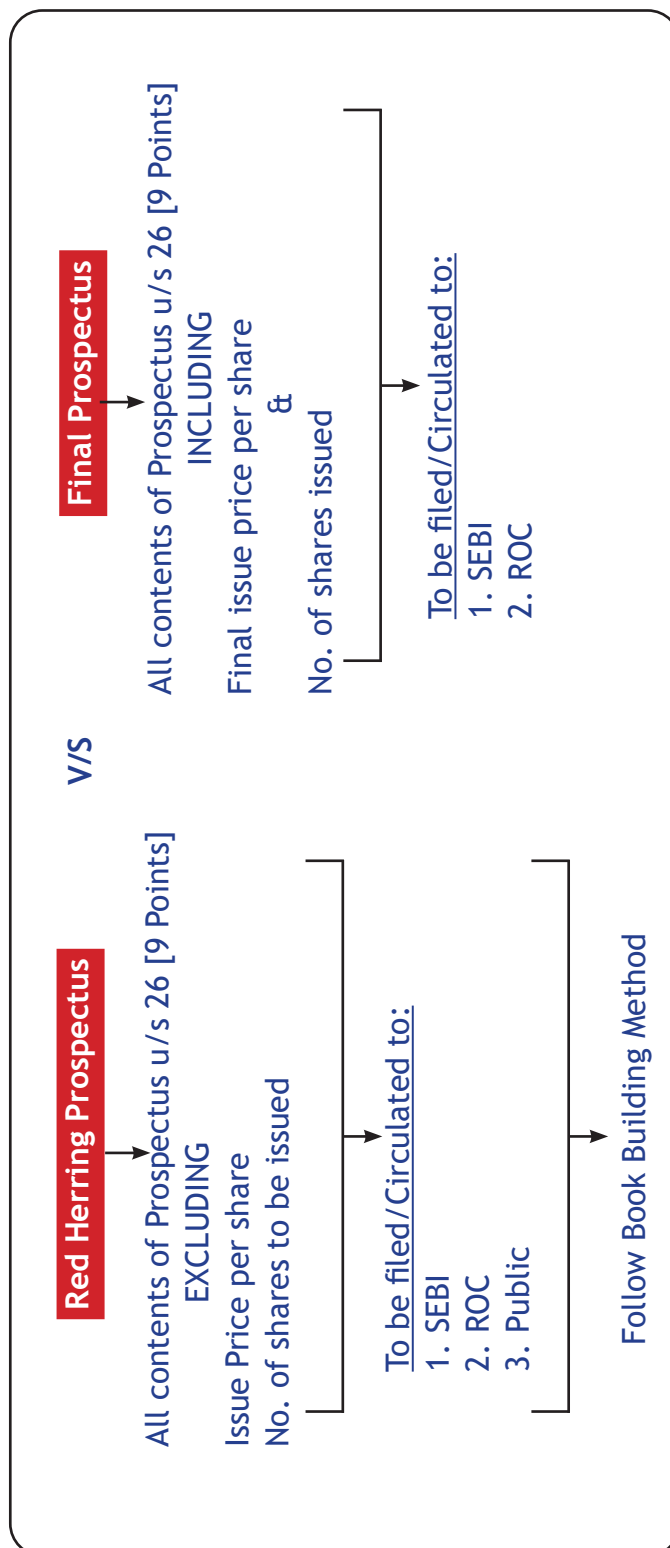
Information Memorandum together with Shelf Prospectus is deemed Prospectus [Sub-section 3]

Where an information memorandum is filed, every time an offer of securities is made under sub-section (2), such memorandum together with the shelf prospectus shall be deemed to be a prospectus.



Red Herring Prospectus - (Section 32)

1. The expression “red herring prospectus” means a prospectus which does not include complete particulars of the quantum or price of the securities included therein. It is a prospectus issued before ‘A Prospectus’
2. Here, ‘A Prospectus’ means the ‘Final Prospectus’
3. Red herring means an Incomplete Prospectus
4. Issued to facilitate Book Building Method
5. Under Book Building Method Issuing company does not know the issue price per share OR No. of shares as it gives the investor a “Price Band” to apply for it’s shares.
6. A company proposing to issue a red herring prospectus shall **file** it with the Registrar at least **three days** prior to the opening of the subscription list and the offer.
7. A red herring prospectus shall carry the same obligations as are applicable to a prospectus and any variation between the red herring prospectus and a prospectus shall be **highlighted as variations** in the prospectus.
8. Upon the closing of the offer of securities under this section, the prospectus stating therein the total capital raised, whether by way of debt or share capital, and the closing price of the securities and any other details as are not included in the red herring prospectus shall be filed with the Registrar and the Securities and Exchange Board.

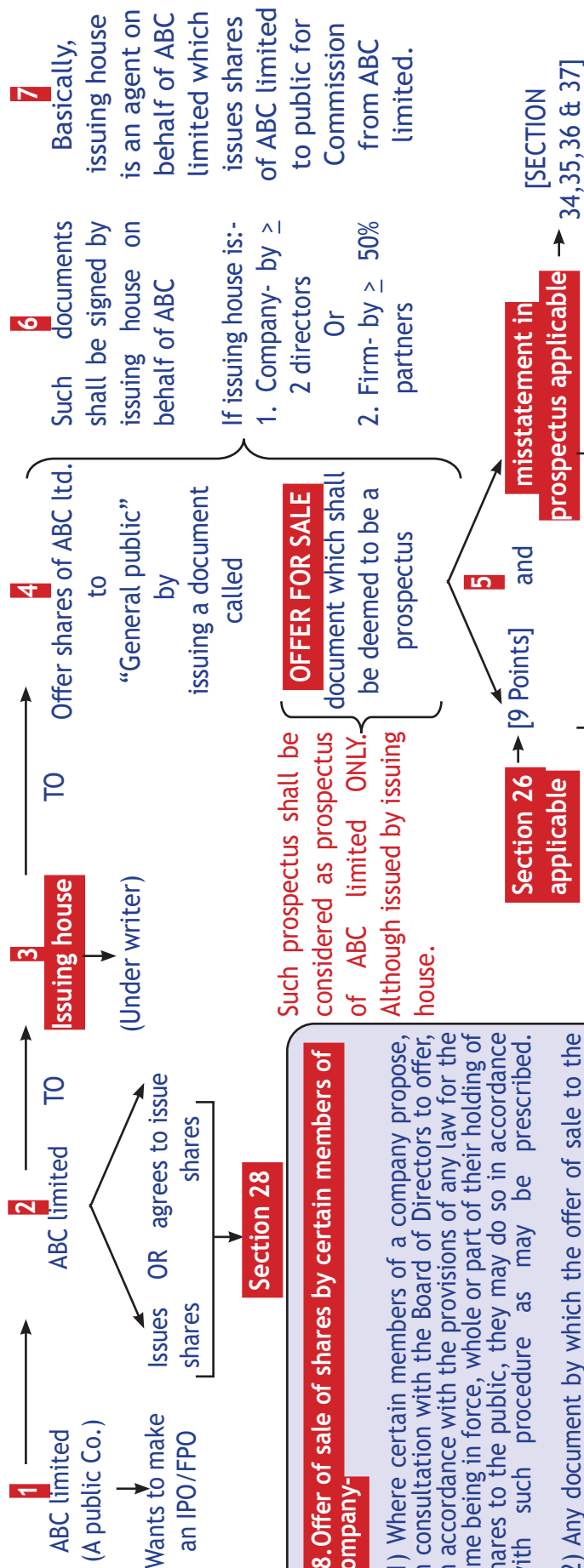


NOTE: Every company going for IPO/FPO shall always issue a Red herring prospectus, therefore it is compulsory for every public offer



Deemed prospectus/By implication-section 25 r.w. Section 28

Documents which are deemed to be a prospectus: As per Section 25(1), where a company allots or agrees to allot any securities of the company with a view to all or any of those securities being offered for sale to the public, any document by which the offer for sale to the public is made shall, for all purposes, be deemed to be a prospectus issued by the company; and all enactments and rules of law as to the contents of prospectus and as to liability in respect of mis-statements, in and omissions from, prospectus, or otherwise relating to prospectus, shall apply



28. Offer of sale of shares by certain members of company-

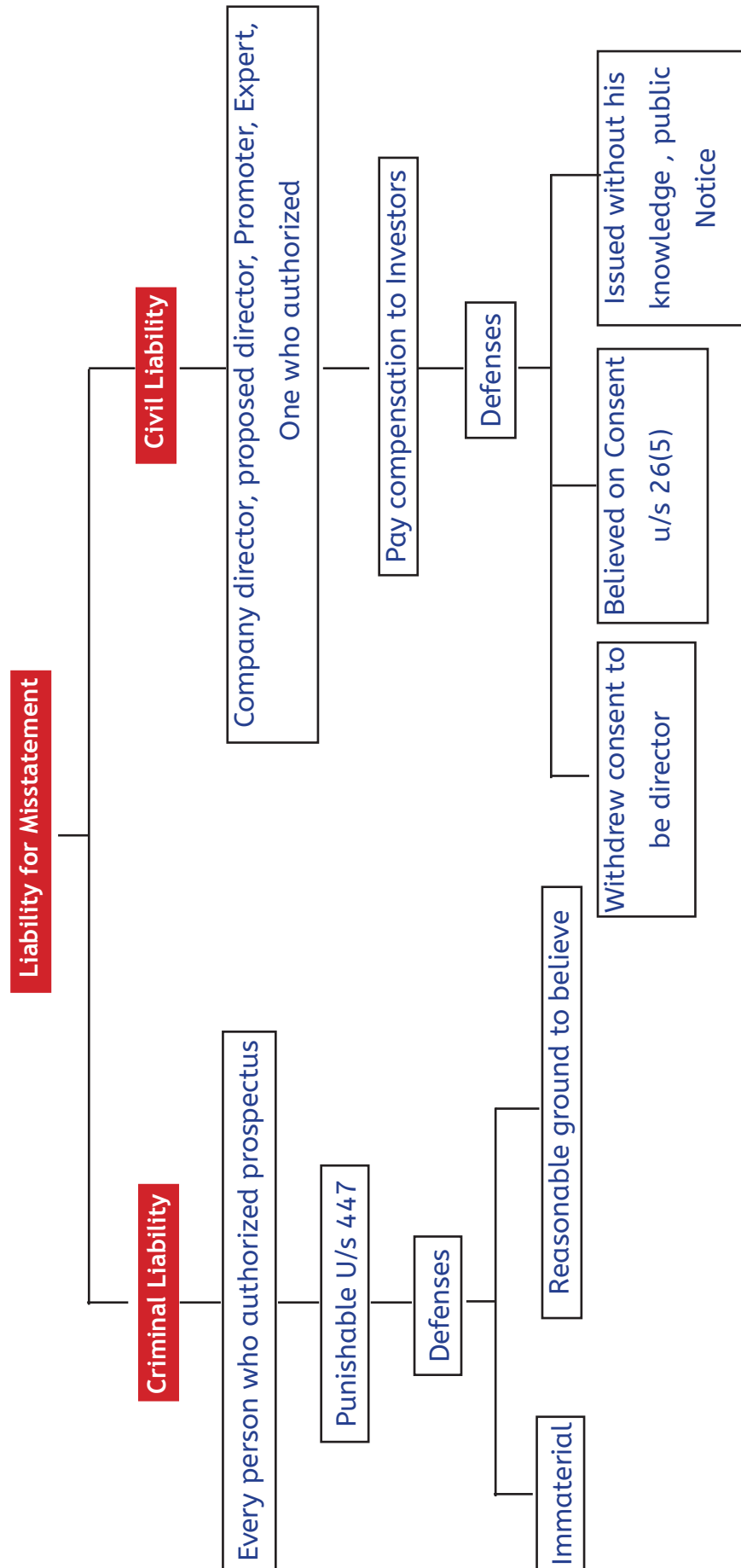
(1) Where certain members of a company propose, in consultation with the Board of Directors to offer, in accordance with the provisions of any law for the time being in force, whole or part of their holding of shares to the public, they may do so in accordance with such procedure as may be prescribed.

(2) Any document by which the offer of sale to the public is made shall, for all purposes, be deemed to be a prospectus issued by the company and all laws and rules made thereunder as to the contents of the prospectus and as to liability in respect of mis-statements in and omission from prospectus or otherwise relating to prospectus shall apply as if this is a prospectus issued by the company.

(3) The members, whether individuals or bodies corporate or both, whose shares are proposed to be offered to the public, shall collectively authorise the company, whose shares are offered for sale to the public, to take all actions in respect of offer of sale for and on their behalf and they shall reimburse the company all expenses incurred by it on this matter.

For the purposes of this Act, it shall, unless the contrary is proved, be evidence that an allotment of, or an agreement to allot, securities was made with a view to the securities being offered for sale to the public if it is shown

Issuing House to offer shares of ABC limited to public within 6 months of receipt from ABC limited. OR When shares are offered to public by issuing house, ABC limited has not received full consideration,





MIS-STATEMENTS IN PROSPECTUS

In common parlance, mis-statement is the act of stating something that is false or not accurate. It could either be by commission or by omission or by both.

CRIMINAL LIABILITY FOR MIS-STATEMENTS IN PROSPECTUS [SECTION 34]

Where a prospectus, issued, circulated or distributed under this Chapter, includes any statement which is **untrue** or misleading in form or context in which it is included or where any inclusion or omission of any matter is likely to **mislead**, every person who authorises the issue of such prospectus shall be liable under section 447: Provided that nothing in this section shall apply to a person if he proves that such statement or omission was **immaterial** or that he had reasonable **grounds** to believe, and did up to the time of issue of the prospectus believe, that the statement was true or the inclusion or omission was necessary.

CIVIL LIABILITY FOR MIS-STATEMENTS IN PROSPECTUS [SECTION 35]

(1) **Liabilities of persons:** According to Section 35(1), where a person has subscribed for securities of a company acting on any statement included, or the inclusion or omission of any matter, in the prospectus which is misleading and has sustained any loss or damage as a consequence thereof, the company and every person who—

- (a) is a **director** of the company at the time of the issue of the prospectus;
- (b) is named in the prospectus as a director of the company, or has agreed to become such director,
- (c) is a **promoter** of the company;
- (d) has **authorised the issue of the prospectus**; and
- (e) is an expert referred to in section 26,

-shall, without prejudice to any punishment to which any person may be liable under section 36, be liable to pay **compensation** to every person who has sustained such loss or damage.

(2) **Exceptions:** No person shall be liable if he proves—

- (a) that, having consented to become a director of the company, he **withdrew** his consent before the issue of the prospectus, and that it was issued without his authority or consent; or
- (b) that the prospectus was **issued without his knowledge** or consent, and that on becoming aware of its issue, he forthwith gave a **reasonable public notice** that it was issued without his knowledge or consent.
- (c) that, as regards every misleading statement purported to be made by an expert or contained in an extract from a report or valuation of an expert, it was a correct and fair representation of the statement or Report ; and he had reasonable ground to believe that the person making the statement was competent to make it and that the said person had given the consent required by section 26

(3) **Liability on defraud:** Where it is proved that a prospectus has been issued with **intent to defraud** the applicants for the securities of a company or any other person or for any fraudulent purpose, every person referred to in subsection (1) shall be **personally** responsible, without any **limitation** of liability, for all or any of the losses or damages that may have been incurred by any person who subscribed to the securities on the basis of such prospectus.

PUNISHMENT FOR FRAUDULENTLY INDUCING PERSONS TO INVEST MONEY [SECTION 36]

Any person who, either knowingly or recklessly makes any statement, promise or forecast which is false, deceptive or misleading, or deliberately conceals any material facts, to induce another person to enter into, or to offer to enter into—

- (a) any agreement for, or with a view to, acquiring, disposing of, subscribing for, or underwriting securities; or
- (b) any agreement, the purpose or the pretended purpose of which is to secure a profit to any of the parties from the yield of securities or by reference to fluctuations in the value of securities; or
- (c) any agreement for, or with a view to obtaining credit facilities from any bank or financial institution, -shall be liable for action under section 447.





ACTION BY AFFECTED PERSONS [SECTION 37]

A suit may be filed or any other action may be taken under section 34 or section 35 or section 36 by any person, **group of persons** or any association of persons **affected by any misleading statement** or the inclusion or omission of any matter in the prospectus.

Class action suit is for a group of people filing a suit against a defendant who has caused **common harm** to the entire group or class. This is not like a common litigation method where one defendant files a case against another defendant while both the parties are available in court. In the case of class action suit, the class or the **group** of people filing the case **need not be present** in the court and **can be represented by one petitioner**. The benefit of these type of suits is that if several people have been injured by one defendant, each one of the injured people need not file a case separately but all of the people can file one single case together against the defendant.

PUNISHMENT FOR FRAUD

According to section 447 of the Act, any person who is found to be guilty of fraud.

	Fine		Imprisonment
(i) Fraud involving less than 10 lakh rupees or 1% of turnover, whichever is lower (public interest not involved)	Up to ₹ 50 lakhs ⁶	or/and	Up to 5 years
(ii) Fraud involving at least 10 lakh rupees or 1% of turnover, whichever is lower (public interest not involved)	Minimum fine equal to amount of fraud; and Maximum fine three times of amount of fraud	and	Minimum 6 months; and Maximum 10 Years
(iii) Fraud at (ii) involves public interest	Minimum fine equal to amount of fraud; and Maximum fine three times of amount of fraud	and	Minimum 3 years; and Maximum 10 Years



Private Placements - Section 42

1. Applicable to public as well as private company.
2. It is not a PUBLIC Offer.
3. Offer of securities on a private basis to identified persons (persons whose record is available with company).
4. Persons shall be "Identified" by BOD of Company .
5. Maximum Allottee per annum 50. However as per Rules, it is 200 (therefore, follow 200 p.a.).
6. Following shall NOT be counted in Number of Allottees (a) QIB (Qualified Institutional Buyers Registered with SEBI) (b) ESOP.
7. Private placement shall require (S.R. + MGT - 14).
8. Company can make multiple private placement issues in one F.Y. but maximum Allottee 200. AND
9. New issue only after completion OR cancellation of previous issue.
10. NO Renunciation Rights.
11. Consideration through banking channel.
12. NO prospectus but Private Placement offer document in PAS-4.
13. NO public advertisement allowed.
14. Allotment of securities to be made in 60 days from receipt of application money.
15. If NO Allotment, repay within 15 days from end of 60 days.
16. If NOT repaid, interest @ 12% p.a. from 61st day.
17. Company to file PAS - 3 within 15 days.
18. Failure to file, Penalty on Company, Promoters and Directors - 1000/- per days per default $\leq$ 25L.
19. Offer made/money accepted in contravention:
Company, Promoters AND Directors liable for penalty: Amount raised u/s 42 OR 2 crores whichever is lower + Refund money.
20. "Provided also that no offer or invitation of any securities under this rule shall be made to a body corporate incorporated in, or a national of, a country which shares a land border with India, unless such body corporate or the national, as the case may be, have obtained Government approval under the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 and attached the same with the private placement offer cum application letter."



QUESTION & ANSWERS



Question 1:

The Board of Directors of Reckless Investments Limited, having registered office at Mumbai, has allotted equity shares to the 550 investors of the company without issuing a prospectus. As no prospectus was issued, nothing was delivered to the Registrar of Companies, Mumbai for filing. Explain the remedy available to the investors in this regard.



Solution:

According to Section 23 of the Companies Act, 2013, a public company can issue securities to the public only by issuing a prospectus. Further, where the limit crosses 200 investors the issue shall be deemed to be a public offer, as provided by Section 42. Section 26 (1) lays down the matters required to be disclosed and included in a prospectus and requires the delivery of the prospectus to the Registrar for filing before its issue.

In the given case, the company has violated the above provisions and therefore, the allotment made by it is void. The company will be required to refund the entire moneys received and will also be punishable under section 26 (9).



Question 2:

An allottee of shares in a company brought action against a director in respect of false statements made in the prospectus. The director contended that the statements were prepared by the promoters and he simply relied on them. Is the director liable under these circumstances? Decide referring to the provisions of the Companies Act, 2013.



Solution:

Yes, the Director shall be held liable for the false statements made in the prospectus under sections 34 and 35 of the Companies Act, 2013. Whereas section 34 imposes a criminal punishment on every person who authorises the issue of such prospectus, section 35 more particularly includes a director of the company in the imposition of liability for such mis-statements.

The only situations when a director will not incur any liability for mis-statements in a prospectus are as under:

- (a) No criminal liability under section 34 shall apply to a person if he proves that such statement or omission was immaterial or that he had reasonable grounds to believe, and did up to the time of issue of the prospectus believe, that the statement was true or the inclusion or omission was necessary.
- (b) No civil liability for any mis-statement under section 35 shall apply to a person if he proves that:
 - (1) having consented to become a director of the company, he withdrew his consent before the issue of the prospectus, and that it was issued without his authority or consent; or



- (2) the prospectus was issued without his knowledge or consent, and that on becoming aware of its issue, he forthwith gave a reasonable public notice that it was issued without his knowledge or consent.

Therefore, in the present case the director cannot escape the liability by stating that he had relied on the promoters for making correct statements in the prospectus. He will be liable for mis-statements in the prospectus.



Question 3:

May 2004, 2013

A company issued a prospectus. All the statements contained therein were literally true. It also stated that the company had paid dividends for a number of years, but did not disclose the fact that the dividends were not paid out of trading profits, but out of capital profits. All allottee of shares wants to avoid the contract on the ground that the prospectus was false in material particulars. Decide.



Solution:

The prospectus is misleading

- since non-disclosure of the fact that the company was making losses and that the dividends were paid out of past year profits gave a false impression that the company was making profits;
- since suppression of such fact might have affected investor's decision to subscribe for shares.
- since the prospectus does not disclose all the material fact truly, honestly and accurately.

The allottee of shares is entitled to avoid allotment

- since the allottee has a right to rescind the contract of allotment of shares if he had relied and acted on the prospectus, i.e. he subscribed for shares after being influenced by a misleading prospectus.



Question 4:

Nov. 2006, May 2017

With a view to issue shares to the general public of a prospectus containing some false information was issued by a company. Mr. X received a copy of the prospectus from the company, but did not apply for allotment of any shares. The allotment of shares to the general public was completed by the company within the stipulated period. A few months later, Mr. X bought 2000 shares through the stock exchange at a higher price which later on fell sharply. X sold these shares at a heavy loss. Mr. X claims damages from the company for the loss suffered on the ground that the prospectus issued by the company contained a false statement. Referring to the provisions of the Companies Act, examine whether X's claim for damages is justified.



Solution:

Mr. X is not an original allottee of shares

- since he purchased the shares from the market, and not from the company.

Mr. X cannot claim damages from the company.

- since Mr. X is not an original allottee of shares;
- since Mr. X did not subscribe for shares on the faith of a misleading prospectus



Question 5.

Unique Builders Limited decides to pay 2.5 percent of the value of debentures as underwriting commission to the underwriters but the Articles of the company authorize only 2.0 percent underwriting commission on debentures. The company further decides to pay the underwriting commission in the form of flats. Examine the validity of the above arrangements under the provisions of the Companies Act, 2013.

(ICAI Module, May'18 RTP)



Solution:

Section 40 (6) of the Companies Act 2013, provides that a company may pay commission to any person in connection with the subscription or procurement of subscription to its securities, whether absolute or conditional, subject to a number of conditions which are prescribed under Companies (Prospectus and Allotment of Securities) Rules, 2014. In relation to the case given, the conditions applicable under the above Rules are as under:

- (a) The payment of such commission shall be authorized in the company's articles of association;
- (b) The commission may be paid out of proceeds of the issue or the profit of the company or both;
- (c) The rate of commission paid or agreed to be paid shall not exceed, in case of shares, five percent (5%) of the price at which the shares are issued or a rate authorised by the articles, whichever is less, and in case of debentures, shall not exceed two and a half per cent (2.5 %) of the price at which the debentures are issued, or as specified in the company's articles, whichever is less;

Thus, the Underwriting commission is limited to 5% of issue price in case of shares and 2.5% in case of debentures. The rates of commission given above are maximum rates.

In view of the above, the decision of Unique Builders Ltd. to pay underwriting commission exceeding 2% as prescribed in the Articles is invalid.

The company may pay the underwriting commission in the form of flats as both the Companies Act and the Rules do not impose any restriction on the mode of payment though the source has been restricted to either the proceeds of the issue or profits of the company.



Question 6.

PQR limited wants to raise funds for its upcoming project. It has issued private placement offer letters to 55 persons in their individual name to issue its equity shares. Out of these four are qualified institutional buyers. Before allotment under this offer letter company issued another private placement offer letter to another 155 persons in their individual name for issue of its debentures. Being a public company can it issue securities in a private placement? Is it in compliance with provisions related to private placement or should these offers be treated as public offers? What if the offer for debentures is given after allotment of equity shares but within the same financial year?

(ICAI Module)



Solution:

1. According to section 42 of the companies act, 2013 any private or public company may make private placement through issued of a private placement offer letter.
2. But the offer shall be made to persons not exceeding fifty or such higher number as may be prescribed, in a financial year. For counting number of persons qualified institutional



buyers and employees under employee's stock option scheme will not be considered. Here rules prescribed limit as 200 persons in a financial year. But this limit should be counted separately for each type of security.

3. If a company makes an offer or invitation to more than the prescribed number of persons it shall be deemed to be an offer to the public and shall be governed by the provisions related to prospectus.
4. Also a company cannot make fresh offer under this section if allotments with respect to any offer made earlier have been completed or that offer has been withdrawn or abandoned by the company. This rule is applicable even if the issue is of different kind of security. Any offer or invitation not in compliance with the provisions of this section shall be treated as a public offer and all provisions will apply accordingly.

In the given case PQR limited is a public company and looking at above provisions we can say that even a public company can make private placement. Company has given offer to 55 persons out of which 4 are qualified institutional buyers hence the offer is given to effectively 51 persons which is well within the limit of 200 persons. From this angle company is in compliance with private placement rules.

But company has given another private placement offer which is non compliance of provisions of section 42 hence the offers given by company will be treated as public offer and will be governed accordingly.

But if the company gives offer for debentures in the same financial year after allotment of equity shares is complete then both the offers can well be treated as private placement offers. Here we should not add 51 and 155 persons for checking the limit of 200 because this limit should be checked



Question 7.

State in what way does the Companies Act, 2013 regulate and restrict the following in respect of a company going for public issue of shares:

- (i) Minimum Subscription, and
- (ii) Application Money payable on shares being issued?

(ICAI Module, May'19 Mock Test)



Solution:

The Companies Act, 2013 by virtue of provisions as contained in **Section 39 (1) and (2)** regulates and restricts the minimum subscription and the application money payable in a public issue of shares as under:

- (i) **Minimum subscription [Section 39 (1)]**
No Allotment shall be made of any securities of a company offered to the public for subscription; unless; -
 - (i) the amount stated in the prospectus as the minimum amount has been subscribed; and
 - (ii) the sums payable on application for such amount has been paid to and received by the company-
- (ii) **Application money:** Section 39 (2) provides that the amount payable on application on each security shall not be less than 5% of the nominal amount of such security or such amount as SEBI may prescribe by making any regulations in this behalf.
Further section 39 (3) provides that if the stated minimum amount is not received by the company within 30 days of the date of issue of the prospectus or such time as prescribed



by SEBI, the company will be required to refund the application money received within such time and manner as may be prescribed.

In case of any default under sub-section, the company and its officer who is in default shall be liable to a penalty, for each default, of one thousand rupees for each day during which such default continues or one lakh rupees, whichever is less.

Section 40 (3) provides that all moneys received on application from the public for subscription to the securities shall be kept in a separate bank account maintained with a scheduled bank.



Question 8.

An allottee of shares in a Company brought action against a Director in respect of false statements in prospectus. The director contended that the statements were prepared by the promoters and he has relied on them. Is the Director liable under the circumstances? Decide referring to the provisions of the Companies Act, 2013.

(ICAI Module)



Solution:

Yes, the Director shall be held liable for the false statements in the prospectus under sections 34 and 35 of the Companies Act, 2013. Whereas section 34 imposes a criminal punishment on every person who authorises the issue of such prospectus, section 35 more particularly includes a director of the company in the imposition of liability for such mis statements.

The only situations when a director will not incur any liability for mis statements in a prospectus are as under:

- (a) No criminal liability under section 34 shall apply to a person if he proves that such statement or omission was immaterial or that he had reasonable grounds to believe, and did up to the time of issue of the prospectus believe, that the statement was true or the inclusion or omission was necessary.
- (b) No civil liability for any mis statement under section 35 shall apply to a person if he proves that:
 - (1) Having consented to become a director of the company, he withdrew his consent before the issue of the prospectus, and that it was issued without his authority or consent; or
 - (2) The prospectus was issued without his knowledge or consent, and that on becoming aware of its issue, he forthwith gave a reasonable public notice that it was issued without his knowledge or consent.

Therefore, in the present case the director cannot hide behind the excuse that he had relied on the promoters for making correct statements in the prospectus. He will be liable for mis-statements in the prospectus.



Question 9.

The Board of Directors of a company decide to pay 5% of issue price of shares as underwriting commission to the underwriters. On the other hand the Articles of Association of the company permit only 3% commission. The Board of Directors further decide to pay the commission out of the proceeds of the share capital. Are the decisions taken by the Board of Directors valid under the Companies Act, 2013?

(ICAI Module, May'19 Mock Test, May'19- 2 Marks)



Solution:

Under the Companies (Prospectus and Allotment of Securities) Rules, 2014 the rate of commission paid or agreed to be paid shall not exceed, in case of shares, five percent (5%) of the price at which the shares are issued or a rate authorised by the articles, whichever is less. The same rules allow the commission to be paid out of proceeds of the issue or the profit of the company or both.

Therefore, the decision of the Board of Directors to pay 5% commission to the underwriters is invalid while the decision to pay out of the proceeds of the share issue is valid.



Question 10.

Prakhar Ltd. intends to raise share capital by issuing Equity Shares in different stages over a certain period of time. However, the company does not wish to issue prospectus each and every time of issue of shares. Considering the provisions of the Companies Act, 2013, discuss what formalities Prakhar Ltd. should follow to avoid repeated issuance of prospectus?

(Nov'18 RTP)



Solution:

Shelf prospectus means a prospectus in respect of which the securities or class of securities included therein are issued for subscription in one or more issues over a certain period without the issue of a further prospectus

- (1) According to Section 31 of the Company Act, 2013 any class or classes of companies, as the Securities and Exchange Board may provide by regulations in this behalf, may file a shelf prospectus with the Registrar at the stage—
 - (A) of the first offer of securities included therein which shall indicate a period not exceeding one year as the period of validity of such prospectus which shall commence from the date of opening of the first offer of securities under that prospectus, and
 - (B) in respect of a second or subsequent offer of such securities issued during the period of validity of that prospectus, no further prospectus is required.
- (2) The other formalities related to such repeated/subsequent issue of shares- A company filing a shelf prospectus shall be required to file an information memorandum containing all material facts relating to new charges created, changes in the financial position of the company as have occurred between the first or previous offer of securities and the succeeding offer of securities and such other changes as may be prescribed, with the Registrar within the prescribed time, prior to the issue of a second or subsequent offer of securities under the shelf prospectus.

Thus, Prakhar Ltd. can follow the above provisions and can issue a shelf prospectus.



Question 11.

Green Ltd. was dealing in export of rubber to specified foreign countries. The company was willing to purchase rubber trees in A.P. State. The prospectus issued by the company contained some important extracts of the expert report and number of trees in A.P. State. The report was found untrue. Mr. Andrew purchased the shares of Green Ltd. on the basis of the expert's report published in the prospectus. However, he did not suffer any loss due to purchase of such shares. Will Mr. Andrew have any remedy against the company? State also the circumstances where an expert is not liable under the Companies Act, 2013.

(May'20 RTP, May'20 Mock Test)



Solution:

Under section 35 (1) of the Companies Act 2013, where a person has subscribed for securities of a company acting on any statement included in the prospectus which is misleading and has sustained any loss or damage as a consequence thereof, the company and every person including an expert shall, be liable to pay compensation to the person who has sustained such loss or damage.

In the present case, Mr. Andrew purchased the shares of Green Ltd. on the basis of the expert report published in the prospectus. Mr. Andrew can claim compensation for any loss or damage that he might have sustained from the purchase of shares. However, he did not suffer any loss due to purchase of such shares.

Hence, Mr. Andrew will have no remedy against the company.

Circumstances when an expert is not liable: An expert will not be liable for any mis- statements in the prospectus under the following situations:

- (i) Under section 26 (5), that having given his consent, but withdrew it in writing before delivery of the copy of prospectus for filing, or
- (ii) Under section 35 (2), that the prospectus was issued without his knowledge / consent and that on becoming aware of it, he forthwith gave a reasonable public notice that it was issued without his knowledge or consent;
- (iii) An expert will not be liable in respect of any statement not made by him in the capacity of an expert and included in the prospectus as such;



Question 12.

TDL Ltd., a public company is planning to bring a public issue of equity shares in June, 2018. The company has appointed underwriters for getting its shares subscribed. As a Chartered Accountant of the company, appraise the Board of TDL Ltd. about the provisions of payment of underwriter's commission as per Companies Act, 2013.

(May'18-6 Marks)



Solution:

The provisions of the Companies Act, 2013 regarding the payment of underwriter's commission are as follows:

Payment of commission: A company may pay commission to any person in connection with the subscription to its securities, whether absolute or conditional, subject to such conditions as given in Rule 13 of the Companies (Prospectus and Allotment of Securities) Rules, 2014.

Conditions for the payment of commission:

1. the payment of such commission shall be authorized in the company's articles of association;
2. the commission may be paid out of proceeds of the issue or the profit of the company or both;
3. Rate of commission: The rate of commission paid or agreed to be paid shall not exceed, in case of shares, five percent of the price at which the shares are issued or a rate authorised by the articles, whichever is less, and in case of debentures, shall not exceed two and a half per cent of the price at which the debentures are issued, or as specified in the company's articles, whichever is less.
4. Disclosure of particulars: the prospectus of the company shall disclose the following particulars -



- a. the name of the underwriters;
 - b. the rate and amount of the commission payable to the underwriter; and
 - c. the number of securities which is to be underwritten or subscribed by the underwriter absolutely or conditionally.
5. No commission to be paid: There shall not be paid commission to any underwriter on securities which are not offered to the public for subscription;
6. Copy of contract of payment of commission to be delivered to registrar: A copy of the contract for the payment of commission is delivered to the Registrar at the time of delivery of the prospectus for registration.



Question 13.

Discuss the provisions relating to private placement of shares under the Companies Act, 2013
(Nov'18-5 Marks)



Solution:

“Private placement” means any offer of securities or invitation to subscribe securities to a select group of persons by a company (other than by way of public offer) through issue of a private placement offer letter and which satisfies below conditions. Any offer or invitation not in compliance with the provisions of this section shall be treated as a public offer and all provisions of this Act, and the Securities Contracts (Regulation) Act, 1956 and the Securities and Exchange Board of India Act, 1992 shall be required to be complied with. If a company makes an offer or accepts monies in contravention of this section, the company, its promoters and directors shall be liable for a penalty which may extend to the amount involved in the offer or invitation or two crore rupees, whichever is higher, and the company shall also refund all monies to subscribers within a period of thirty days of the order imposing the penalty.

Requirements of offer or invitation for subscription of securities on private placement: [Section 42]



Question 14:

A Ltd. issued 1,00,000 equity shares of ₹ 100 each at par to the public by issuing a prospectus. The prospectus discloses the minimum subscription amount of ₹ 15,00,000 required to be received on application of shares and share application money shall be payable at ₹ 20 per share. The prospectus further reveals that A Ltd. has applied for listing of shares in 3 recognized stock exchanges of which 1 application has been rejected. The issue was fully subscribed and A Ltd. received an amount of ₹ 20,00,000 on share application. A Ltd., then proceeded for allotment of shares.

Examine the three disclosures in the above case study which are the deciding factors in an allotment of shares and the consequences for violation, if any under the provisions of the Companies Act, 2013.

(6 Marks)



Solution:

As per the requirement of the question, disclosures which are the deciding factors in an allotment of shares are laid down in section 39 of the Companies Act, 2013.

According to Section 39(1), no allotment of any securities of a company offered to the public for subscription shall be made unless- the amount stated in the prospectus as the minimum amount has been subscribed, and the sums payable on application for the amount so stated have been paid to, and received by the company by cheque or other instrument. The amount payable on application



on every security shall not be less than five per cent of the nominal amount of the security or such other percentage or amount, as may be specified by the Securities and Exchange Board by making regulations in this behalf.

In the question, A Ltd. issued shares to public by issuing of prospectus, disclosing minimum subscription, sum payable on application for the amount; and the amount received on share application is more than 5% of the nominal amount of the security.

Further, it revealed that A Ltd. has applied for listing of shares in 3 recognized stock exchanges of which one application was rejected. In the given instance, there is compliance to section 23, as nothing is talked about matters required to be included in the prospectus under section 26 (1) and about filing with the registrar; assuming that the said requirements have been complied with, requirement of section 39 as regards obtaining of minimum subscription and the minimum amount receivable on application (not less than 5% of the nominal value of the securities offered) are fulfilled. The provisions of section 40 of the Companies Act, 2013 states that every company making public offer shall, before making such offer, make an application to one or more recognized stock exchange or exchanges and obtain permission for the securities to be dealt with in such stock exchange or exchanges.

The above provision is very clear that not only the company has to apply for listing of the securities at a recognized stock exchange, but also obtain permission thereof from all the stock exchanges where it has applied, before making the public offer. Since one of the three recognized stock exchanges, where the company has applied for enlisting, has rejected the application and the company has proceeded with making the offer of shares, it has violated the provisions of section 40. Therefore, this shall be deemed to be irregular allotment of shares. Consequently, A Ltd. shall be required to refund the application money to the applicants in the prescribed manner within the stipulated time frame.



Question 15:

ABC Limited proposes to issue series of debentures frequently within a period of one year to raise the funds without undergoing the complicated exercise of issuing the prospectus every time of issuing a new series of debentures. Examine the feasibility of the proposal of ABC Limited having taken into account the concept of deemed prospectus dealt with under the provisions of the Companies Act, 2013.

(3 Marks)



Solution:

Information Memorandum together with Shelf Prospectus is deemed Prospectus. The expression “shelf prospectus” means a prospectus in respect of which the securities or class of securities included therein are issued for subscription in one or more issues over a certain period without the issue of a further prospectus. [Explanation to Section 31]

Any class or classes of companies, as the Securities and Exchange Board may provide by regulations in this behalf, may file a shelf prospectus with the Registrar at the stage-

- (i) of the first offer of securities included therein which shall indicate a period not exceeding one year as the period of validity of such prospectus which shall commence from the date of opening of the first offer of securities under that prospectus, and in respect of a second or subsequent offer of such securities issued during the period of validity of that prospectus,

No further prospectus is required for issue of securities. [Sub-section (1)]

Hence, the proposal of ABC Limited to take into account the concept of deemed prospectus is correct.



CHAPTER WISE - CLASS TEST



Question 1.

Explain various instances which make the allotment of securities as irregular allotment under the Companies Act, 2013. (May'19- 4 Marks)



Solution:

Irregular allotment: The Companies Act, 2013 does not specifically provide for the term “Irregular Allotment” of securities. Hence, we have to examine the requirements of a proper issue of securities and consider the consequences of non- fulfillment of those requirements. In broad terms an allotment of shares is deemed to be irregular when it has been made by a company in violation of Sections 23, 26, 39 or 40. Irregular allotment therefore arises in the following instances:

1. Where a company does not issue a prospectus in a public issue as required by section 23; or
2. Where the prospectus issued by the company does not include any of the matters required to be included therein under section 26 (1), or the information given is misleading, faulty and incorrect; or
3. Where the prospectus has not been filed with the Registrar for registration under section 26 (4); or
4. The minimum subscription as specified in the prospectus has not been received in terms of section 39; or
5. The minimum amount receivable on application is less than 5% of the nominal value of the securities offered or lower than the amount prescribed by SEBI in this behalf; or
6. In case of a public issue, approval for listing has not been obtained from one or more of the recognized stock exchanges under section 40 of the Companies Act, 2013.



Question 2.

The Board of Directors of Chandra Ltd. proposes to issue the prospectus inviting offers from the public for subscribing the shares of the Company. State the reports which shall be included in the prospectus for the purposes of providing financial information under the provisions of the Companies Act, 2013.

(Nov'19- 4 Marks)



Solution:

As per section 26(1) of the Companies Act, 2013, every prospectus issued by or on behalf of a public company either with reference to its formation or subsequently, or by or on behalf of any person who is or has been engaged or interested in the formation of a public company, shall be dated and signed and shall state such information and set out such reports on financial information as may be specified by the Securities and Exchange Board in consultation with the Central Government:

Provided that until the Securities and Exchange Board specifies the information and reports on financial information under this sub-section, the regulations made by the Securities and Exchange Board under the Securities and Exchange Board of India Act, 1992, in respect of such financial information or reports on financial information shall apply.

Prospectus issued make a declaration about the compliance of the provisions of this Act and



a statement to the effect that nothing in the prospectus is contrary to the provisions of this Act, the Securities Contracts (Regulation) Act, 1956 and the Securities and Exchange Board of India Act, 1992 and the rules and regulations made there under.

Accordingly, the Board of Directors of Chandra Ltd. who proposes to issue the prospectus shall provide such reports on financial information as may be specified by the Securities and Exchange Board in consultation with the Central Government in compliance with the above stated provision and make a declaration about the compliance of the above stated provisions.

MCQs



Question 1:

Trident Limited is in process of making private placement of securities. It received application money on 2nd March 2023. It shall allot its securities by _____, if failed then repay application money to the subscribers by, else liable to repay that money with interest at the rate of __.

- (a) 1st April, 16th April, and 12% respectively
- (b) 1st May, 16th May, and 12% respectively
- (c) 1st April, 16th April, and 6% respectively
- (d) 16th April, 1st May, and 12% respectively



Solution:

- (b) 1st May, 16th May, and 12% respectively



Question 2.

Modern Furniture Limited, issued a document containing offer of securities for sale that is considered as deemed prospectus under section 25, which requires such document must contains certain matters/disclosures in addition to those required under section 26. Which of following are correct requirements;

- i. A statement of the net amount received or to be received as consideration for the securities to which the offer relates
 - ii. The persons making the offer were named in the prospectus as promoters of the company.
 - iii. The time and place at which the underlying contract for allotment may be inspected.
- (a) i or ii only
 - (b) i or iii only
 - (c) ii or iii only
 - (d) All of i, ii and iii



Solution:

- (b) i or iii only



Question 3.

Section 40 of the Companies Act, 2013 requires every company shall make an application to one or more recognised stock exchange or exchanges before making public offer. Madhav Casting Limited filed an application to three exchanges for the securities to be dealt with in such stock exchanges, it received permission from couple of them and proceed with public issue. There will be:



- (a) No penalty, as application has been filed
- (b) Penalty on Madhav Casting Limited ranging from ₹ 5 lakh to ₹ 50 lakh
- (c) Penalty on Madhav Casting Limited ranging from ₹ 5 lakh to ₹ 50 lakh and every officer of the company who is in default ranging from ₹ 50 thousand to ₹ 3 lakh
- (d) Penalty on Madhav Casting Limited ranging from ₹ 5 lakh to ₹ 50 lakh and every officer of the company who is in default ranging from ₹ 50 thousand to ₹ 3 lakh and/or Imprisonment upto one year.



Solution:

- (c) Penalty on Madhav Casting Limited ranging from ₹ 5 lakh to ₹ 50 lakh and every officer of the company who is in default ranging from ₹ 50 thousand to ₹ 3 lakh.



Question 4.

Rig exploration and refinery limited (RERL) decided to raise capital through issue of a shelf prospectus. Company secretary explains the requirement to board that RERL shall be required to file an information memorandum with the Registrar within, prior to the issue of a second or subsequent offer of securities under the shelf prospectus.

- (a) 15 days
- (b) 21 days
- (c) 30 days
- (d) 1 month



Solution:

- (d) 1 month



Question 5.

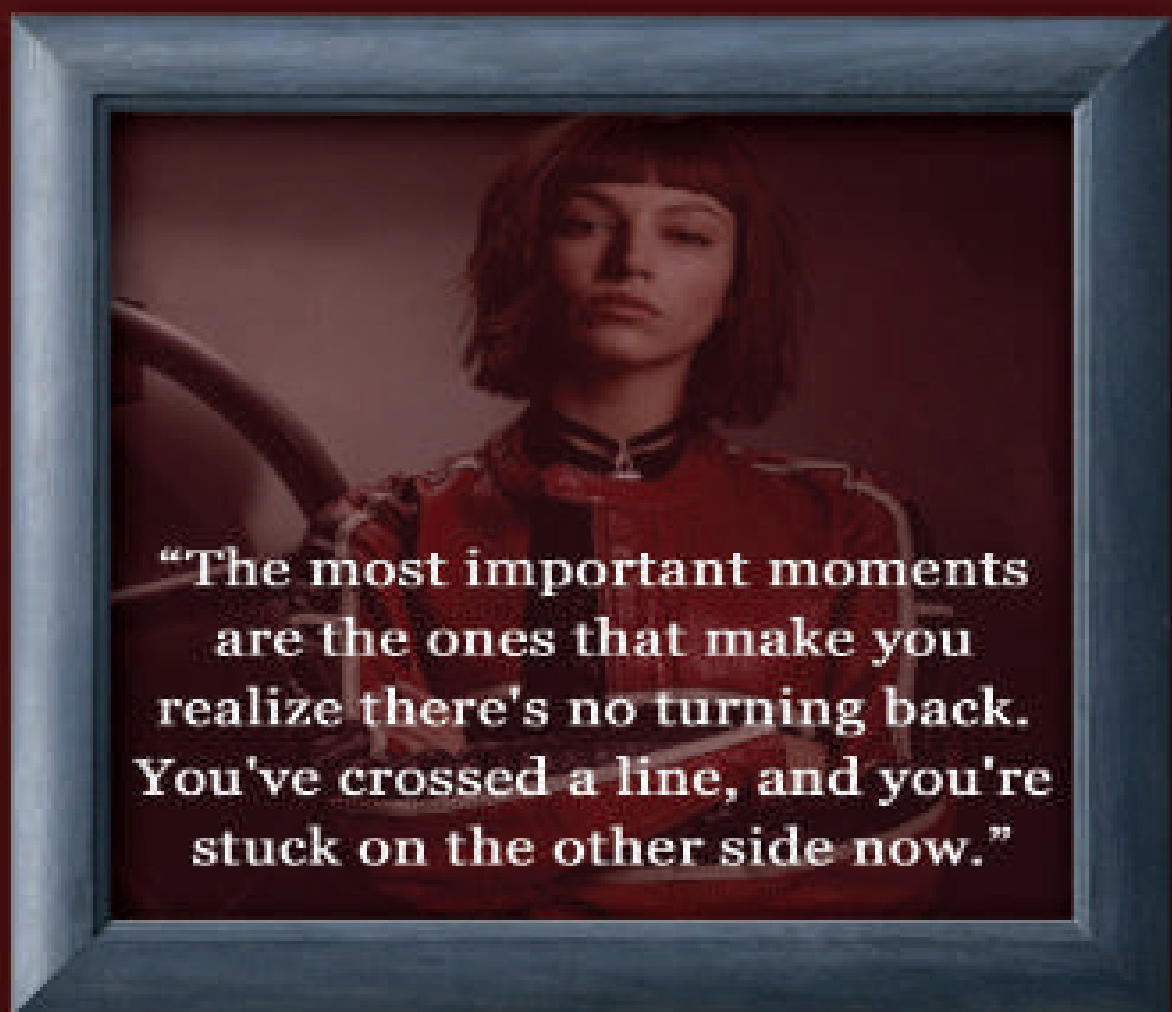
Modern Furniture decided to raise capital by issue for which prospectus need to be issued. The copy of prospectus submitted with registrar for filling need to be duly signed by:

- (a) Any two directors including managing directors
- (b) Majority of directors
- (c) Majority of directors including proposed directors
- (d) Every director or proposed director



Solution:

- (d) Every director or proposed director



“The most important moments
are the ones that make you
realize there's no turning back.
You've crossed a line, and you're
stuck on the other side now.”



04

SHARE CAPITAL AND DEBENTURES



Share capital

1. **Authorised Capital-Section 2(8):** “authorised capital” or “nominal capital” means such capital as is authorised by the memorandum of a company to be the maximum amount of share capital of the company;
2. **Subscribed capital-section 2(86):** “subscribed capital” means such part of the capital which is for the time being subscribed by the members of a company;
3. **Called-up capital Section 2(15):** “called-up capital” means such part of the capital, which has been called for payment;
4. **Paid-up share capital Section 2(64):** “paid-up share capital” or “share capital paid-up” means such aggregate amount of money credited as paid-up as is equivalent to the amount received as paid-up in respect of shares issued and also includes any amount credited as paid-up in respect of shares of the company, but does not include any other amount received in respect of such shares, by whatever name called;
5. **Shares 2(84):** “share” means a share in the share capital of a company and includes stock;

DEMAT shares

Compulsory for every:

1. Listed public company
2. Every unlisted Public company

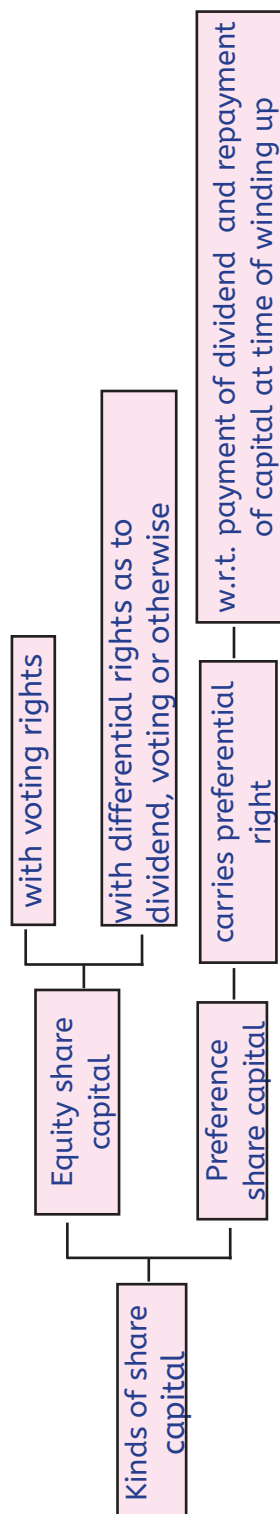
- Proof of Ownership is record of depository.
 - Shares does not have a unique number.
 - Depository is like bank.
 - NSDL & CDSL are 2 depositories in India.
 - Depository participant is an agent of depository
- Example Zerodha/ Sharekhan etc.

Physical shares

Applicable for every other company (they “may” issue demat shares)

- Share certificate is the ownership
- Every share certificate has a unique number
- **numbering of shares-section 45**
- **Share certificate-section 46**

Following diagram depicts kinds of share capital:



According to Section 43, the share capital of a company limited by shares shall be of two kinds, namely: —

- (a) **equity share capital—**
 - (i) with voting rights; or
 - (ii) with differential rights as to dividend, voting or otherwise in accordance with such rules as may be prescribed; and
- (b) **preference share capital**

Explanation—For the purposes Section 43

- (i) **"equity share capital"**, with reference to any company limited by shares, means all share capital which is not preference share capital;
- (ii) **"preference share capital"**, with reference to any company limited by shares, means that part of the issued share capital of the company which carries or would carry a preferential right with respect to—
 - (a) payment of dividend, either as a fixed amount or an amount calculated at a fixed rate, which may either be free of or subject to income-tax; and
 - (b) repayment, in the case of a winding up or repayment of capital, of the amount of the share capital paid-up or deemed to have been paid-up, whether or not, there is a preferential right to the payment of any fixed premium or premium on any fixed scale, specified in the memorandum or articles of the company;



numbering of shares-section 45 - Share certificate-section 46 : (ONLY FOR PHYSICAL SHARES)

Purpose:

1. It is 'prima facie' evidence of title of shares.

2. Share certificate shall be issued if:
a. Approved by BOD resolution AND
b. Surrender to company letter of allotment by member (LOA)

3. If LOA is lost /destroyed BOD to impose condition of evidence and indemnity AND payment of out of pocket expense by shareholder to company.

4. Where a share is held in depository form, the record of the **depository** is the prima facie evidence of the interest of the **beneficial owner**.

5. Notwithstanding anything contained in the **articles** of a company, the manner of issue of a certificate of shares or the duplicate thereof, the form of such certificate, the particulars to be entered in the register of members and other matters shall be such as may be prescribed.

Signing and sealing of share certificate

1. Every share certificate shall issued under common seal of company (if any)

2. It shall be signed by: 2 directors authorised by BOD and company secretary (if company has appointed)

3. Directors may sign by machines but it is not allowed for CS .

4. In case of OPC, it shall be signed by 1 director or person authorized by BOD

Duplicate share certificate

(1) Company may issue duplicate share certificate for:
• Consolidation /sub division
• lost/defaced
• Pages for recording transfer are fully utilised

(2) Conditions

1. BOD resolution
2. Original certificate if available is cancelled OR surrender to company.
3. Pay rupees 2 to 50 per certificate.
4. Evidence and indemnity by member to company.
5. Chai-pani expense incurred by company to be paid by members.
6. Word "Duplicates issued in lieu of share certificate number" printed on duplicates share certificate.

Form of share certificate

- Share certificate shall be in form no. SH-1
- Every certificate shall state:
 1. Name of company.
 2. Date of issue.
 3. Name of person in whose favour certificate is issued.
 4. Number of shares.
 5. Amount paid up.

Duplicate share certificate with Fraudulent motive:

Penalty on company - ≥ 5 times F.V of shares OR ≤ 10 times F.V of shares OR 10,00,00,000 whichever is more

Every officer of company - liable u/s 447 for proven fraud.



Physical shares and share certificates

Section 49 to 51- Meaning of calls on shares (only for physical shares)

1. **Call** is a demand by the company from investors upon which shareholders pay whole or part of balance still due on each class of shares allotted OR held by them.
2. Call may also be made by a liquidator in the event of winding up of a company .
3. Amount payable on application on each share shall be $\geq 5\%$ of F.V.

Essential of valid calls:

1. Power off BOD by passing a BOD resolution + MGT -14
2. BOD must follow provisions of AOA otherwise call is invalid.
3. Directors making call are duly appointed and qualified.
4. BOD meeting for approval of call shall have valid quorum.
5. State amount, time and place of payment in BOD resolution
6. Give notice to shareholders and intimate amount, time and place.
7. Call to be made for benefit of company and NOT private ends of the director.
8. Calls on same class of shares must be made on "Uniform" basis all members pay same. Section 49

Manner of making call

1. Calls to be made as per AOA
2. At least 14 day notice to members for each call.
3. Minimum one month between 2 calls.
4. Maximum call $\leq 25\%$ of F.V. , but AOA may provide more limit.
5. BOD may revoke or postpone the call.
6. Joint shareholders shall be jointly and severally liable
7. Members may make a call in advance and may get interest as per AOA
8. Defaulting member shall not have proportionate voting rights to the extent of arrears

Payment in advance of calls

1. 50. Company to accept unpaid share capital, although not called up BOD may if allowed by AOA allow members to pay calls in advance (Section 50)
2. Company may pay interest on such advance calls as per AOA
3. Interest may be out of capital if profits NOT available
4. Such advance is NOT refundable except in winding up where it is paid after creditors but before other shareholders
5. No voting rights for advance calls paid. Voting rights ONLY after advance gets adjusted against future calls.
6. Payment of Dividend in proportion to amount paid-up A company may, if so authorised by its articles, pay dividends in proportion to the amount paid-up on each share.

If shares are partly paid up:

- Proportionate voting rights AND
- Proportionate dividend (Section 51)



Types of shares

Preference shares

(SECTION 55 READ WITH 64)

It has 2 preferential rights:

1. Payment of dividend AND
 2. Repayment of capital on winding up
- Issue of preference shares (section 55)
1. Only redeemable preference shares.
 2. Issue only allowed as per AOA
 3. S.R. of member + MGT - 14
 4. No subsisting default in redemption of preference shares or payment of dividend
 5. Maximum tenure ≤ 20 years ordinary Co.

6. ≤ 30 years for infrastructure company however at option of preference shareholders redemption of 10% of such preferences from 21st year

Redemption of preference shares (section 55)

1. Shares to be fully paid up
2. Redemption out of:
 - Capital/revaluation reserve - ✗
 - Profit/Fresh issue/GR - ✓
3. Notified company can only use security premium for redemption (u/s 133)
4. Create CRR if reserve used
5. Company may redeem preference shares by issuing fresh preference shares if approved by 75% of preference shares with NCLT Approval
6. Dissenting preferential holders to be paid cash
7. File SH - 7 within 30 days (section 64)

Equity Share

Equity Shares with Differential Rights

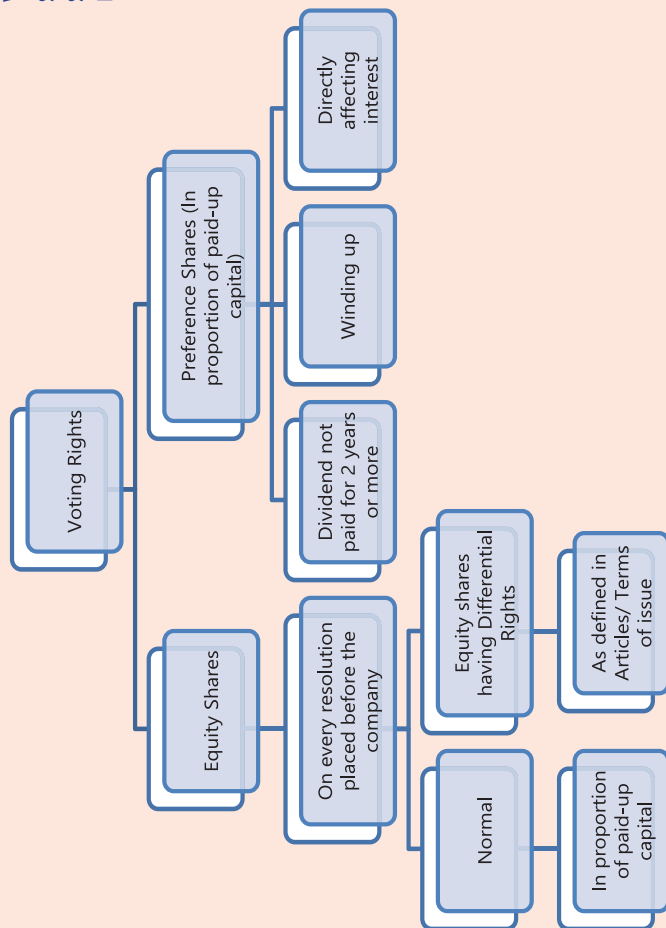
Conditions for the issue of equity shares with differential rights: According to Rule 4 (1), a company limited by shares may issue equity shares with differential rights as to dividend, voting or otherwise, if it complies with the following conditions, namely:

- (a) the articles of association of the company authorizes the issue of shares with differential rights;
 - (b) the issue of shares is authorized by an ordinary resolution passed at a general meeting of the shareholders. Where the equity shares of a company are listed on a recognized stock exchange, the issue of such shares shall be approved by the shareholders through postal ballot;
 - (c) the voting power in respect of shares with differential rights of the company shall not exceed seventy-four per cent of total voting power including voting power in respect of equity shares with differential rights issued at any point of time;
 - (d) Omitted;
 - (e) the company has not defaulted in filing financial statements and annual returns for three financial years immediately preceding the financial year in which it is decided to issue such shares;
 - (f) the company has no subsisting default in the payment of a declared dividend to its shareholders or repayment of its matured deposits or redemption of its preference shares or debentures that have become due for redemption or payment of interest on such deposits or debentures or payment of dividend;
 - (g) the company has not defaulted in payment of the dividend on preference shares or repayment of any term loan from a public financial institution or State level financial institution or scheduled Bank that has become repayable or interest payable thereon or dues with respect to statutory payments relating to its employees to any authority or default in crediting the amount in Investor Education and Protection Fund to the Central Government;
- Provided that a company may issue equity shares with differential rights upon expiry of five years from the end of the financial Year in which such default was made good.
- (h) the company has not been penalized by Court or Tribunal during the last three years of any offence under the RBI Act, 1934, the SEBI Act, 1992.

Tata Motors to Cancel DVR shares and Delist them instead Members to get 7 Ordinary shares for 10 DVR shares.[July 2023]



Voting Rights [Section 47]



Note:

Voting right of preference share holder, on a poll shall be in proportion to his share in the paid-up preference share capital of the company. **Second Proviso** to section 47 (2) empowers preference shareholder with right to vote on all the resolutions placed before the company, in case where the dividend in respect of his class of preference shares has not been paid for a period of two years or more.

First Proviso to section 47 (2), provides that in case of resolutions wherein both equity shareholders and preference shareholders are entitled to vote, the proportion of the voting rights of equity shareholders to the voting rights of the preference shareholders shall be in the same proportion as the paid-up capital in respect of the equity shares bears to the paid-up capital in respect of the preference shares.

Variations of shareholders' rights [Section 48]

Where share capital of a company is divided into different classes of shares, it may sometimes be necessary for it to amend the rights attached to one or more classes of shares. The Companies Act states the following laws on the variations of shareholders' right:

(1) **Variation in rights of shareholders with consent:** Where a share capital of the company is divided into different classes of shares, the rights attached to the shares of any class may be varied with the consent in **writing** of the holders of not less than three-fourths of the issued shares of that class or by means of a **special** resolution passed at a separate meeting of the holders of the issued shares of that class, –

- if provision with respect to such variation is contained in the **memorandum** or **articles** of the company; or
- in the absence of any such provision in the memorandum or **articles**, if such variation is not prohibited by the **terms of issue** of the shares of that class:

Provided that if variation by one class of shareholders affects the rights of any **other class** of shareholders, the consent of three-fourths of such other class of shareholders shall also be obtained and the provisions of this section shall apply to such variation.

(2) **No consent for variation:** Where the holders of not less than **ten per cent** of the issued shares of a class did not consent to such variation or vote in favour of the special resolution for the variation, they may apply to the **Tribunal** to have the variation cancelled, and where any such application is made, the variation shall not have effect unless and until it is confirmed by the Tribunal:

Provided that an application under this section shall be made within **twenty-one** days after the date on which the consent was given or the resolution was passed, as the case may be, and may be made on behalf of the shareholders entitled to make the application by such one or more of their number as they may appoint in writing for the purpose. [Sub - section (2)]

(3) **Binding decision of tribunal:** The decision of the Tribunal on any application under sub-section (2) shall be **binding** on the shareholders.

(4) **Filing copy of order with the Registrar:** The Company shall, within **thirty days** of the date of the order of the Tribunal, file a copy thereof with the Registrar.



Transfer/Transmission & Refusal to register securities

- (1) A company shall not register a transfer of securities of the company, or the interest of a member in the company in the case of a company having no share capital, other than the transfer between persons both of whose names are entered as holders of beneficial interest in the records of a depository, unless a proper instrument of transfer, in such form as may be prescribed, duly stamped, dated and executed by or on behalf of the transferor and the transferee and specifying the name, address and occupation, if any, of the transferee has been delivered to the company by the transferor or the transferee within a period of sixty days from the date of execution, along with the certificate relating to the securities, or if no such certificate is in existence, along with the letter of allotment of securities: Provided that where the instrument of transfer has been lost or the instrument of transfer has not been delivered within the prescribed period, the company may register the transfer on such terms as to indemnity as the Board may think fit.
#Exemption to Government companies
- (2) Nothing in sub-section (1) shall prejudice the power of the company to register, on receipt of an intimation of transmission of any right to securities by operation of law from any person to whom such right has been transmitted.
- (3) Where an application is made by the transferor alone and relates to partly paid shares, the transfer shall not be registered, unless the company gives the notice of the application, in such manner as may be prescribed, to the transferee and the transferee gives no objection to the transfer within two weeks from the receipt of notice.

Company delivering the certificate: Every company shall, unless prohibited by any provision of law or any order of Court, Tribunal or other authority, deliver the certificates of all securities allotted, transferred or transmitted—

Different conditions	Period of the delivering the certificates
In the case of subscribers to the memorandum;	Within 2 months from the date of incorporation
In the case of any allotment of any of its shares	Within a period of two months from the date of allotment
In the case of a transfer or transmission of securities	Within a period of one month from the date of receipt by the company of the instrument of transfer or the intimation of transmission
In the case of any allotment of debenture	Within a period of six months from the date of allotment

Transfer of security of the deceased: The transfer of any security or other interest of a deceased person in a company made by his legal representative shall, even if the legal representative is not a holder thereof, be valid as if he had been the holder at the time of the execution of the instrument of transfer.

Default in compliance of the provisions [Section 56]

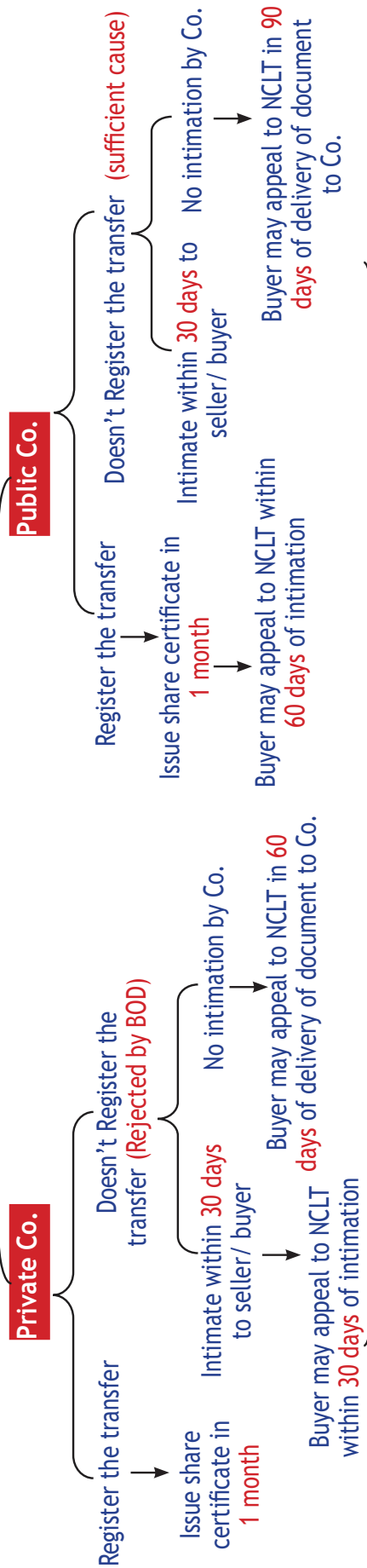
Where any default is made in complying with the provisions of sub-sections (1) to (5), the company and every officer of the company who is in default shall be liable to a penalty of fifty thousand rupees.".

Companies Amendment Act, 2020

Liability of depository: Where any depository or depository participant, with an intention to defraud a person, has transferred shares, it shall be liable under section 447 of the Companies Act, 2013 with the liability mentioned under the Depositories Act, 1996.



4. Registration/ Refusal to Register by Co. (Section 58)



NCLT may dismiss OR Accept the appeal AND pass order in 3 months. If appeal accepted then NCLT to order Co. to register the transfer within 10 days & pay damages.

(6) If a person contravenes the order of the Tribunal under this section, he shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to three years and with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees.

Rectification of register of members after transfer: Section 59

1. If name of any person is entered in register of members Without Sufficient Cause OR
 - After having been entered in register is omitted OR
 - Default is made OR Delay takes place in entering name.
2. The person aggrieved OR Any member of Co. OR the Co.
3. May appeal to NCLT OR Competent court outside India in respect of foreign members for rectification.
4. The NCLT may either dismiss appeal OR direct transfer OR transmission shall be registered by Co. within 10 days of NCLT order.

Transmission (By operation of Law)

Procedure for transmission shall be the same:

1. On death OR lunacy of original member : shares vest in his legal representative & he can sell shares without being registered.
2. On Insolvency of original member: shares vest in official assignee OR receiver. He may disclaim (disown) partly/ fully paid sh. Which are under mortgage/ encumbrance.
3. Documents in transmission:
 - a. No instrument of transfer but intimation of transmission required.
 - b. Along with letter of indemnity AND Probate (Attested copy of will) AND NOC in case of > 1 claimants.



Buy - Back of shares & CRR Section 68 & 69

1. **Purpose of Buy-back**
 - a. Improve EPS & Market price.
 - b. Safeguard hostile takeover.
 - c. Exit route to shareholders incase of penny stock.
 - d. Return surplus cash to shareholders.
 2. **Sources of money to Buy-back**
 - a. Free reserves.
 - b. Security premium OR
 - c. Proceeds of earlier Issue Not of same class.
 3. **How much money can be used for buy-back:**
 - a. By BOD Resolution - upto 10% [Paid -up equity capital + FR + SP]
 - b. By BOD Resolution + S.R. of members - upto 25% [Paid up eq + Paid up Pref. + FR + SP]
 4. **How much shares can be bought -back at Once?**
 $\leq 25\%$ of paid-up eq capital
 5. **After buy-back - Debt: Equity $\leq 2:1$**
 6. **Buy Back authorized by AOA & only fully paid shares**
 7. **Time Gap Between 2 Buy-Back** - 1 year from completion Of Earlier BuyBack
Time for fresh Issue - 6m from completion Of Earlier BuyBack
 8. **Time limit for completion of buy-back:** Every buy-back shall be completed within 12 months from the date of passing the special resolution or a resolution passed by the Board at general meeting authorising the buy-back. [Sections 68(4)].
 9. **Buy-Back from Whom?:** The buy-back under Sub-section (1) may be—
 - (a) from the existing share holders or security holders on a **proportionate** basis; or
 - (b) from the open market; **L&T Buyback from Open Market [July 2023]** or
 - (c) by purchasing the securities issued to employees of the company pursuant to a scheme of stock option or sweat equity. [Sections 68(5)]**Swiggy to buyback only from Employees [July 2023]**
 10. **Extinguishment of Securities:** Where a company buys-back its own securities or other specified securities, it shall extinguish and physically **destroy** the shares or securities so bought-back within **seven days** of the last date of completion of buy-back. [Sections 68(7)]
11. **Cooling Period :** Where a company completes a buy-back of its shares or other specified securities under this section, it shall not make further issue of same kind of shares (including allotment of further shares under clause (a) of Sub-section (1) of Section 62 or other specified securities within a period of **six months except** by way of bonus issue or in the discharge of subsisting obligations such as conversion of warrants, stock option schemes, sweat equity or conversion of preference shares or debentures into equity shares. [Sections 68(8)]
 12. **Declaration of Solvency:** Where a company has passed a special resolution or the Board has passed a resolution to buy-back its own shares or other securities under this section, it shall, before making such buy-back, file with the Registrar and the Securities and Exchange Board of India a declaration of solvency in the form as may be prescribed
SH-9 - Declaration of solvency with ROC & SEBI
 13. **Register of Buy Back:** Where a company buys-back its shares or other specified securities under this section, it shall maintain a **register** of the shares or securities so bought, the consideration paid for the shares or securities bought- back, the date of cancellation of shares or securities, the date of extinguishing and physically destroying the shares or securities and such other particulars as may be prescribed. [Sections 68(9)]
SH-10 - Register of buyback maintained by Co.
 14. **Filing of Buy-back Return:** A company shall, after completion of the buy-back under this section, file with the Registrar and the Securities and Exchange Board of India, a return containing such particulars relating to the buy-back within thirty days of such completion, as may be prescribed:
SH-11 - Details of buyback file with ROC & SEBI
 15. In case of default -
 Company penalty - $\geq 1L \leq 3L$ AND
 Every officer penalty - $\geq 1L \leq 3L$
 16. **As per Section 69:** Buyback out of reserves then Co. to transfer sum equal to F.V. of Buyback to CRR.



Prohibition for buy-back in certain circumstances [Section 70]

This section of the Companies Act, 2013 prohibits the company for buy back in the certain circumstances.

- (1) The provision says that no company shall directly or indirectly purchase its own shares or other specified securities-
 - (a) through any **subsidiary** company including its own subsidiary companies; or
 - (b) through any **investment** company or group of investment companies; or
 - (c) if a default, is made by the company, in repayment of **deposits** or interest payment thereon, **redemption** of debentures or preference shares or payment of **dividend** to any shareholder or repayment of any **term loan** or interest payable thereon to any financial institutions or banking company;

But where the default is **remedied** and a period of three years has lapsed after such default ceased to subsist, there such buy-back is not prohibited.

- (2) No company shall directly or indirectly purchase its own shares or other specified securities in case such company has not complied with provisions of Sections 92 (Annual Report), 123 (Declaration of dividend), 127 (Punishment for failure to distribute dividends), and section 129 (Financial Statements).

Section 67: Co. Limited by share/guarantee shall not buy its own shares OR Give Financial Assistance to anyone:

- (1) No company limited by shares or by guarantee and having a share capital shall have power to buy its own shares unless the consequent reduction of share capital is effected under the provisions of this Act.

#Exemption to Nidhi companies

- (2) No public company shall give, whether directly or indirectly and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of, or in connection with, a purchase or subscription made or to be made, by any person or for any shares in the company or in its holding company.

- (3) Nothing in sub-section (2) shall apply to-

Exception: A Public Co. MAY Give Financial Assistance in:

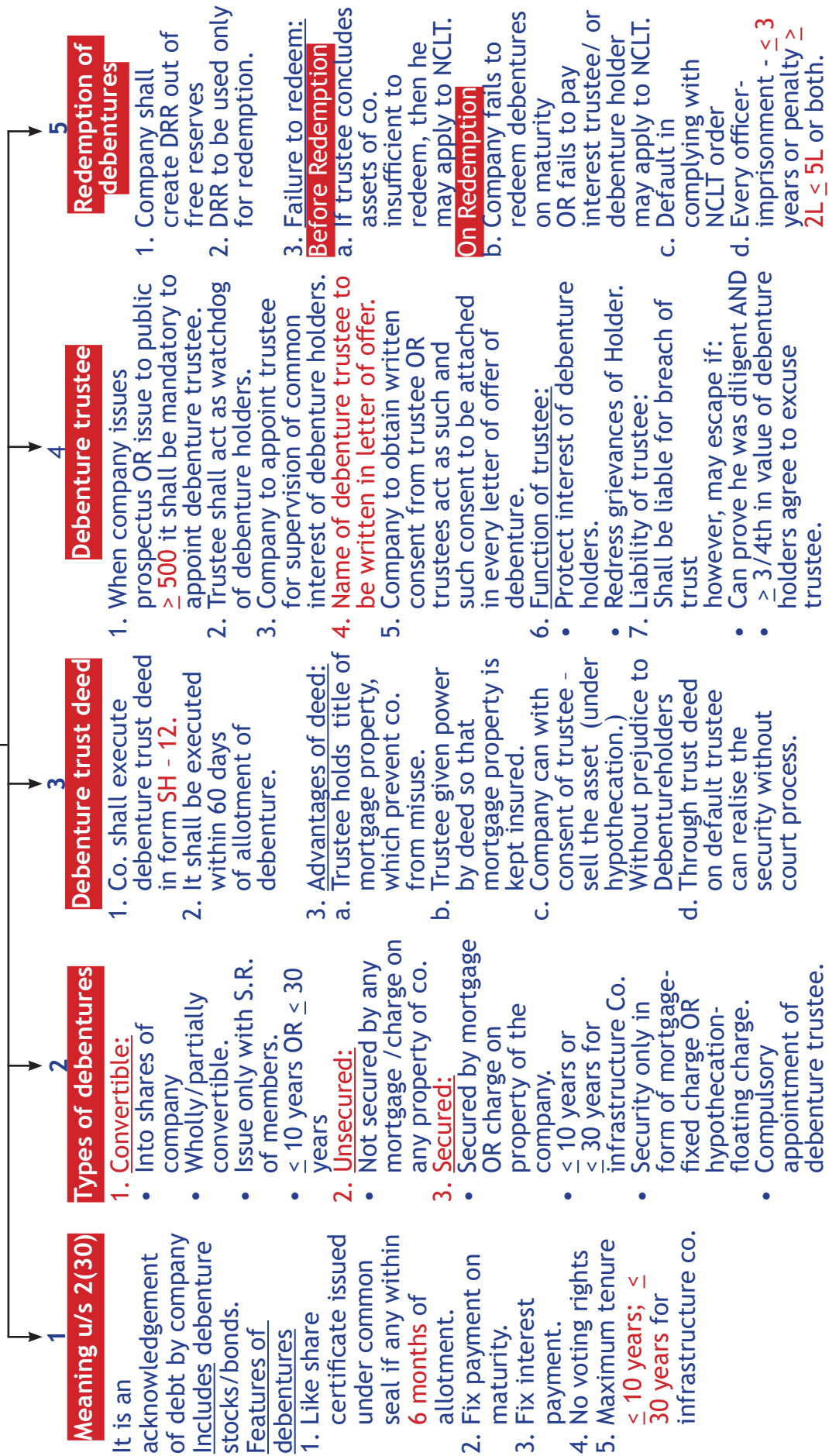
- a. Lending by Banking Co. in ordinary course of business.
- b. Lending by a co. as per ESOP by S.R. of member to a trust & trust to purchase sh. of the Co. for future benefit of employee (i.e. Trust will purchase sh. of the Co. & allot to employee as ESOP on behalf of Co.)
- c. Lending by Co. to employees (other than directors OR KMP) $\leq$ 6m Salary enabling them to purchase share of the Company from market (Indirect ESOP)
 - **Section N.A. to : 1. Pvt. Co. 2. IFSC Public Co. 3. Nidhi Co.**
 - **Penalty of Co:- $\geq$ 1L $\leq$ 25L AND**
 - **Every Officers: Imprisonment $\leq$ 3 years AND Penalty $\geq$ 1L $\leq$ 25L**

- (4) Nothing in this section shall affect the right of a company to redeem any preference shares issued by it under this Act or under any previous company law.



Debentures may be issued by $\longleftrightarrow$ Public Co. - By Public offer IPO/FPO or By Private placement
Private Co. - By Private placement

Debentures section 71

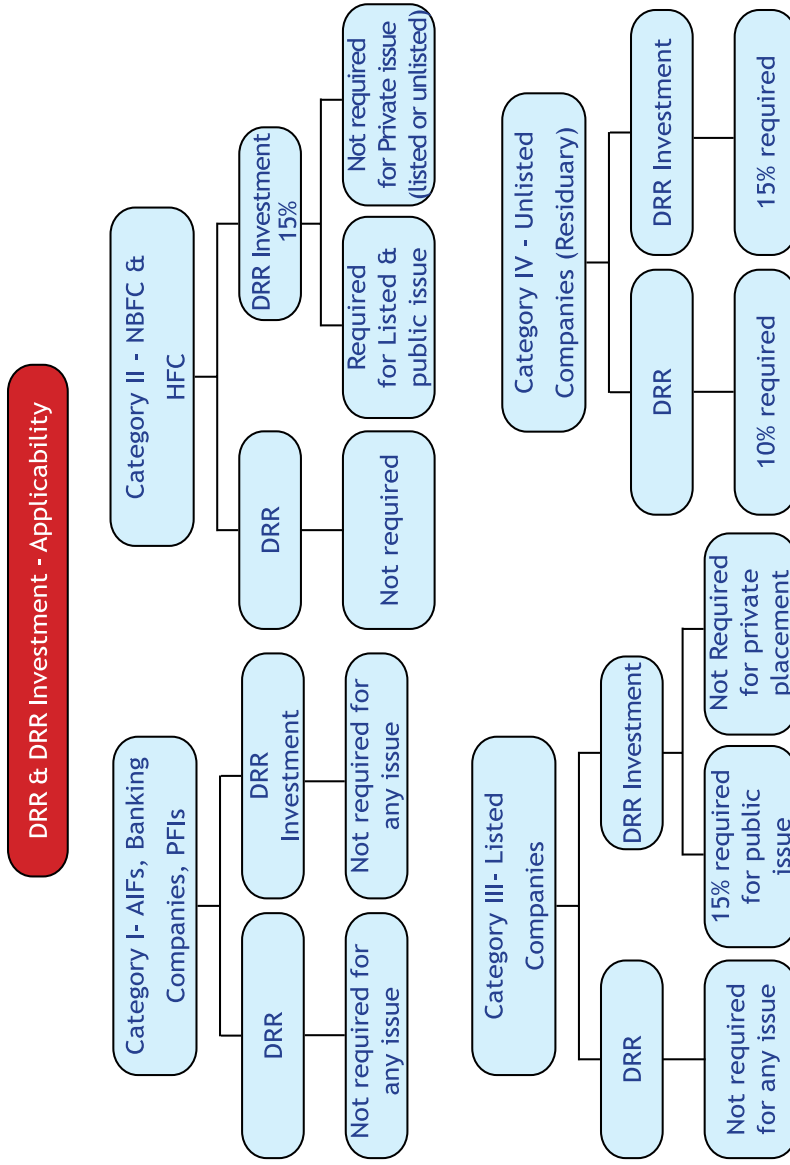


Compulsory Appointment of Debenture Trustee:

1. Secured Debentures
2. Public offer of Debentures
3. Issue of Debentures ≥ 500 persons

As per the Companies (Share Capital and Debentures) Rules, 2014, the company shall create a **Debenture Redemption Reserve** for the purpose of redemption of debentures, in accordance with the conditions given below-

- the Debenture Redemption Reserve shall be created out of the profits of the company available for payment of dividend;
- the company shall create Debenture Redemption Reserve (DRR) in accordance with following conditions:-



Also company shall (on or before the 30th day of April in each year) **deposit** minimum **fifteen percent** of the amount of its debentures maturing during the year in any one or more of the following methods, namely:-

- in deposits with any **scheduled bank**;
- in securities of the Central **Government** or of any State Government;
- in securities mentioned in section 20 of the Indian **Trusts Act, 1882**;

Above investments can not be charged for securing any loan etc. Also it should be used only for redemption of debentures.

Also it should not at any time fall below 15% of the amount of the debentures maturing during the year ending on the 31st day of March of that year;



CALLS AND INCIDENTAL MATTERS [SECTION 49 TO SECTION 51]

Calls are made by the company on security holders to pay the amount called up in respect of partly paid up securities.

As per **Section 49**, these calls have to **uniformly** made and there should be no differentiation for a given class of security holders.

Explanation.—For the purposes of this section, shares of the **same nominal value** on which different amounts have been paid-up shall **not** be deemed to fall under the same class (i.e. the provision is not applicable in case where different amounts are paid for a same class for security.)

Calls in Advance

As per **Section 50**, a company may, if so authorised by its **articles**, accept from any member, the whole or a part of the amount remaining unpaid on any shares held by him, even if no part of that amount has been called up (i.e. if authorised by the articles, a company can keep advance subscription or call money received in advance.)

However, in case of member of a company limited by shares there would be **no voting** right on that advance amount till the amount is duly called for and adjusted.

The company could pay proportionate dividends in proportion to amount paid on each share, if authorised by the articles [**Section 51**].

In other words, advance payment will never lead to increased voting rights but delayed payment of call money could be the reason of decreased voting rights.

Application of premiums received on issue of shares [Section 52]

Where a company issues shares at a premium, whether for cash or otherwise, a sum equal to the aggregate amount of the premium received on those shares shall be **transferred to a securities premium account** and the provisions of this Act relating to reduction of share capital (which are very stringent) of a company shall, except as provided in this section, apply as if the securities premium account were the paid-up share capital of the company.

Application of securities premium account: The securities premium account may be applied by the company—

- (a) towards the issue of unissued shares of the company to the members of the company as fully paid **bonus** shares;
- (b) in writing off the **preliminary** expenses of the company;
- (c) in writing off the **expenses** of, or the commission paid or discount allowed on, any issue of shares or debentures of the company;
- (d) in providing for the premium payable on the **redemption** of any redeemable preference shares or of any debentures of the company; or
- (e) for the purchase of its **own shares** or other securities under section 68.



Who may apply the securities premium account: The securities premium account may be applied by such class of companies, as may be prescribed and whose financial statement comply with the accounting standards prescribed for such class of companies under section 133,—

- (a) in paying up unissued equity shares of the company to be issued to members of the company as fully paid **bonus shares**; or
- (b) in writing off the expenses of or the **commission** paid or **discount** allowed on any issue of equity shares of the company; or
- (c) for the **purchase of its own shares** or other securities under section 68.

Prohibition on issue of shares at discount [Section 53]

A company cannot issue shares in disregard of Section 53 of the Companies Act, 2013.

1. According to section 53, a company shall **not issue** shares at a discount, except in the case of an issue of sweat equity shares given under section 54 of the Companies Act, 2013. [Sub section (1)]
2. Any share issued by a company at a discount shall be **void**. [Sub section (2)]
3. **Exception:** Notwithstanding anything contained in sub-sections (1) and (2), a company may issue shares at a discount to its **creditors** when its debt is converted into shares in pursuance of any statutory resolution plan or debt restructuring scheme in accordance with any guidelines or directions or regulations specified by the Reserve Bank of India under the Reserve Bank of India Act, 1934 or the Banking (Regulation) Act, 1949.
4. Where any company fails to comply with the provisions of this section, such company and every officer who is in default shall be liable to a **penalty** which may extend to an amount equal to the amount raised through the issue of shares at a discount or five lakh rupees, whichever is less, and the company shall also be liable to refund all monies received with interest at the rate of twelve per cent. per annum from the date of issue of such shares to the persons to whom such shares have been issued.

Issue of Sweat equity shares [Section 54]

As per **Section 2(88)-sweat equity shares** means such equity shares as are issued by a company to its **directors** or **employees** at a **discount** or for consideration, **other than cash**, for providing their know-how or making available rights in the nature of intellectual property rights or value additions, by whatever name called;

Section 54 of the Companies Act, 2013 provides the conditions where a company may issue sweat equity shares of a class of shares **already issued**.

Conditions: A company may issue sweat equity shares of a class of shares already issued, if the following conditions are fulfilled, namely—

- (a) the issue is authorised by a **special resolution** passed by the company;
- (b) the **resolution specifies** the number of shares, the current market price, consideration, if any, and the class or classes of directors or employees to whom such equity shares are to be issued;
- (c) where the equity shares of the company are **listed on a recognised stock exchange**, the sweat equity shares are issued in accordance with the **regulations** made by the **Securities and Exchange Board** in this behalf



The rights, limitations, restrictions and provisions as are for the time being applicable to equity shares shall be applicable to the sweat equity shares issued under this section and the holders of such shares shall **rank pari passu** with other equity shareholders.

As per the Rule 8 of the Companies (Share and Debentures) Rules, 2014,

“Employee” means-(a) a permanent employee of the company who has been working in India or outside India; or

(b) a director of the company, whether a whole- time director or not; or

(c) an employee or a director as defined in sub-clauses (a) or (b) above of a subsidiary, in India or outside India, or of a holding company of the company;

Special Points

(1) The company shall not issue sweat equity shares for more than fifteen percent of the existing paid up equity share capital in a year or shares of the issue value of rupees five crores, whichever is higher:

Provided that the issuance of sweat equity shares in the Company shall not exceed twenty five percent, of the paid up equity capital of the Company at any time.

Provided further that a startup company, may issue sweat equity shares not exceeding fifty per cent of its paid up capital upto ten years from the date of its incorporation or registration.

(2) The sweat equity shares issued to directors or employees shall be locked in/non transferable for a period of three years from the date of allotment and the fact that the share certificates are under lock-in and the period of expiry of lock in shall be stamped in bold or mentioned in any other prominent manner on the share certificate.

Punishment for personation of shareholder [Section 57]

If any person deceitfully **personates** as—

- an owner of any security or interest in a company, or
- of any share warrant or coupon issued in pursuance of this Act, and thereby obtains or attempts to obtain any such **security or interest** or any such share warrant or coupon, or receives or attempts to receive **any money due to any such owner**,

Such person shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to three years and with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees.

Further issue of share capital - Rights Issue; Preferential Allotment [Section 62]

A rights issue involves pre-emptive subscription rights to buy additional securities in a company offered to the company’s existing security holders. It is a non- dilutive pro rata way to raise capital.

As per the section 62 of the Companies Act, 2013-

(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, 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 or such lesser number of days as may be prescribed 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;

Companies Amendment Act, 2020

(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 disadvantageous to the shareholders and the company;

(b) to employees under a scheme of employees' stock option, subject to & special resolution passed by company and subject to the conditions as may be prescribed; or

(c) to any persons, if it is authorised by a special resolution, whether or not those persons include the persons referred to in clause (a) or clause (b), either for cash or for a consideration other than cash, if the price of such shares is determined by the valuation report of a registered valuer, subject to the compliance with the applicable provisions of Chapter III and any other conditions as may be prescribed.

(2) **Exception:** This section shall not apply to the increase of the subscribed capital of a company caused by the exercise of an option attached to the debentures issued or loan raised by the company to convert such debentures or loans into shares in the company.



Issue of bonus shares [Section 63]

Bonus shares are shares issued proportionately by a company to its current shareholders as fully paid shares free of any cost to them.

This section 63 of the Companies Act, 2013 deals with the condition and the manner of issue of fully paid-up bonus shares by a company to its members.

- (1) Section 63 says that a company may issue fully paid-up bonus shares to its members, in any manner whatsoever, out of—
 - (i) its free reserves;
 - (ii) the securities premium account; or
 - (iii) the capital redemption reserve account:

Provided that no issue of bonus shares shall be made by capitalising reserves created by the revaluation of assets.

- (2) No company shall capitalise its profits or reserves for the purpose of issuing fully paid-up bonus shares unless—
 - (a) it is authorised by its **articles**;
 - (b) it has on the recommendation of the **Board**, been authorised in the **general meeting** of the company;
 - (c) it has **not defaulted** in payment of interest or principal in respect of fixed deposits or **debt** securities issued by it;
 - (d) it has **not defaulted** in respect of the payment of statutory dues of the **employees**, such as, contribution to provident fund, gratuity and bonus;
 - (e) the partly paid-up shares, if any outstanding on the date of allotment, are made fully paid-up;
 - (f) it complies with such conditions as may be **prescribed**.*
- (3) The bonus shares shall not be issued in lieu of dividend.



QUESTION & ANSWERS



Question 1:

Nov. 2017

A Limited has an Authorized Capital of 10,00,000 equity shares of the face value of Rs. 100/- each. Some of the shareholders expressed their opinion in the Annual General Meeting that it is very difficult for them to trade in the shares of the Company in the share market and requested the Company to reduce the face value of each share to Rs. 10/- and increase the number of shares to 1,00,00,000. Examine whether the request of the shareholders is possible and if so, how the Company can alter its share capital as per the provisions of the Companies Act, 2013.



Solution:

It is possible to reduce the nominal value of Rs. 10 per share.

- if the articles of the company authorize it to do so; and
- if the company passes an resolution.

The notice of such alteration shall be given to the Registrar, within 30 days, along with a copy of altered memorandum.



Question 2:

May 2001, 2007, 2017

DJA Company Limited is holding 40% of total equity shares in MR Company Limited. The Board of Directors of MR Company Limited decided to raise the paid-up equity share capital by issuing further shares and also decided not to offer any shares to DJA Company Limited on the ground that it was already holding a high percentage of shares in MR Company Limited. Articles of Association of MR Company Limited provides that the new shares be offered to the existing shareholders of the company. On 1-9-2018 new shares were offered to all the shareholders except DJA Company Limited. Referring to the provisions of the Companies Act, 2013 examine the validity of decision of Board of Directors of MR Company Limited of not offering any further shares to DJA Company Limited.



Solution:

The decision of the Board is not valid

- since the refusal to offer shares to DJA Company Limited on the ground that is already holding a high percentage of shares, is not a valid ground as per Sec. 62.



Question 3:

Nov. 2017

Shyam Dairy Ltd. a dairy products manufacturing company wants to set-up a new processing unit at Jaipur. Due to paucity of funds, the existing shareholders are not willing to fund for expansion. Hence, the Company approached XYZ Ltd. for subscribing to the shares of the company for expansion purposes. Can Shyam Dairy Ltd. issue shares only to XYZ Ltd. under the provisions of the Companies Act, 2013? If so, state the conditions.



Solution:

Shyam Dairy Ltd. can issue further shares to XYZ Ltd.

- if a special resolution authorizing the issue of shares to XYZ Ltd. is passed in a GM of Shyam Dairy Ltd.; and
- the shares are issued to XYZ Ltd. at a price as is determined by the valuation report of a registered valuer.



Question 4:

Nov. 2002, 2016

ABC Company Limited at a general meeting of members of the company passes an ordinary resolution to buy-back 30% of its equity share capital. The articles of the company empower the company for buy-back of shares. The company further decides that the payment for buy-back be made out of the proceeds of the company's earlier issue of equity shares. Explaining the provisions of the Companies Act, and stating the sources through which the buy-back of companies own shares be executed, examine:

1. Whether company's proposal is in order?
2. Would your answer be still the same in case the company, instead of 30%, decides to buy-back only 20% of its equity share capital?



Solution:

The proposal of the company to buy-back its shares is not valid

- since the company has passed OR instead of SR, as required u/s 68;
- since the company proposes to buy-back 30% of the equity share capital which exceeds the statutory ceiling of 25% of total paid up equity capital;
- since the company proposes to buy-back out of the proceeds of an earlier issue of same kind of shares, which is prohibited u/s 68.

The decision to buy-back 20% of equity share capital shall not be valid

- since buy-back by passing OR is violative of Sec. 68;
- since buy-back out of the proceeds of an earlier issue of same kind of shares is prohibited u/s 68.



Question 5:

Nov. 2015, May 2018

A company refuses to register transfer of shares made by Mr. X to Mr. Y. The company does not even send a notice of refusal to Mr. X or Mr Y respectively within the prescribed period. Has the aggrieved party any right(s) against the company for such refusal? Advise as per the provisions of the Companies Act, 2013.



Solution:

The company has contravene Sec. 58

- since, in case of refusal by a company to transfer the shares, the company is required to send notice of refusal to the transferor and the transferee within 30 days of receipt of transfer deed;

Rights against company's refusal

- Mr. Y is entitled to file an appeal to the Tribunal against the refusal of the company to transfer the shares;
- Mr. X has no right to appeal against the refusal of the company to transfer the shares.



Order of the Tribunal

- The Tribunal may direct the company to register the transfer of shares.
- The company shall comply with the order of Tribunal within 10 days.
- The Tribunal may direct the company to pay damages, if any, sustained by any party aggrieved.



Question 6.

Ramesh, who is a resident of New Delhi, sent a transfer deed, for registration of transfer of shares to the company at the address of its Registered Office in Mumbai. He did not receive the shares certificates even after the expiry of four months from the date of dispatch of transfer deed. He lodged a criminal complaint in the Court at New Delhi. Decide, under the provisions of the Companies Act, 2013, whether the Court at New Delhi is competent to take action in the said matter?

(ICAI Module)



Solution:

Jurisdiction of Court, now Tribunal, the Companies Act, 2013: According to Section 56 (4) of the Companies Act, 2013 every company, unless prohibited by any provision of law or of any order of court, Tribunal or other authority, shall deliver the certificates of all shares transferred within a period of one month from the date of receipt by the company of the instrument of transfer.

The jurisdiction binding on the company is that of the state in which the registered office of the company is situated. Hence, in the given case the **Delhi court is not competent to take action in the matter.**



Question 7.

Mr. 'Y', the transferee, acquired 250 equity shares of BRS Limited from Mr. 'X', the transferor. But the signature of Mr. 'X', the transferor, on the transfer deed was forged. Mr. 'Y' after getting the shares registered by the company in his name, sold 150 equity shares to Mr. 'Z' on the basis of the share certificate issued by BRS Limited. Mr. 'X' and 'Z' were not aware of the forgery. State the rights of Mr. 'X', 'Y' and 'Z' against the company with reference to the aforesaid shares.

(ICAI Module, May'20 Mock Test)



Solution:

According to **Section 46(1)** of the Companies Act, 2013, a share certificate once issued under the common seal, if any, of the company or signed by two directors or by a director and the Company Secretary, wherever the company has appointed a Company Secretary, specifying the shares held by any person, shall be **prima facie evidence** of the title of the person to such shares. Therefore, in the normal course the person named in the share certificate is for all practical purposes the legal owner of the shares therein and the company cannot deny his title to the shares.

However, **a forged transfer is a nullity.** It does not give the transferee (Y) any title to the shares. Similarly, any transfer made by Y (to Z) will also not give a good title to the shares as the title of the buyer is only as good as that of the seller.

Therefore, if the company acts on a forged transfer and removes the name of the real owner (X) from the Register of Members, then the **company is bound to restore** the name of X as the



holder of the shares and to pay him any dividends which he ought to have received. In the above case, 'therefore, X has the right against the company to get the shares recorded in his name. However, **neither Y nor Z have any rights against the company** even though they are bona fide purchasers. But as Z acted on the faith of share certificate issued by company, he can demand compensation.

However, since Y seems to be the perpetrator of the forgery, he will be liable both criminally and for compensation to X, Z and the company.



Question 8.

OLAF Limited, a subsidiary of PQR Limited, decides to give a loan of ₹4,00,000 to the Human Resource Manager, who is not a Key Managerial Personnel of OLAF Limited, drawing salary of ₹30,000 per month, to buy 500 partly paid-up Equity Shares of ₹1000 each in OLAF Limited. Examine the validity of company's decision under the provisions of the Companies Act, 2013.

(May'20 RTP)



Solution:

Restrictions on purchase by company or giving of loans by it for purchase of its share: As per section 67 (3) of the Companies Act, 2013 a company is allowed to give a loan to its employees subject to the following limitations:

- (a) The employee must **not** be a **Key Managerial Personnel**;
- (b) The amount of such loan shall not exceed an amount equal to **six months' salary** of the employee.
- (c) The shares to be subscribed must be **fully paid** shares

In the given instance, Human Resource Manager is not a KMP of the OLAF Ltd. He is drawing salary of ₹30,000 per month and loan taken to buy 500 partly paid up equity shares of ₹1000 each in OLAF Ltd.

Keeping the above provisions of law in mind, the company's (OLAF Ltd.) **decision is invalid** due to two reasons:

- i. The amount of loan being **more than 6 months' salary** of the HR Manager, which should have restricted the loan to ₹1.8 Lakhs.
- ii. The shares subscribed are **partly paid** shares whereas the benefit is available only for subscribing fully paid shares.



Question 9.

Mars India Ltd. owed to Sunil ₹1,000. On becoming this debt payable, the company offered Sunil 10 shares of ₹100 each in full settlement of the debt. The said shares were fully paid and were allotted to Sunil. Examine the validity of this allotment in the light of the provisions of the Companies Act, 2013

(ICAI Module)



Solution:

Under section 62 (1) (c) of the Companies Act, 2013 where at any time, a company having a share capital proposes to increase its subscribed capital by the issue of further shares, either for cash or for a consideration other than cash, such shares may be offered to any persons, if it is authorised by a special resolution and if the price of such shares is determined by a **valuation report** of a registered valuer, subject to the compliance with the applicable provisions of Chapter III and any other conditions as may be prescribed.

In the present case, Mars India Ltd is **empowered to allot** the shares to Sunil in settlement of



its debt to him. The issue will be classified as issue for consideration other than cash must be approved by the members by a **special resolution**.

Further, the valuation of the shares must be done by a registered valuer, subject to the compliance with the applicable provisions of Chapter III and any other conditions as may be prescribed.



Question 10.

What are the provisions of the Companies Act, 2013 relating to the appointment of 'Debenture Trustee' by a company? Whether the following can be appointed as 'Debenture Trustee':

- (i) A shareholder who has no beneficial interest.
- (ii) A creditor whom the company owes Rs.499 only.
- (iii) A person who has given a guarantee for repayment of amount of debentures issued by the company?

(ICAI Module)



Solution:

Appointment of Debenture Trustee: Under section 71 (5) of the Companies Act, 2013, no company shall issue a prospectus or make an offer or invitation to the public or to its members exceeding five hundred for the subscription of its debentures, unless the company has, before such issue or offer, appointed one or more debenture trustees and the conditions governing the appointment of such trustees shall be such as may be prescribed.

The rules framed under the Companies Act for the issue of secured debentures provide that before the appointment of debenture trustee or trustees, a written consent shall be obtained from such debenture trustee or trustees proposed to be appointed and a statement to that effect shall appear in the letter of offer issued for inviting the subscription of the debentures. Further according to the rules, **no person** shall be appointed as a debenture trustee, if he-

- (i) Beneficially holds **shares** in the company;
- (ii) Is a promoter, **director** or key managerial personnel or any other officer or an employee of the company or its holding, subsidiary or associate company;
- (iii) Is beneficially entitled to **moneys** which are to be paid by the company otherwise than as remuneration payable to the debenture trustee;
- (iv) Is **indebted** to the company, or its subsidiary or its holding or associate company or a subsidiary of such holding company;
- (v) Has furnished any **guarantee** in respect of the principal debts secured by the debentures or interest thereon;
- (vi) Has any **pecuniary** relationship with the company amounting to two percent. or more of its gross turnover or total income or fifty lakh rupees or such higher amount as may be prescribed, whichever is lower, during the two immediately preceding financial years or during the current financial year;
- (vii) is a **relative** of any promoter or any person who is in the employment of the company as a director or key managerial personnel;

Thus, based on the above provisions answers to the given questions are:

- (i) A shareholder who has no beneficial interest, **can be** appointed as a debenture trustee.
- (ii) A creditor whom company owes Rs.499 **cannot be** so appointed. The amount owed is immaterial.



- (iii) A person who has given guarantee for repayment of principal and interest thereon in respect of debentures also cannot be appointed as a debenture trustee.



Question 11.

Mr Nilesh has transferred 1000 shares of Perfect Ltd. to Ms. Mukta. The company has refused to register transfer of shares and does not even send a notice of refusal to Mr. Nilesh or Ms. Mukta respectively within the prescribed period. Discuss as per the provisions of the Companies Act, 2013, whether aggrieved party has any right(s) against the company for such refusal?

(ICAI Module, May'18 RTP, May'19 Mock Test, Nov'19 Mock Test)



Solution:

The problem as asked in the question is governed by **Section 58** of the Companies Act, 2013 dealing with the refusal to register transfer and appeal against refusal.

In the present case the company has committed the **wrongful act** of not sending the notice of refusal of registering the transfer of shares.

Under **section 58 (4)**, if a public company without sufficient cause refuses to register the transfer of securities within a period of thirty days from the date on which the instrument of transfer is delivered to the company, the transferee may, within a period of **sixty** days of such refusal or where no intimation has been received from the company, within **ninety** days of the delivery of the instrument of transfer, appeal to the Tribunal.

Section 58 (5) further provides that the Tribunal, while dealing with an appeal made under sub-section (4), may, after hearing the parties, either dismiss the appeal, or by order—

- (a) direct that the **transfer** or transmission shall be registered by the company and the company shall comply with such order within a period of ten days of the receipt of the order; or
- (b) direct **rectification** of the register and also direct the company to pay damages, if any, sustained by any party aggrieved;

In the present case Ms. Mukta **can make an appeal** before the tribunal and claim damages.



Question 12.

Kavish Ltd., desirous of buying back of all its equity shares from the existing shareholders of the company, seeks your advice. Examining the provisions of the Companies Act, 2013 discuss whether the above buy back of equity shares by the company is possible. Also, state the sources out of which buy back of shares can be financed? (May'18 RTP)



Solution:

In terms of section 68 (2) (c) of the Companies Act, 2013 a company is allowed to buy back a maximum of 25% of the aggregate of its paid-up capital and free reserves. Hence, the company in the given case is not allowed to buy back its entire equity shares.

Section 68 (1) of the Companies Act, 2013 specifies the sources of funding buy back of its shares and other specified securities as under:

- (a) Free reserves or
- (b) Security Premium account or
- (c) Proceeds of the issue of any shares or other specified securities

However, under the proviso to section 68 (1) no buy back of shares or any specified securities can be made out of the proceeds of an earlier issue of the same kind of shares or same kind of specified securities.



Question 13.

Earth Ltd., a Public Company offer the new shares (further issue of shares) to persons other than the existing shareholders of the Company. Explain the conditions when shares can be issued to persons other than existing shareholders. Discuss whether these shares can be offered to the Preference Shareholders? (Nov'18 RTP)



Solution:

Issue of Further Shares: Section 62 (1) (a) of the Companies Act, 2013 provides that if, at any time, a company having a share capital proposes to increase its subscribed capital by the issue of further shares, such shares should be offered to the existing equity shareholders of the company as at the date of the offer, in proportion to the capital paid up on those shares. However, certain exceptions have been provided in the Companies Act, 2013 when such further shares of a company may-be offered to other persons as well. These are as under-

- (a) Under section 62 (1) (b) issue of further shares may be offered to employees under a scheme of employees' stock option subject to a special resolution passed by the company and subject to such conditions as may be prescribed.
- (b) Under section 62 (1) (c) such shares may be offered to any persons, if it is authorised by a special resolution, either for cash or for a consideration other than cash, if the price of such shares is determined by the valuation report of a registered valuer, subject to the compliance with the applicable provisions of Chapter III and any other conditions as may be prescribed.
- (c) If any equity shareholder to whom the shares are offered in terms of section 62(1) as described above, declines such offer, the Board of Directors may dispose of the shares in such manner as is not disadvantageous to the shareholders or to the company.

Preference Shareholders: From the wordings of Section 62 (1) (c), it is quite clear that these shares can be issued to any persons who may be preference shareholders as well provided such issue is authorized by a special resolution of the company and are issued on such conditions as may be prescribed.



Question 14:

X Ltd. issued a notice on 1st Feb, 2018 to its existing shares holders offering to purchase one extra share for every five shares held by them.

The last date to accept the offer was 15th Feb, 2018 only. Mr. Kavi has given an application to renounce the shares offered to him in favour of Mr. Ravi, who is not a shareholder of the company. Examine the validity of application of Mr. Kavi under the provisions of the Companies Act, 2013. Would your answer differ if Mr. Kavi is a shareholder of X Ltd.? (5 Marks)



Solution:

According to section 62 of the Companies Act, 2013, 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 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.

In the instant case, X Ltd. issued a notice on 1st Feb, 2018 to its existing shares holders offering to purchase one extra share for every five shares held by them. The last date to accept the offer was 15th Feb, 2018 only. Mr. Kavi has given an application to renounce the shares offered to him in favour of Mr. Ravi, who is not a shareholder of the company. As nothing is specified related to the Articles of the company, it is assumed offer shall be deemed to include a right of renunciation. Hence, Mr. Kavi can renounce the shares offered to him in favour of Mr. Ravi, who is not a shareholder of the company.

In the second part of the question, even if Mr. Ravi is a shareholder of X Ltd. then also it does not affect the right of renunciation of shares of Mr. Kavi to Mr. Ravi.



Question 15:

ABC Limited is a public company incorporated in New Delhi. The Board of Directors (BOD) of the company wants to bring a public issue of 100000 equity shares of ₹ 10 each. The BOD has appointed an underwriter for this issue for ensuring the minimum subscription of the issue. The underwriter advised the BOD that due to current economic situation of the Country it would be better if the company offers these shares at a discount of ₹ 1 per share to ensure full subscription of this public issue. The Board of Directors agreed to the suggestion of underwriter and offered the shares at a discount of ₹ 1 per share. The issue was fully subscribed and the shares were allotted to the applicants in due course.

Decide whether the issue of shares as mentioned above is valid or not as per Section 53 of Companies Act 2013. What would be your answer in the above case if the shares are issued to employees as Sweat equity shares? (2 + 1 = 3 Marks)



Solution:

As per the provisions of sub-section (1) of section 53 read with section 54 of the Companies Act, 2013, a company shall not issue shares at a discount, except in the case of an issue of sweat equity shares. As per the provisions of sub-section (2) of section 53 of the Companies Act, 2013, any share issued by a company at a discount shall be void.

In terms of the above provisions, issue of shares by ABC Limited at a discount of ₹ 1 per share is not valid.

In case the above shares have been issued to employees as Sweat equity shares, then the issue of shares at discount is valid. [Section 54(1) of the Companies Act, 2013.]



Question 16:

The Board of Directors of Rajesh Exports Ltd., a subsidiary of Manish Ltd., decides to grant a loan of ₹ 3 lakh to Bhaskar, the finance manager of Manish Ltd., getting salary of ₹ 40,000 per month, to buy 500 partly paid-Up equity shares of ₹ 1,000 each of Rajesh Exports Ltd. Examine the validity of Board's decision with reference to the provisions of the Companies Act, 2013.

(2 Marks)



Solution:

As per section 67(2) of the Companies Act, 2013, no public company shall give, whether directly or indirectly and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of, or in connection with, a purchase or subscription made or to be made, by any person of or for any shares in the company or in its holding company.

As per the provisions of section 67(3)(c) of the Companies Act, 2013, nothing stated above, shall apply to the giving of loans by a company to persons in the employment of the company other than its directors or key managerial personnel, for an amount not exceeding their salary or wages for a period of six months with a view to enabling them to purchase or subscribe for fully paid-up shares in the company or its holding company to be held by them by way of beneficial ownership.

If we analyse the provisions of section 67(3)(c) of the Companies Act, 2013, we can come to know that the relaxation given here can be availed only when all the following three conditions are fulfilled:

1. The loan has been given to the employees of the company other than its directors or key managerial personnel (not the employee of its holding company). - Therefore this condition has not been fulfilled;
2. The amount does not exceed their salary or wages for a period of six months.-This condition has not been fulfilled.
3. The amount should be utilized by the employee for purchase of fully shares or subscribe for fully paid-up shares in the company or its holding company to be held by them by way of beneficial ownership. - Here Mr. Bhaskar is going to purchase the shares in Rajesh Exports Ltd., which is neither his employer company, nor holding company of his employer company and the shares are not fully paid-up. Therefore, this condition has also not been fulfilled.

Even in case Mr. Bhaskar would not have fulfilled any one of the above conditions, the decision of the Board of Directors of Rajesh Exports Ltd. would not have been valid. Therefore we can conclude that the decision of the Board of Directors of Rajesh Exports Ltd. is not valid.



Question 17:

“The offer of buy-back of its own shares by a company shall not be made within a period of six months from the date of the closure of the preceding offer of buy-back, if any and cooling period to make further issue of same kind of shares including allotment of further shares shall be a period of one year from the completion of buy back subject to certain exceptions.” Examine the validity of this statement by explaining the provisions of the Companies Act, 2013 in this regard.

(3 Marks)



Solution:

According to proviso to section 68(2) of the Companies Act, 2013, no offer of buy-back, shall be made within a period of one year from the date of the closure of the preceding offer of buy-back, if any.

Section 68 (8) casts an obligation that where a company completes a buy-back of its shares or other specified securities under this section, it shall not make further issue of same kind of shares including allotment of further shares under section 62(1)(a) or other specified securities within a period of six months except by way of bonus issue or in the discharge of subsisting obligations such as conversion of warrants, stock option schemes, sweat equity or conversion of preference shares or debentures into equity shares.

Keeping in view of the above provisions, the statement “the offer of buy-back of its own shares by a company shall not be made within a period of six months from the date of the closure of the preceding offer of buy back, if any and cooling period to make further issue of same kind of shares including allotment of further shares shall be a period of one year from the completion of buy back subject to certain exceptions” is not valid.



Question 18:

Following is the extract of the Balance sheet Beltex Ltd. as on 31st March, 2020:

Particulars		Amount (₹)
Equity & Liabilities		
(1) Shareholder's Fund		
(a) Share Capital:		
Authorized Capital:		
10,000, 12% Preference Shares of ₹ 10 each	1,00,000	
1,00,000 equity shares of ₹ 10 each	10,00,000	<u>11,00,000</u>
Issued & Subscribed Capital:		
8000, 12% Preference Shares of ₹ 10 each fully paid up		80,000
90,000 equity shares of ₹ 10 each, ₹ 8 paid up		7,20,000
(b) Reserve and Surplus		
General Reserve	1,20,000	
Capital Reserve	75,000	
Securities Premium	25,000	
Surplus in statement of P& L	<u>2,00,000</u>	<u>4,20,000</u>
(2) Non-Current Liabilities:		
(a) Long-term borrowings:		
Secured Loan: 12% partly convertible		
Debenture @ ₹ 100 each		5,00,000



On 1st April, 2020 the company has made final call at ₹ 2 each on 90,000 Equity Shares. The call money was received by 25th April, 2020. Thereafter, the company decided to capitalize its reserves by way of bonus @ 1 share for every 4 shares to existing shareholders.

Answer the following questions according to the Companies Act, 2013, in above case:

- (A) Which of the above-mentioned sources can be used by company to issue bonus shares?
- (B) Calculate the amount to be capitalized from free reserves to issue bonus shares?
- (C) If the company did not ask for the final call on April 1st, 2020. Can it still issue bonus shares to its members?

(3 Marks)



Solution:

(ii) Issue of Bonus Shares

(1) According to section 63 (1) of the Companies Act, 2013, a company may issue fully paid-up bonus shares to its members, in any manner whatsoever, out of—

- (i) its free reserves;
- (ii) the securities premium account; or
- (iii) the capital redemption reserve account.

However, no issue of bonus shares shall be made by capitalising reserves created by the revaluation of assets.

(2) Section 63 (2) provides that the company can issue bonus shares only when the partly paid-up shares, if any outstanding on the date of allotment, are made fully paid-up.

(A) The following sources can be used by the company to issue bonus shares:

1. General Reserve
2. Securities Premium
3. Surplus in statement of P&L

(B) Amount of bonus shares to be issued = 90,000 shares x 1/4

= 22,500 shares

Amount that ought to be capitalized = 22,500 x ₹ 10 per share

for issue of bonus shares = ₹ 2,25,000

Total amount available to be capitalized from = 1,20,000+25,000+2,00,000

free reserves to issue bonus shares = ₹ 3,45,000

(b) Hence, the amount to be capitalized from free reserves to issue bonus shares will be ₹ 2,25,000.

(c) A company can issue bonus shares on only fully paid shares. Hence, if the company did not ask for the final call on 1st April, 2020, it cannot issue bonus shares to its members.



CHAPTER WISE - CLASS TEST



Question 1.

Growmore Limited's share capital is divided into different classes. Now, Growmore Limited intends to vary the rights attached to a particular class of shares. Explain the provisions of the Companies Act, 2013 to Growmore Limited as to obtaining consent from the shareholders in relation to variation of rights. (Nov'18 RTP)



Solution:

According to section 48 of the Companies Act, 2013-

- (1) Variation in rights of shareholders with consent: Where a share capital of the company is divided into different classes of shares, the rights attached to the shares of any class may be varied with the consent in writing of the holders of not less than three-fourths of the issued shares of that class or by means of a special resolution passed at a separate meeting of the holders of the issued shares of that class,—
 - (a) if provision with respect to such variation is contained in the memorandum or articles of the company; or
 - (b) in the absence of any such provision in the memorandum or articles, if such variation is not prohibited by the terms of issue of the shares of that class:
Provided that if variation by one class of shareholders affects the rights of any other class of shareholders, the consent of three-fourths of such other class of shareholders shall also be obtained and the provisions of this section shall apply to such variation.
- (2) No consent for variation: Where the holders of not less than ten per cent of the issued shares of a class did not consent to such variation or vote in favour of the special resolution for the variation, they may apply to the Tribunal to have the variation cancelled, and where any such application is made, the variation shall not have effect unless and until it is confirmed by the Tribunal:

Provided that an application under this section shall be made within twenty-one days after the date on which the consent was given or the resolution was passed, as the case may be, and may be made on behalf of the shareholders entitled to make the application by such one or more of their number as they may appoint in writing for the purpose.



Question 2.

Heavy Metals Limited wants to provide financial assistance to its employees, to enable them to subscribe for certain number of fully paid shares. Considering the provision of the Companies Act, 2013, what advice would you give to the company in this regard?

(Nov'18 RTP)



Solution:

Under section 67 (2) of the Companies Act, 2013 no public company is allowed to give, directly or indirectly and whether by means of a loan, guarantee, or security, any financial assistance for the purpose of, or in connection with, a purchase or subscription, by any person of any shares in it or in its holding company.

However, **section 67 (3)** makes an exception by allowing companies to give loans to their



employees other than its directors or key managerial personnel, for an amount not exceeding their salary or wages for a period of six months with a view to enabling them to purchase or subscribe for fully paid-up shares in the company or its holding company to be held by them by way of beneficial ownership.

It is further provided that disclosures in respect of voting rights not exercised directly by the employees in respect of shares to which the scheme relates shall be made in the Board's report in such manner as may be prescribed.

Hence, Heavy Metals Ltd can provide financial assistance upto the specified limit to its employees to enable them to subscribe for the shares in the company provided the shares are purchased by the employees to be held for beneficial ownership by them.

However, the directors or key managerial personnel will not be eligible for such assistance.



Question 3.

Harsh purchased 1000 shares of Singhanian Ltd. from Pratik and sent those shares to the company for transfer in his name. The company neither transferred the shares nor sent any notice of refusal of transfer to any party within the period stipulated in the Companies Act, 2013. What is the time frame in which the company is supposed to reply to transferee? Does Harsh, the transferee have any remedies against the company for not sending any intimation in relation to transfer of shares to him?

(May'18-4 Marks)



Solution:

Refusal for Registration of transferred/transmitted securities: According to **Section 58 (4)** of the Companies Act, 2013, if a public company without sufficient cause refuses to register the transfer of securities within a period of thirty days from the date on which the instrument of transfer is delivered to the company, the transferee may, within a period of sixty days of such refusal or where no intimation has been received from the company within ninety days of the delivery of the instrument of transfer, appeal to the Tribunal.

Remedies available to the Transferee against the company: **Section 58 (5)** of the Companies Act, 2013, provides that the Tribunal, while dealing with an appeal may, after hearing the parties, either dismiss the appeal, or by order—

- direct that the transfer or transmission shall be registered by the company and the company shall comply with such order within a period of ten days of the receipt of the order; or
- direct rectification of the register and also direct the company to pay damages, if any, sustained by any party aggrieved;

In the instant case, Harsh, can make an appeal before the tribunal for remedies that the company shall be ordered to register transfer /transmission of securities within 10 days of the receipt of order, or rectify register and pay damages.



Question 4.

ABC Ltd. has following balances in their Balance Sheet as on 31st March, 2018:

Equity shares capital (3.00 lakhs equity shares of ₹10 each)	30.00 lacs
Free reserves	5.00 lacs
Securities Premium Account	3.00 lacs



Capital redemption reserve account	4.00 lacs
Revaluation Reserve	3.00 lacs

Directors of the company seek your advice in following cases:

- (i) Whether company can give bonus shares in the ratio of 1:3?
- (ii) What if company decide to give bonus shares in the ratio of 1:2?

(Nov'18-2 Marks)



Solution:

Issue of bonus shares [Section 63]: As per Section 63 of the Companies Act, 2013, a company may issue fully paid-up bonus shares to its members, in any manner whatsoever, out of—

- (i) its free reserves;
- (ii) the securities premium account; or
- (iii) the capital redemption reserve account:

Provided that no issue of bonus shares shall be made by capitalising reserves created by the revaluation of assets.

As per the given facts, ABC Ltd. has total eligible amount of ₹ 12 lakhs (i.e. 5.00+3.00+4.00) out of which bonus shares can be issued and the total share capital is ₹30.00 lakhs.

Accordingly:

- (i) For issue of 1:3 bonus shares, there will be a requirement of ₹ 10 lakhs (i.e., $1/3 \times 30.00$ lakh) which is well within the limit of available amount of ₹ 12 lakhs. So, ABC Limited can go ahead with the bonus issue in the ratio of 1:3.
- (ii) In case ABC Limited intends to issue bonus shares in the ratio of 1:2, there will be a requirement of ₹15 lakhs (i.e., $1/2 \times 30.00$ lakh). Here in this case, the company cannot go ahead with the issue of bonus shares in the ratio of 1:2, since the requirement of ₹15 Lakhs is exceeding the available eligible amount of ₹12 lakhs.



Question 5.

Which fund may be utilized by a public limited company for purchasing (buy back) its own shares? Also explain the provisions of the Companies Act, 2013 regarding the circumstances in which a company is prohibited to buy back its own shares.

(May'19- 5 Marks)



Solution:

Funds utilized for purchase of its own securities: Section 68 of the Companies Act, 2013 states that a company may purchase its own securities out of:

- (i) its free reserves; or
- (ii) the securities premium account; or
- (iii) the proceeds of the issue of any shares or other specified securities.

However, buy-back of any kind of shares or other specified securities cannot be made out of the proceeds of an earlier issue of the same kind of shares or same kind of other specified securities

Prohibition for buy-back in certain circumstances [Section 70]

- (1) The provision says that no company shall directly or indirectly purchase its own shares or other specified securities-
 - (a) through any subsidiary company including its own subsidiary companies; or



- (b) through any investment company or group of investment companies; or
- (c) if a default is made by the company in repayment of deposits or interest payment thereon, redemption of debentures or preference shares or payment of dividend to any shareholder or repayment of any term loan or interest payable thereon, to any financial institutions or banking company;

But where the default is remedied and a period of three years has lapsed after such default ceased to subsist, then such buy-back is not prohibited.

- (2) No company shall directly or indirectly purchase its own shares or other specified securities in case such company has not complied with provisions of Sections 92 (Annual Report), 123 (Declaration of dividend), 127 (Punishment for failure to distribute dividends), and section 129 (Financial Statements).

MCQs



Question 1:

Sarvodaya Urban Nidhi Limited has ₹ 14 Crore and ₹ 6 Crore as paid-up equity and preference share capital respectively. Balance in retain earnings account is ₹ 2.4 Crore. Equity share capital having face value of ₹ 10 each, while preference share has face value of 100 each. Mr. Surya and Mr. Chandan own 11,20,000 and 5,60,000 shares respectively. In context of resolution placed before the company which directly affect the rights attached to his preference shares, the voting right of Mr. Surya and Mr. Chandan in percentage term shall be:

- (a) 8% and 4% respectively
- (b) 5.6% and 2.8% respectively
- (c) 5% and 2.8% respectively
- (d) 5% and 2.5% respectively



Solution:

- (c) 5% and 2.8% respectively



Question 2.

In a litigation regarding title of shares, a share certificate issued in physical form by Modern Furniture Limited, an unlisted private company that doesn't have a common seal submitted as evidence of the title. The same shall be clear and convincing evidence of title, if signed by;

- i. two directors
 - ii. two directors, out of which one shall be managing director
 - iii. two directors and the Company Secretary, wherever the company has appointed a Company Secretary
 - iv. a director and the Company Secretary, wherever the company has appointed a Company Secretary
- (a) By i or iii only
 - (b) By i or iv only
 - (c) By ii or iii only
 - (d) By ii or iv only



Solution:

- (b) two directors, out which one shall be managing director



Question 3.

Mr. Bahu has received a notice from Mahishmati Private Limited on 2nd March, 2023 intimating that Mr. Bali has submitted a transfer deed duly signed by him for transfer of 1000 partly paid shares (₹ 8 paid-up out of Face Value of ₹ 10 per share) in his (Mr. Bahu) name. Mr. Bahu as transferee must raise his objection to the proposed transfer of partly paid shares latest by

- (a) 9th March, 2023
- (b) 16th March, 2023
- (c) 17th March, 2023
- (d) 31st March, 2023



Solution:

- (c) 16th March, 2023



Question 4.

Section 67 of the Companies Act, 2013 impose a restriction on public company from giving any financial assistance whether directly or indirectly and whether by means of a loan, guarantee, the provision of security or otherwise for the purpose of, or in connection with, a purchase or subscription made or to be made, by any person of or for any shares in the company or in its holding company. Star Engineering Limited which is not covered by any of exemptions specified under said section, contravene the restrictive provisions stated above. Every officer of the company who is in default shall be liable for;

- (a) Fine which shall not be less than one lakh rupees but may extend to twenty- five lakh rupees
- (b) Fine which shall not be less than one lakh rupees but may extend to twenty- five lakh rupees or Imprisonment for a term which may extend to three years or both
- (c) Fine which may extend to twenty-five lakh rupees or Imprisonment for a term which may extend to three years or both
- (d) Fine which shall not be less than one lakh rupees but may extend to twenty- five lakh rupees and Imprisonment for a term which may extend to three years



Solution:

- (d) Fine which shall not be less than one lakh rupees but may extend to twenty-five lakh rupees and Imprisonment for a term which may extend to three years



Question 5.

Modern Furniture an unlisted company receive a request for issue of duplicate share certificate. Complete documents in this regards submitted with the company on 30th December 2022. Modern furniture shall issue the duplicate share certificates by:

- (a) 29th January 2023
- (b) 13th February 2023
- (c) 28th February 2023
- (d) 29th March 2023



Solution:

- (d) 29th March 2023



Doosron se haarke loser kehlane se kahin
zyada bura hai..khud se haarke loser kehlana.



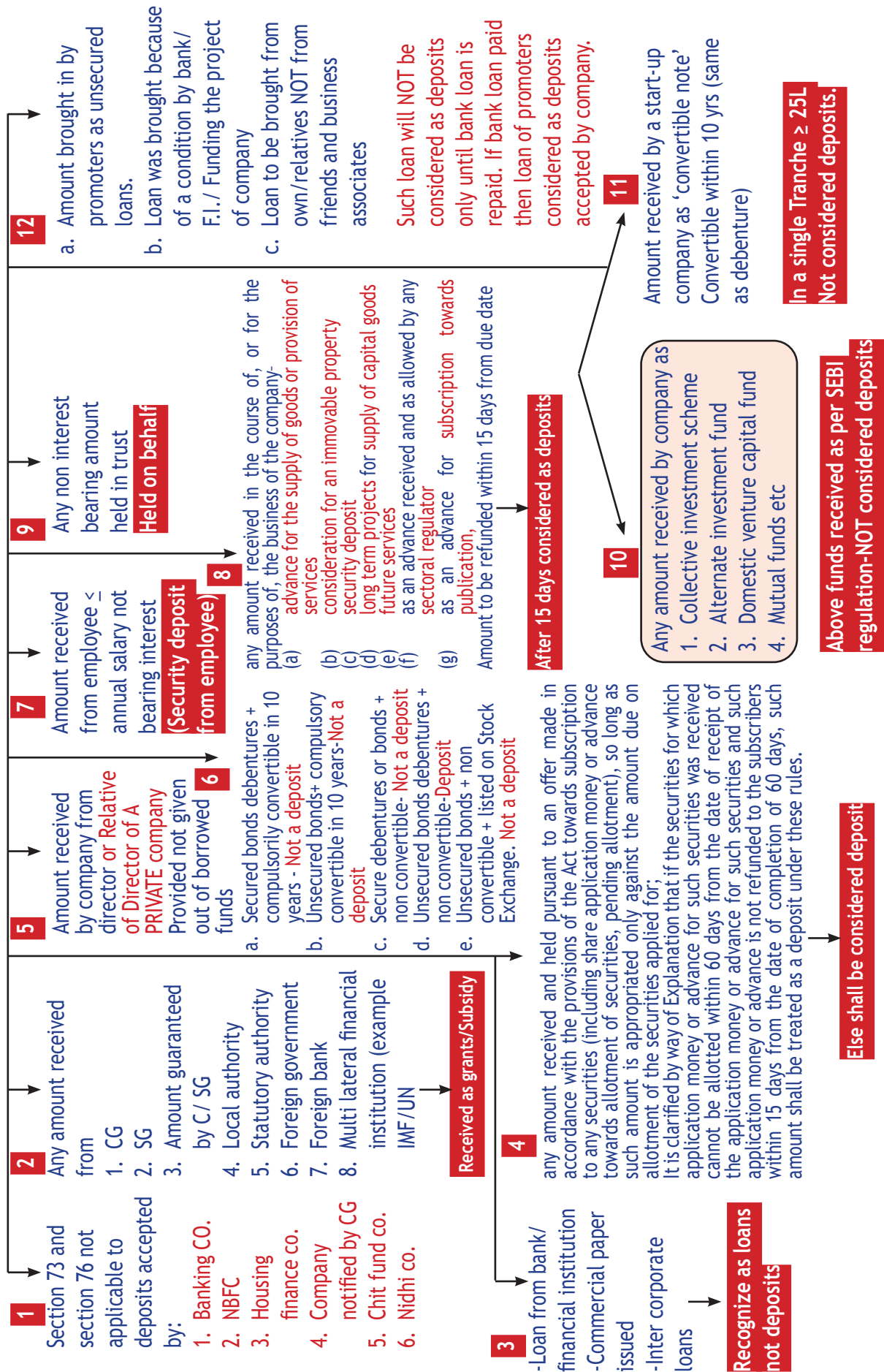
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ACCEPTANCE OF DEPOSITS BY COMPANIES



2(31) "deposit" includes any receipt of money by way of deposit or loan or in any other form by a company, but does not include such categories of amount as may be prescribed in consultation with the Reserve Bank of India;

Acceptance of deposits by companies - Definition of deposit rule 2(1)(C) Deposit does not include the following: Negative list





Acceptance of deposits by company

Acceptance of deposits from members (section 73)

- (1) no company shall invite, accept or renew deposits under this Act from the public except in a manner provided under this Chapter
- (2) A company may, subject to the passing of a resolution in general meeting, accept deposits from its members on such terms and conditions, subject to the fulfilment of the following conditions, namely:-
 - (a) issuance of a circular to its members including therein a statement showing the financial position of the company, the credit rating obtained, the total number of depositors and the amount due towards deposits in respect of any previous deposits accepted by the company;
 - (b) filing a copy of the circular along with such statement with the Registrar within thirty days before the date of issue of the circular;
 - (c) depositing, on or before the 30th day of April each year, such sum which shall not be less than 20% of the amount of its deposits maturing during the following financial year and kept in a scheduled bank in a separate bank account to be called deposit repayment reserve account.
 - (d) Omitted w.e.f. 15th August, 2018
 - (e) certifying that the company has not committed any default in the repayment of deposits accepted either before or after the commencement of this Act or payment of interest on such deposits and where a default had occurred, the company made good the default and a period of 5 years had lapsed since the date of making good the default; and
 - (f) providing security, if any for the due repayment of the amount of deposit or the interest thereon including the creation of such charge on the property or assets of the company.
- (3) Every deposit accepted by a company shall be repaid with interest in accordance with the terms and conditions of the agreement referred to in that sub-section.

Acceptance of deposits from public (section 76)

Only eligible company can accept deposits from public

Eligible public company:
 Net worth $\geq$ 100 crores OR
 Turnover $\geq$ 500 crores

Net worth = P.S.C. + ALL reserve + security premium

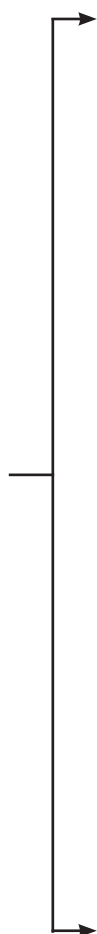
- (1) Notwithstanding anything contained in section 73, an Eligible public company, may accept deposits from persons other than its members subject to compliance with the requirements provided in sub-section(2) of section 73.
 Provided that such a company shall be required to obtain the rating (including its networth, liquidity and ability to pay its deposits on due date) from a recognised credit rating agency for informing the public.
 Provided further that every company accepting secured deposits from the public shall within 30 days of such acceptance, create a charge on its assets of an amount not less than the amount of deposits accepted.
- (2) The provisions of this Chapter shall, mutatis mutandis, apply to the acceptance of deposits from public under this section.

If company fails to repay deposit OR part thereof depositor MAY apply to NCLT for remedy.



Acceptance of deposits by company

Default in repayment of deposits



Deposit accepted before commencement of companies act, 2013 (section 74)

If a company has accepted deposits in companies act, 1956 and fails to repay within:

1. 3 months of commencement of Companies Act, 2013 OR

2. On the maturity date OR

3. Within 3 years or commencement of new act OR

4. Within extended time granted by NCLT

Punishment

- a. Company: ≥ 1 crores ≤ 10 crores

- b. Every officer of company:
Imprisonment ≤ 7 years OR
Penalty $\geq 25L \leq 2$ crores OR
BOTH

Deposit accepted after commencement of Companies Act 2013 (section 76A)

If company has accepted deposits in Companies Act 2013 and fails to repay as per section 73 or section 76:

Punishment:

- a. Company:

Minimum- 1 crore OR 2 times deposit amount
whichever is lower

Maximum- 10 crore

- b. Every officer of company:

Imprisonment ≤ 7 years AND

Penalty $\geq 25L \leq 2$ crores

Officer contravenes knowingly and willfully

Liable under section 447



PROVISIONS REGARDING ACCEPTANCE OF DEPOSITS FROM MEMBERS	PROVISIONS REGARDING ACCEPTANCE OF DEPOSITS FROM PUBLIC BY ELIGIBLE COMPANIES
(1) Any company may accept or renew deposits from its members by following the provisions as set out below:	(1) Only 'eligible companies' are permitted to accept deposits from the public, in addition to their members.
Exemption to certain private companies: (A) which accepts from its members monies not exceeding one hundred per cent. of aggregate of the paid-up share capital, free reserves and securities premium account; or (B) which is a start-up, for 10 years from the date of its incorporation; or (C) which fulfils all of the following conditions, namely: (a) which is not an associate or a subsidiary company of any other company; (b) if the borrowings of such a company from banks or financial institutions or any body corporate is less than twice of its paid-up share capital or fifty crore rupees, whichever is lower; and (c) such a company has not defaulted in the repayment of such borrowings subsisting at the time of accepting deposits under this section. However, such a company [as referred to in clauses (A), (B) or (C)] shall file the details of monies accepted to the Registrar in the specified manner (i.e. in Form DPT-3).	
(2) Passing of a Resolution: A company is required to pass a resolution in general meeting for acceptance of deposits from its members. [section 73 (2)].	(2) Passing of Special Resolution: The 'eligible company' is required to obtain the prior consent by means of a special resolution in general meeting and also file the said resolution with the Registrar of Companies before making any invitation to the public for acceptance of deposits.



(3) Issuance of a Circular containing Statement: The company is required to issue a circular to its members including therein a statement showing the financial position of the company, the credit rating obtained, the total number of depositors and the amount due towards deposits in respect of any previous deposits accepted by the company and such other particulars in the prescribed form and manner. DPT-1. [section 73 (2) (a)] Filing of Circular: The company is required to file a copy of the circular containing the statement with the Registrar within 30 days before the date of issue of the circular. [section 73 (2) (b)] Certification as to No default in Repayment: The company needs to certify that it has not committed any default in the repayment of deposits accepted either before or after the commencement of this Act or payment of interest on such deposits. In case a default had occurred, the company made good the default and a period of five years had lapsed since the date of making good the default. [section 73 (2) (e)]	(3) Issuance of Circular in the Form of Advertisement : An ‘eligible company’ intending to invite deposits is required to issue a circular in the form of an advertisement in DPT-1. Such advertisement shall be published in English in an English newspaper and in vernacular language in a vernacular newspaper. Both newspapers should have wide circulation in the State in which the registered office of the company is situated. If the company has its website, the circular shall also be placed on the website. Obtaining of Credit Rating: The ‘eligible company’ shall be required to obtain the rating (including its net-worth, liquidity and ability to pay its deposits on due date) from a recognised credit rating agency. The given rating which ensures safety shall be informed to the public at the time of invitation of deposits from the public. Further, the rating shall be obtained for every year during the tenure of deposits.
(5) Requirement of Deposit Repayment Reserve Account: The company is required to deposit, on or before 30th of April each year, at least 20% of the amount of its deposits maturing during the following financial year and kept in a scheduled bank in a separate bank account to be called deposit repayment reserve account. [section 73 (2) (c)] Such amount shall not at any time fall below twenty percent of the amount of deposits maturing during the financial year.	
(6) Provision of Security: The company may provide security, if any, for the due repayment of the amount of deposit or the interest thereon. Further, if security is provided, the company shall take steps for the creation of charge on the property or assets of the company.	



(7) **Appointment of Trustee for Depositors:** Following provisions are required to be observed in this respect:

- One or more trustees for depositors need to be appointed by the company for creating security for the deposits.
- A written consent shall be obtained from the trustee before their appointment.
- A statement shall appear in the circular or advertisement with reasonable prominence to the effect that the trustees for depositors have given their consent to the company for such appointment.
- The company shall execute a deposit trust deed in Form DPT-2 at least seven days before issuing the circular or circular in the form of advertisement.
- No person including a company that is in the business of providing trusteeship services shall be appointed as a trustee for the depositors, if the proposed trustee:
 - (a) is a director, key managerial personnel or any other officer or an employee of the company or of its holding, subsidiary or associate company or a depositor in the company;
 - (b) is indebted to the company, or its subsidiary or its holding or associate company or a subsidiary of such holding company;
 - (c) has any material pecuniary relationship with the company;
 - (d) has entered into any guarantee arrangement in respect of principal debts secured by the deposits or interest thereon;
 - (e) is related to any person specified in clause (a) above.
- No trustee for depositors shall be removed from office after the issue of circular or advertisement and before the expiry of his term except with the consent of all the directors present at a meeting of the board.

(8) **Maximum Amount of Deposits from Members:** A company is permitted to accept or renew any deposit from its members including other such deposits outstanding as on the date of acceptance or renewal.

$$\text{Max} = \leq 35\% [\text{PSC} + \text{FR} + \text{SP}]$$

(8) **Maximum Amount of Deposits :** An eligible company is permitted to accept or renew deposits as under:

From its members:

$$\text{Member} = \leq 10\% [\text{PSC} + \text{FR} + \text{SP}]$$

From Persons other than its Members:

$$\text{Public} = \leq 25\% [\text{PSC} + \text{FR} + \text{SP}]$$

Maximum Amount of Acceptable Deposit in case of an Eligible Government Company:

$$\text{Members} + \text{Public} = \leq 35\% [\text{PSC} + \text{FR} + \text{SP}]$$

(9) **Repayment of deposit:** Every deposit accepted by a company shall be repaid with interest in accordance with the terms and conditions of the agreement. [Section 73 (3)]

(10) **Application to Tribunal if the Company fails to Repay:** In case a company fails to repay the deposit or part thereof or any interest thereon, the depositor concerned may apply to the Tribunal for an order directing the company to pay the sum due or for any loss or damage incurred by him as a result of such non- payment and for such other orders as the Tribunal may deem fit. [Section 73 (4)]



(11) Tenure for which Deposits can be Accepted: A company is not permitted to accept or renew deposits (whether secured or unsecured) which is repayable on demand or in less than six months. Further, the maximum period of acceptance of deposit cannot exceed thirty six months.

Exception to the rule of tenure of six months: For the purpose of meeting any of its short-term requirements of funds, a company may accept or renew deposits for repayment earlier than six months subject to the condition that:

- (i) such deposits shall not exceed ten per cent. of the aggregate of the paid-up share capital, free reserves and securities premium account of the company; and
- (ii) such deposits are repayable only on or after three months from the date of such deposits or renewal.

(12) Register of Deposits:

- Every company accepting deposits shall **maintain one or more separate registers** for deposits accepted or renewed at its registered office.

Following **particulars** shall be entered separately in the case of each depositor:

- (a) name, address and PAN of the depositor/s;
 - (b) particulars of the guardian, in case of a minor;
 - (c) particulars of the nominee;
 - (d) deposit receipt number;
 - (e) date and the amount of each deposit;
 - (f) duration of the deposit and the date on which each deposit is repayable;
 - (g) rate of interest on such deposits to be payable to the depositor;
 - (h) due date for payment of interest;
 - (i) mandate and instructions for payment of interest and for non- deduction of tax at source, if any;
 - (j) date or dates on which the payment of interest shall be made;
 - (l) particulars of security or charge created for repayment of deposits;
 - (m) any other relevant particulars.
- The entries shall be made within seven days from the date of issuance of the receipt duly authenticated by a director or secretary of the company or by any other officer authorised by the Board for this purpose.
 - The said register shall be preserved in good order for a period of **not less than eight years** from the financial year in which the latest entry is made in the register.

(13) Ceiling on Rate of Interest and Brokerage Payable on Deposits: A company is permitted to invite or accept or renew any deposit at any rate of interest or pay any amount of brokerage but in no case, it shall exceed the maximum rate of interest or brokerage prescribed by the Reserve Bank of India in case of non-banking financial companies (NBFCs) for acceptance of deposits.



- (14) **Deposits in Joint Names:** In case the depositors so desire, deposits may be accepted in joint names not exceeding three. A joint deposit may be accepted with or without any of the clauses, namely, “Jointly”, “Either or Survivor”, “First named or Survivor”, “Anyone or Survivor”. These clauses operate on maturity.
- (15) **Filing of Return of Deposits with the Registrar:** A duly audited return of deposits in DPT-3 (containing particulars as on 31st March of every year) shall be filed with the Registrar of Companies along with requisite fee on or before the 30th June of that year (other than a Government company).
- (16) **No Right to Alter:** The company has no right to alter any of the terms and conditions of the deposit, deposit trust deed and deposit insurance contract which may prove detrimental to the interest of the depositors after circular or circular in the form of advertisement is issued and deposits are accepted.
- (17) **Penal Rate of Interest :** In case the company fails to repay deposits (both secured and unsecured) on maturity, after they are claimed, it shall pay penal rate of interest of **eighteen per cent per annum** for the overdue period.
- (18) **Punishment for Contravention:** If any company inviting deposits or any other person contravenes any of the ‘deposit rules’ for which no punishment is provided in the Act, the company and every officer-in-default shall be punishable as under:
- **with fine** extendable to **five thousand rupees**; and
 - in case the contravention is a **continuing one**, with a further fine up to **five hundred rupees** for every day during which the contravention continues.
- (19) **Premature Repayment of Deposits :** After the expiry of six months but before the actual date of maturity, if a depositor requests for premature repayment, the rate of interest payable shall be **one percent less than the rate** which would be payable for the period for which the deposit has actually run.

PUNISHMENT FOR CONTRAVENTION OF SECTION 73 OR SECTION 76

According to section 76A of the Act, in case a company accepts or invites or allows any other person to accept or invite on its behalf any deposit in contravention of the manner or the conditions prescribed under section 73 or section 76 or rules made thereunder or if a company fails to repay the deposit or part thereof or any interest within the time specified under section 73 or section 76 or rules made thereunder or such further time as may be allowed by the Tribunal under section 73, then the following consequences will follow:

- (a) **Punishment for the company:** The company shall, in addition to the payment of the amount of deposit or part thereof and the interest due, be punishable with fine which shall not be less than one crore rupees or twice the amount of deposit accepted by the company, whichever is lower but which may extend to ten crore rupees; and
- (b) **Punishment for officer-in-default:** Every officer of the company who is in default shall be punishable with imprisonment which may extend to seven years and with fine which shall not be less than twenty-five lakh rupees but which may extend to two crore rupees. Further, if it is proved that the officer of the company who is in default, has contravened such provisions knowingly or wilfully with the intention to deceive the company or its shareholders or depositors or creditors or tax authorities, he shall be liable for action under section 447 (Punishment for fraud).



REPAYMENT OF DEPOSITS ACCEPTED BEFORE COMMENCEMENT OF THE COMPANIES ACT, 2013

The provisions regarding repayment of deposits accepted before commencement of the Companies Act, 2013, has been dealt with in section 74. These provisions are explained as under:

- (i) **Filing of Statement of Deposits with the Registrar of Companies and Repayment Thereafter:** As per section 74 (1), in case any deposit was accepted by a company before the commencement of this Act (i.e. before 1.4.2014), and the amount of such deposit or any interest remains unpaid as on 1.4.2014 or becomes due at any time thereafter, the company shall take the following steps:
 - (a) **file**, within a period of **3 months** from such commencement or from the date on which such payments are due, with the Registrar:
 - a statement of all the deposits accepted by the company and sums remaining unpaid on such amount with the interest payable thereon along with the arrangements made for such repayment. This is to be done notwithstanding anything contained in any other law for the time being in force or under the terms and conditions subject to which the deposit was accepted or any scheme framed under any law; and
 - (b) **repay within three years** from such commencement or on or before expiry of the period for which the deposits were accepted, whichever is earlier.
- (ii) **Extension of Time for Repayment of Deposits by the Tribunal:** As per section 74 (2), the Tribunal may, on an application made by the company, after considering the financial condition of the company, the amount of deposit and the interest payable thereon and such other matters, allow further time as considered reasonable to the company to repay the deposit.
- (iii) **Punishment for Non-Repayment of Deposits:** As per section 74 (3), if a company fails to repay the deposit or part thereof or any interest thereon within the time specified in section 74 (1) or such further extended time allowed by the Tribunal under section 74 (2), the company shall, in addition to the payment of the amount of deposit or part thereof and the interest due, be punishable as under:
 - **company:** with fine minimum of one crore rupees and maximum of ten crore rupees; and
 - **every officer-in-default:** with imprisonment extendable to seven years or with fine minimum of 25 lakh rupees and maximum of two crore rupees, or with both.



QUESTION & ANSWERS



Question 1.

Discuss the following situations in the light of 'deposit provisions' as contained in the Companies Act, 2013 and the Companies (Acceptance of Deposits) Rules, 2014, as amended from time to time.

- (i) Samit, one of the directors of Zarr Technology Private Limited, a start-up company, requested his close friend Ritesh to lend to the company ₹30.00 lacs in a single tranche by way of a convertible note repayable within a period six years from the date of its issue. Advise whether it is a deposit or not
- (ii) Polestar Traders Limited received a loan of ₹30.00 lacs from Rachna who is one of its directors. Advise whether it is a deposit or not.
- (iii) City Bakers Limited failed to repay deposits of ₹50.00 crores and interest due thereon even after the extended time granted by the Tribunal. Is the company or Swati, its officer-in-default, liable to any penalty?
- (iv) Shringaar Readymade Garments Limited wants to accept deposits of ₹ 50.00 lacs from its members for a tenure which is less than six months. Is it a possibility?
- (v) Is it in order for the Diamond Housing Finance Limited to accept and renew deposits from the public from time to time?

(ICAI Module, May'20 Mock Test)



Solution:

- (i) In terms of Rule 2 (1) (c) (xvii) if a start-up company receives rupees twenty five lakh or more by way of a convertible note (convertible into equity shares or repayable within a period not exceeding 10 years from the date of issue) in a single tranche, from a person, it shall not be treated as deposit.

In the given case, Zarr Technology Private Limited, a start-up company, received ₹ 30.00 lacs from Ritesh in a single tranche by way of a convertible note which is repayable within a period of six years from the date of its issue. In view of Rule 2 (1) (c) (xvii) which requires a convertible note to be repayable within a period of 10 years from the date of its issue, the amount of ₹30.00 lacs shall not be considered as deposit.

- (ii) In terms of Rule 2 (1) (c) (viii), any amount received from a person who is director of the company at the time of giving loan to the company shall not be treated as deposit if such director furnishes to the company at the time of giving money, a written declaration to the effect that the amount is not being given out of funds acquired by him by borrowing or accepting loans or deposits from others and further, the company shall disclose the details of money so accepted in the Board's report.

In the given case, it is assumed that Rachna was one of the directors of Polestar Traders Limited when the company received a loan of ₹30.00 lacs from her. Further, it is assumed that she had furnished to the company at time of giving money, a written declaration to the effect that the amount was not being given out of funds acquired by her by borrowing or accepting loans or deposits from others and in addition, the company had disclosed



the details of money so accepted in the appropriate Board's report. If these conditions are satisfied ₹ 30.00 lacs shall not be treated as deposit.

- (iii) By not repaying the deposit of ₹50.00 crores and the interest due thereon even after the extended time granted by the Tribunal, City Bakers Limited has contravened the conditions prescribed under Section 73 of the Act. Accordingly, following penalty is leviable:

- Punishment for the company: City Bakers Limited shall, in addition to the payment of the amount of deposit and the interest due thereon, be punishable with fine which shall not be less than ₹ one crore or twice the amount of deposit accepted by the company, whichever is lower but which may extend to ₹ten crores.
- Punishment for officer-in-default: Swati, being the officer-in-default, shall be punishable with imprisonment which may extend to seven years and with fine which shall not be less than rupees twenty-five lakhs but which may extend to ₹two crores.

Further, if it is proved that Swati had contravened such provisions knowingly or wilfully with the intention to deceive the company or its shareholders or depositors or creditors or tax authorities, she will be liable for action under section 447 (Punishment for fraud).

- (iv) According to Rule 3 (1), a company is not permitted to accept or renew deposits (whether secured or unsecured) which is repayable on demand or in less than six months. Further, the maximum period of acceptance of deposit cannot exceed thirty six months.

However, as an exception to this rule, for the purpose of meeting any of its short-term requirements of funds, a company is permitted to accept or renew deposits for repayment earlier than six months subject to the conditions that:

- (i) such deposits shall not exceed ten per cent. of the aggregate of the paid-up share capital, free reserves and securities premium account of the company; and
- (ii) such deposits are repayable only on or after three months from the date of such deposits or renewal.

In the given case of Shringaar Readymade Garments Limited, it wants to accept deposits of ₹ 50.00 lacs from its members for a tenure which is less than six months. It can do so if it justifies that the deposits are required for the purpose of meeting any of its short-term requirements of funds but in no case such deposits shall exceed 10% ten per cent of the aggregate of its paid- up share capital, free reserves and securities premium account and further, such deposits shall be repayable only on or after three months from the date of such deposits.

- (v) According to **section 73 (1)** of the Act, no company can accept or renew deposits from public unless it follows the manner provided under Chapter V of the Act (contains provisions regarding acceptance of deposits by companies) for acceptance or renewal of deposits from public. However, Proviso to **Section 73 (1)** states that such prohibition with respect to the acceptance or renewal of deposit from public, inter-alia, shall not apply to a housing finance company registered with the National Housing Bank established under the National Housing Bank Act, 1987.

In the given case, it is assumed that Diamond Housing Finance Limited is registered with the National Housing Bank and therefore the prohibition contained in **section 73 (1)** of the Act with respect to the acceptance renewal of deposit from public shall not apply to



it. In other words, it being an exempted company, can accept deposits from the public from time to time without following the prescribed manner.



Question 2.

Enumerate the amounts which when received by a company in the ordinary course of business are not to be considered as deposits.

(ICAI Module)



Solution:

According to Rule 2 (1) (c) (xii), following amounts if received by a company in the course of, or for the purposes of, the business of the company, shall not be considered as deposits:

- (a) any amount received as an advance for the supply of goods or provision of services accounted for in any manner whatsoever to be appropriated within a period of three hundred and sixty five days from the date of acceptance of such advance:
However, in case any advance is subject matter of any legal proceedings before any court of law, the time limit of three hundred and sixty five days shall not apply.
- (b) any amount received as advance in connection with consideration for an immovable property under an agreement or arrangement. However, such advance is required to be adjusted against such property in accordance with the terms of agreement or arrangement;
- (c) any amount received as security deposit for the performance of the contract for supply of goods or provision of services;
- (d) any amount received as advance under long term projects for supply of capital goods except those covered under item (b) above;
- (e) any amount received as an advance towards consideration for providing future services in the form of a warranty or maintenance contract as per written agreement or arrangement, if the period for providing such services does not exceed the period prevalent as per common business practice or five years, from the date of acceptance of such service whichever is less;
- (f) any amount received as an advance and as allowed by any sectoral regulator or in accordance with directions of Central or State Government;
- (g) any amount received as an advance for subscription towards publication, whether in print or in electronic to be adjusted against receipt of such publications;
However, if the amount received under items (a), (b) and (d) above becomes refundable (with or without interest) due to the reasons that the company accepting the money does not have necessary permission or approval, wherever required, to deal in the goods or properties or services for which the money is taken, then the amount received shall be deemed to be a deposit under these rules.
Further, for the purposes of this sub-clause the amount shall be deemed to be deposits on the expiry of fifteen days from the date they become due for refund.



Question 3.

ABC Limited having a net worth of ₹120 crores wants to accept deposit from its members. The directors of the company have approached you to advise them as to what special care has to be taken while accepting such deposit from the members in case their company falls within the category of an 'eligible company'.

(ICAI Module, May'19 Mock Test)



Solution:

According to section 76 (1) of the Act, an “eligible company” means a public company, having a net worth of not less than one hundred crore rupees or a turnover of not less than five hundred crore rupees and which has obtained the prior consent of the company in general meeting by means of a special resolution and also filed the said resolution with the Registrar of Companies before making any invitation to the public for acceptance of deposits.

However, an ‘eligible company’, which is accepting deposits within the limits specified, may accept deposits by means of an ordinary resolution.

According to Rule 4 (a), an ‘eligible company’ shall accept or renew any deposit from its members, if the amount of such deposit together with the amount of deposits outstanding as on the date of acceptance or renewal of such deposits from members does not exceed ten per cent. of the aggregate of the paid-up share capital, free reserves and securities premium account of the company.

ABC Limited is having a net worth of 120 crore rupees. Hence, it falls in the category of ‘eligible company’.

Thus, ABC has to ensure that acceptance deposits from members together with the amount of deposits outstanding as on the date of acceptance or renewal of such deposits from members, in no case, exceeds 10% of the aggregate of the paid-up share capital, free reserves and securities premium account of the company.



Question 4.

Ashish Ltd. having a net-worth of ₹80 crores and turnover of ₹30 crores want to accept deposits from public other than its members. Referring to the provisions of the Companies Act, 2013, state the conditions and the procedures to be followed by Ashish Ltd for accepting deposits from public other than its members.

(May'19 RTP)



Solution:

Acceptance of deposit from public: According to section 76 of the Companies Act, 2013, a public company, having net worth of not less than 100 crore rupees or turnover of not less than 500 crore rupees, can accept deposits from persons other than its members subject to compliance with the requirements provided in sub-section (2) of section 73 and subject to such rules as the Central Government may, in consultation with the Reserve Bank of India, prescribe.

Provided that such a company shall be required to obtain the rating (including its net-worth, liquidity and ability to pay its deposits on due date) from a recognised credit rating agency for informing the public the rating given to the company at the time of invitation of deposits from the public which ensures adequate safety and the rating shall be obtained for every year during the tenure of deposits.

Provided further that every company accepting secured deposits from the public shall within thirty days of such acceptance, create a charge on its assets of an amount not less than the amount of deposits accepted in favour of the deposit holders in accordance with such rules as may be prescribed.

Since, Ashish Ltd. has a net worth of ₹80 crores and turnover of ₹30 crores, which is less than the prescribed limits, hence, it cannot accept deposit from public other than its members. If the company wants to accept deposits from public other than its members, it has to fulfill the eligibility criteria of net worth or Turnover or both and then the other conditions as stated above.



Question 5.

Explain provisions for 'Appointment of Trustee for Depositors' under the Companies Act, 2013. (May'18- 6 Marks)



Solution:

Appointment of Trustee for Depositors [Rule 7 of the Companies (Acceptance of Deposits) Rules, 2014]:

- (1) No company referred to in sub-section (2) of section 73 or any eligible company shall issue a circular or advertisement inviting secured deposits unless the company has appointed one or more trustees for depositors for creating security for the deposits. However, a written consent shall be obtained from the trustee for depositors before their appointment and a statement shall appear in the circular or circular in the form of advertisement with reasonable prominence to the effect that the trustees for depositors have given their consent to the company to be so appointed.
- (2) The company shall execute a deposit trust deed in DPT-2 at least seven days before issuing the circular or circular in the form of advertisement.
- (3) No person including a company that is in the business of providing trusteeship services shall be appointed as a trustee for the depositors, if the proposed trustee:
 - (a) is a director, key managerial personnel or any other officer or an employee of the company or of its holding, subsidiary or associate company or a depositor in the company;
 - (b) is indebted to the company, or its subsidiary or its holding or associate company or a subsidiary of such holding company;
 - (c) has any material pecuniary relationship with the company;
 - (d) has entered into any guarantee arrangement in respect of principal debts secured by the deposits or interest thereon;
 - (e) is related to any person specified in clause (a) above.
- (4) No trustee for depositors shall be removed from office after the issue of circular or advertisement and before the expiry of his term except with the consent of all the directors present at a meeting of the board.



Question 6.

State, with reasons, whether the following statements are true or false?

- (i) ABC Private Limited may accept the deposits from its members to the extent of ₹50.00 Lakh, if the aggregate of its paid-up capital; free reserves and security premium account is ₹50.00 Lakh.
- (ii) A Government Company, which is eligible to accept deposits under Section 76 of the Companies Act, 2013 cannot accept deposits from public exceeding 25% of the aggregate of its paid- up capital, free reserves and security premium account

(May'19- 2 Marks)



Solution:

- (i) As per the provisions of Section 73(2) of the Companies Act, 2013 read with Rule 3 of the Companies (Acceptance of Deposits) Rules, 2014, as amended by the Companies (Acceptance of Deposits) Amendment Rules, 2016, a company shall accept any deposit from its members, together with the amount of other deposits outstanding as on the date



of acceptance of such deposits not exceeding thirty five per cent of the aggregate of the Paid-up share capital, free Reserves and securities premium account of the company. Provided that a private company may accept from its members monies not exceeding one hundred per cent of aggregate of the paid up share capital, free reserves and securities premium account and such company shall file the details of monies so accepted to the Registrar in such manner as may be specified.

Therefore, the given statement of eligibility of ABC Private Ltd. to accept deposits from its members to the extent of ₹ 50.00 lakh is True.

- (ii) A Government company is not eligible to accept or renew deposits under section 76, if the amount of such deposits together with the amount of other deposits outstanding as on the date of acceptance or renewal exceeds thirty five per cent of the aggregate of its Paid-up share capital, free Reserves and securities premium account of the company. Therefore, the given statement prescribing the limit of 25% to accept deposits is False.



Question 7.

Define the term 'deposit' under the provisions of the Companies Act, 2013 and comment with relevant provisions that the following amount received by a company will be considered as deposit or not;

- (i) ₹5,00,000 raised by Rishi Ltd. through issue of non-convertible debenture not constituting a charge on the assets of the company and listed on a recognised stock exchange as per applicable regulations made by Securities and Exchange Board of India.
- (ii) ₹2,00,000 received from Mr. T, an employee of the company who is drawing annual salary of ₹1,50,000 under a contract of employment with the company in the nature of non-interest bearing security deposit.
- (iii) Amount of ₹3, 00,000 received by a private company from a relative of a Director, declared by the depositor as out of gift received from his mother.

(Nov'19-6 Marks)



Solution:

Deposit: According to section 2 (31) of the Companies Act, 2013, the term 'deposit' includes any receipt of money by way of deposit or loan or in any other form, by a company, but does not include such categories of amount as prescribed in the Rule 2 (1) (c) of the Companies (Acceptance of deposit) Rules, 2014, in consultation with the Reserve bank of India.

Amounts received by the company will not be considered as deposit: In terms of Rule 2 (1) (c) of the Companies (Acceptance of deposit) Rules, 2014, following shall be the answers-

- (i) In the first case, where ₹5,00,000 raised by the Rishi Ltd. through issue of non-convertible debenture not constituting a charge on the assets of the company and listed on recognised stock exchange as per the applicable regulations made by the SEBI, will not be considered as deposit in terms of sub-clause (ixa) of the said rule.
- (ii) In the second case, ₹2,00,000 was received from Mr. T, an employee of the company drawing annual salary of ₹1,50,000 under a contract of employment with the company in the nature of non-interest bearing security deposit. This amount received by company from employee, Mr. T will be considered as deposit in terms of sub-clause (x) of the said rule, as amount received is more than his annual salary under a contract of employment with the company in the nature of non-interest bearing security deposit.



- (iii) In the third case, amount of ₹3,00,000 received by a private company from a relative of a Director, declaring details of the amounts so deposited as out of gift received from his mother. This amount received by the private Company will not be considered as deposit in terms of sub-clause (viii) of the said rule. Here as per the requirement, the relative of the director of the private company, from whom money is received, furnished the declaration in writing to the effect that the amount is given out of gift received from his mother and not being given out of funds acquired by him by borrowing or accepting loans or deposits from others.



Question 8:

Viki Limited engaged in the business of consumer durables. It is managed by a team of professional managers. The Company has not made default in payment of statutory dues, and repayment of debenture/ Institutional loan with interest. The Company advertised a circular in the newspaper dated 20th September 2020 inviting the deposits from the members and public for the first time. The latest audited financial statement of the Company revealed the following data, as on 31.3.2020:

Paid up share capital	₹ 70 Crores
Securities Premium	₹ 20 Crores
Free Reserves	₹ 20 Crores
Long-term borrowings	₹ 50 Crores

The Company in the advertisement invited public deposit for a period of 4 Months Plan A and Plan B for 36 Months.

- Explain the term 'eligible company' and calculate the Maximum amount of Deposit that can be accepted from Public (Non-Member) for Plan A and Plan B based on latest audited Financial Statement under the provisions of the Companies Act, 2013.
- Calculate the maximum amount of deposit Viki Limited can accept from the public under Plan B in case it is a wholly owned Government Company under the provisions of the said Act.

(6 Marks)



Solution:

According to Rule 2(1)(e) of the Companies (Acceptance of Deposits) Rules, 2014 "eligible company" means a public company as referred to in sub-section (1) of section 76 of the Companies Act, 2013, having a net worth of not less than one hundred crore rupees or a turnover of not less than five hundred crore rupees and which has obtained the prior consent of the company in general meeting by means of a special resolution and also filed the said resolution with the Registrar of Companies before making any invitation to the Public for acceptance of deposits.

Provided that an eligible company, which is accepting deposits within the limits specified under clause (c) of sub-section (1) of section 180, may accept deposits by means of an ordinary resolution.

Net worth of Viki Limited as per section 2(57) of the Companies Act, 2013 can be calculated as follows:

Paid up share capital: ₹ 70 crores Free Reserves: ₹ 20 crores Securities premium: ₹ 20 crores
Total: ₹ 110 crores

Hence, Viki Limited is an eligible company, since its Net worth is in excess of ₹ 100 crores.



Tenure for which Deposits can be Accepted: As per Rule 3(1)(a) of the Companies (Acceptance of Deposits) Rules, 2014, a company is not permitted to accept or renew deposits (whether secured or unsecured) which is repayable on demand or in less than six months. Further, the maximum period of acceptance of deposit cannot exceed thirty six months.

Exception to the rule of tenure of six months: As per the proviso to the above rule, for the purpose of meeting any of its short-term requirements of funds, a company may accept or renew deposits for repayment earlier than six months subject to the condition that such deposits shall not exceed ten per cent. of the aggregate of the paid-up share capital, free reserves and securities premium account of the company.

As per Rule 3(1)(b) of the Companies (Acceptance of Deposits) Rules, 2014, such deposits are repayable not earlier than three months from the date of such deposits or renewal thereof.

Maximum Amount of Deposits: As per Rule 3(4)(b) of the Companies (Acceptance of Deposits) Rules, 2014, an eligible company is permitted to accept or renew deposits from persons other than its members. As per the law the amount of such deposit together with the amount of outstanding deposits (excluding deposits from members) on the date of acceptance or renewal can be maximum twenty-five per cent. of the aggregate of its paid-up share capital, free reserves and securities premium account of the company.

For Plan A: Since the maximum period of deposits is 4 months, the maximum amount of deposits shall not exceed ten per cent. of the aggregate of the paid-up share capital, free reserves and securities premium account of the company.

Maximum amount of deposits: 10% of 110 crores (70 + 20 + 20) = 11 crores.

For Plan B: Maximum amount of deposits: 25% of 110 crores (70 + 20 + 20) - 11 crores (outstanding deposit under plan A) = 16.5 crores.

CHAPTER WISE - CLASS TEST



Question 1:

(a) RS Ltd. received share application money of ₹ 50.00 Lakh on 01.06.2019 but failed to allot shares within the prescribed time limit.

The share application money of ₹ 5.00 Lakh received from Mr. Khanna, a customer of the Company, was refunded by way of book adjustment towards the dues payable by him to the company on 30.07.2019. The Company Secretary of RS Ltd. reported to the Board that the entire amount of ₹ 50.00 Lakh shall be deemed to be 'Deposits' as on 31.07.2019 and the Company is required to comply with the provisions of the Companies Act, 2013 applicable to acceptance of deposits in relation to this amount.

You are required to examine the validity of the reporting of the Company Secretary in the light of the relevant provisions of the Companies Act, 2013. (4 Marks)



Solution:

According to Rule 2(1)(c) of the Companies (Acceptance of Deposits) Rules, 2014, the following category of receipt is not considered as deposit:

Any amount received and held pursuant to an offer made in accordance with the provisions of the Companies Act, 2013 towards subscription to any securities, including share application money or advance towards allotment of securities, pending allotment, so long as such amount is appropriated only against the amount due on allotment of the securities applied for;

It is clarified by way of Explanation that if the securities for which application money or advance for such securities was received cannot be allotted within 60 days from the date of



receipt of the application money or advance for such securities and such application money or advance is not refunded to the subscribers within 15 days from the date of completion of 60 days, such amount shall be treated as a deposit under these rules.

Further, it is clarified that any adjustment of the amount for any other purpose shall not be treated as refund.

In the given question, RS Limited has received ₹ 50 Lakhs as share application money on 01.06.2019. It failed to allot shares within the prescribed limit. Further, on 30. 07.2019 the company adjusted the amount of ₹ 5 Lakhs received from Mr. Khanna (a customer of the company), by way of book adjustment towards the dues payable by him to the company.

In the light of the facts of the question and provisions of Law:

- (1) If such application money or advance is not refunded to the subscribers within 15 days from the date of completion of 60 days, such amount shall be treated as a deposit. In the question, the prescribed limit of 60 days will end on 31.07.2019 and the company has 15 more days to refund such application money to the subscribers. Otherwise, after lapse of such 15 days, the amount not so refunded will be treated as deposit. Hence, the Company Secretary of RS Limited is not correct in treating the entire amount of ₹ 50 Lac as 'Deposits' on 31.07.2019.
- (2) Any adjustment of the amount for any other purpose shall not be treated as refund. Thus, the amount of ₹ 5 Lakhs adjusted against payment due to be received from Mr. Khanna, cannot be treated as refund.



Question 2:

The Promoters of Jayshree Spinning Mills Limited contributed in the shape of unsecured loan to the company in fulfilment of the margin money requirements stipulated by State Industries Development Corporation Ltd. (SIDCL) for granting loan. In the light of the provisions of the Companies Act, 2013 and Rules made thereunder whether the unsecured loan will be regarded as Deposit or not. What will be your answer in case the entire loan obtained from SIDCL is repaid? (4 Marks)



Solution:

According to Rule 2 (1) (c) of the Companies (Acceptance of Deposits) Rules, 2014, the following amount is not considered as deposit:

Any amount brought in by the promoters of the company by way of unsecured loan in pursuance of the stipulation of any lending financial institution or a bank subject to the fulfillment of following conditions:

- (a) the loan is brought because of the stipulation imposed by the lending institutions on the promoters to contribute such finance;
- (b) the loan is provided by the promoters themselves or by their relatives or by both; and
- (c) such exemption shall be available only till the loans of financial institution or bank are repaid and not thereafter.

Hence, in the instant case, the unsecured loan contributed by promoters of Jayshree Spinning Mills Limited will not be regarded as deposit as the unsecured loan is brought because of the stipulation imposed by the SIDCL and the loan is provided by the promoters themselves.

In case the entire loan obtained from SIDCL is repaid, then the unsecured loan provided by promoters of Jayshree Spinning Mills Limited will be regarded as deposit



MCQs



Question 1:

Varsha Limited decides to raise deposits of ₹ 20.00 lakh from its members. However, it proposes to secure such deposits partially by offering a security worth ₹ 15.00 lakh. Which of the following options best describe such deposits:

- (a) Fully secured deposits (except a small portion)
- (b) Unsecured deposits
- (c) Partially secured deposits
- (d) These cannot be classified as deposits



Solution:

- (b) Unsecured deposits



Question 2.

What is the maximum tenure for which a company can accept or renew deposits from its members as well as public?

- (a) 12 months
- (b) 24 months
- (c) 36 months
- (d) 48 months



Solution:

- (c) 36 months



Question 3.

Fin Limited is accepting deposits of various tenures from its members from time to time. The current Register of Deposits, maintained at its registered office is complete. State the minimum period for which it should mandatorily be preserved in good order.

- (a) Four years from the financial year in which the latest entry is made in the Register.
- (b) Six years from the financial year in which the latest entry is made in the Register.
- (c) Eight years from the financial year in which the latest entry is made in the Register.
- (d) Ten years from the latest date of entry.



Solution:

- (c) Eight years from the financial year in which the latest entry is made in the Register.



Question 4.

Every company shall pay a penal rate of interest of per annum for the overdue period in case of deposits, whether secured or unsecured, matured and claimed but remaining unpaid:

- (a) 9%
- (b) 14%
- (c) 18%
- (d) 24%



Solution:

(c) 18%



Question 5.

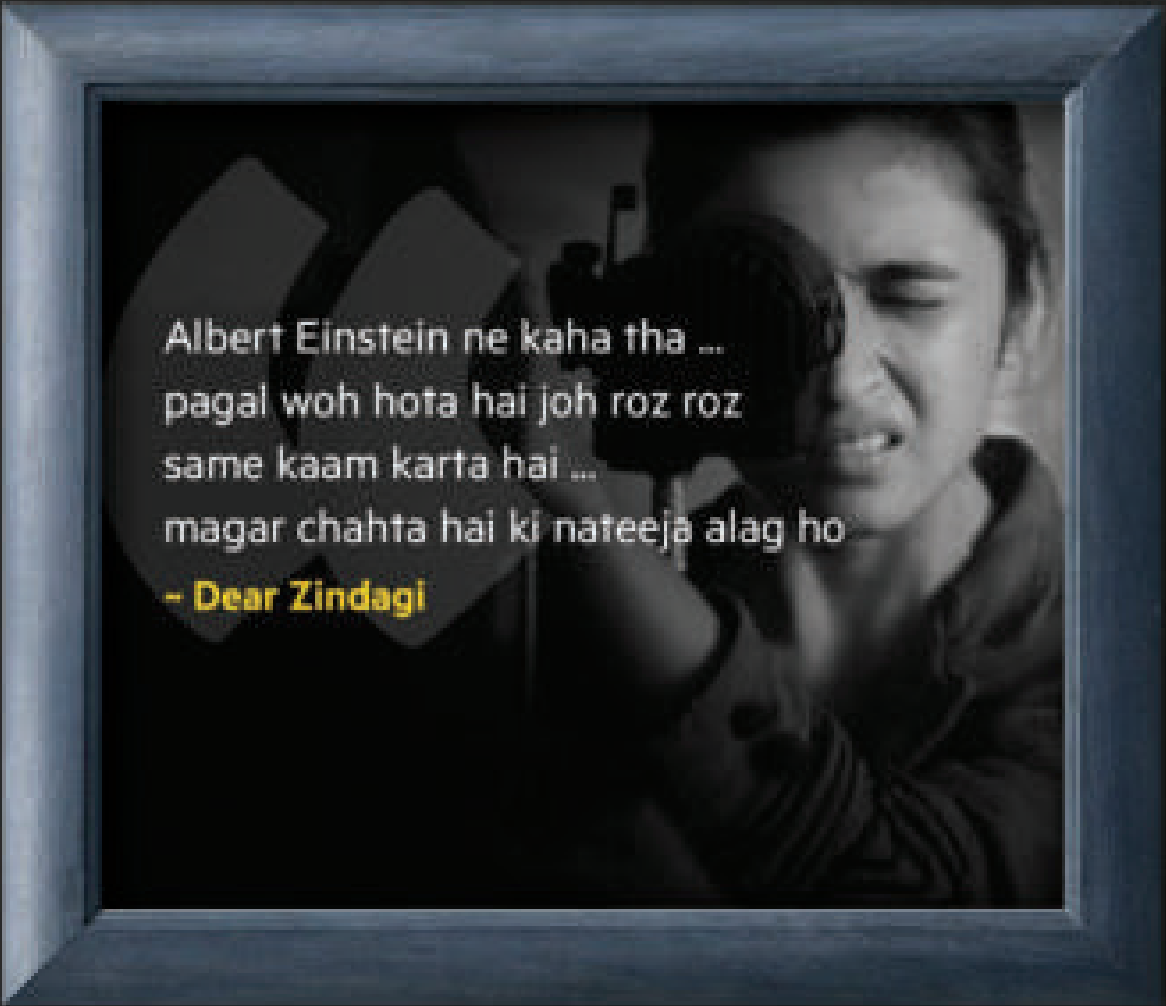
As per the provisions of the Companies Act, 2013 and relevant rules thereunder, an eligible company is not permitted to accept from public or renew the same deposits (whether secured or unsecured) which is repayable on demand or in less than _____ months. Further, the maximum period of acceptance of deposit cannot exceed _____ months. But, for the purpose of meeting any of its short- term requirements of funds, a company may accept or renew deposits for repayment earlier than months subject to certain conditions.

- (a) six, thirty six, six
- (b) three, twenty four, three
- (c) six, sixty, six
- (d) three, sixty, six



Solution:

(a) six, thirty six, six



Albert Einstein ne kaha tha ...
pagal woh hota hai joh roz roz
same kaam karta hai ...
magar chahta hai ki nateeja alag ho

- **Dear Zindagi**



06

REGISTRATION OF CHARGES



- Chapters is from the view point of Borrowing Company
- Charge to be Registered for Assets in as well as Outside India
- Charge can be for both Tangible/Intangible Assets

Registration of Charges

Charge means security given for securing loan/debenture.

Fix charge

1. On specific asset.
2. Loss of ownership

Floating charge

1. On a class of asset. (Current Asset)
2. Neither loss of ownership nor possession.

On default it gets converted to fix charge

Section 77
Registration

Within 30 days
CHG-1/CHG-9
(Debenture)

Within 30 days
+
with
ADDITIONAL FEES

Not Registered
within 60 days
If
Within further
60 days with
ADVALOREM

If NOT then

CG Approval
CHG-8
[Section 87]

Certificate of
Registration
CHG-2

Section 79
Modification

Within 30 days
CHG-1/CHG-9
(Debenture)

Within 30 days
+
with
ADDITIONAL FEES

Not Modified
within 60 days
If
Within further
60 days with
ADVALOREM

If NOT then

CG Approval
CHG-8
[Section 87]

Certificate of
Modification
CHG-3

Section 82
Satisfaction

Within 30 days
CHG-4*

270 days
+
with
ADDITIONAL FEES

Not Satisfied
within 300 days
If

If NOT then

CG Approval
CHG-8
[Section 87]

Certificate of
Satisfaction
CHG-5

Consequence of non-registration of charge - Section 86

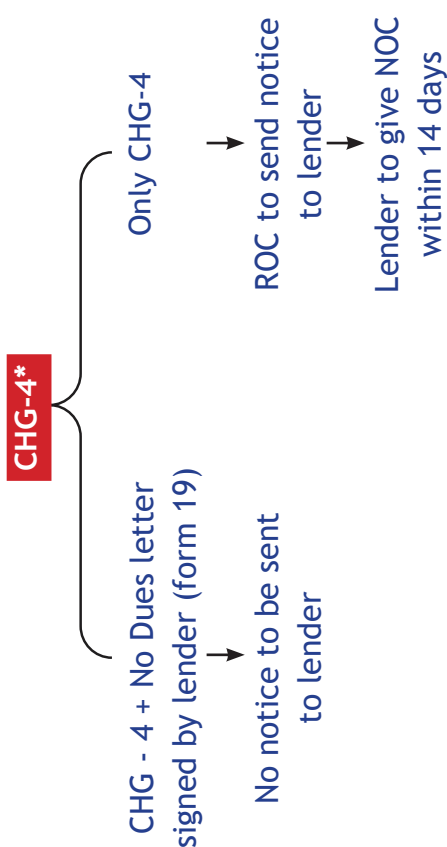
Company Penalty 5 Lacs

Every Officer
Penalty 50000

if any person wilfully furnishes:

- any false or incorrect information; or
- knowingly suppresses any material information; which is required to be registered under section 77, he shall be liable for action under section 447.

An unregistered charge still will be valid & Lender shall have Power to Recover the Money from Borrower



RECTIFICATION BY CENTRAL GOVERNMENT IN REGISTER OF CHARGES [SECTION 87]

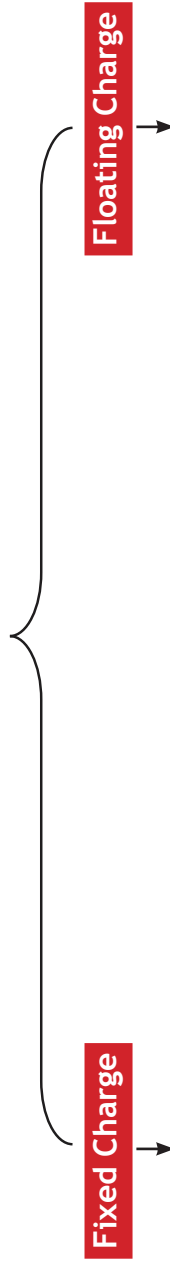
The Central Government on being satisfied that-

- (a) The omission to give intimation to the registrar of the payment or satisfaction of a charge within the time required under this chapter; or
- (b) The omission or misstatement of any particulars in any filing previously made to the Registrar with respect to any such charge or modification or with respect to any memorandum of satisfaction or other entry made in pursuance of section 82 or section 83,
Was accidental or due to inadvertence or some other sufficient cause or it is not of a nature to prejudice the position of creditors or shareholders of the company,
it may on the application of the company or any person interested and on such terms and conditions as the central government deems just and expedient direct that the time for giving of intimation of payment or satisfaction shall be extended or
as the case may require that the omission or misstatement shall be rectified.



INTRODUCTION

According to section 2(16) of the Companies Act, 2013 “charge” has been defined as an interest or lien created on the property or assets of a company or any of its undertakings or both as security and includes a mortgage.

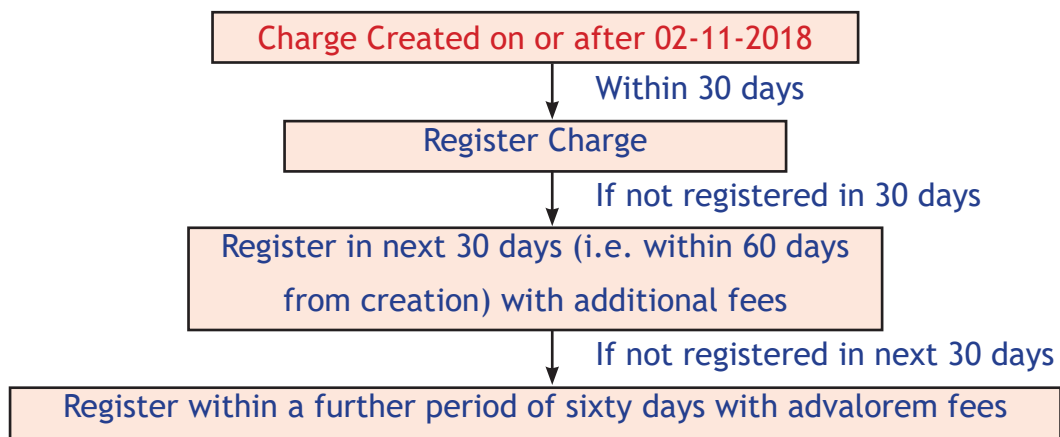


A ‘fixed charge’ is a charge which attaches specific assets of the borrowing company. These assets are of permanent nature like land and building, office premises, machinery installed by the company, etc. and are identified at the time of creation of charge. When a charge is created on such assets, the charge remains ‘fixed’ and the borrowing company is not permitted to sell such assets though it may use them. A fixed charge is created by way of mortgage or deposit of title deeds. Assets under fixed charge can be sold only with the permission of the charge-holder. A fixed charge is vacated when the money borrowed against the assets subject to fixed charge is repaid in full.

A ‘floating charge’ is created on assets which are of fluctuating nature like raw material, stock-in-trade, debtors, etc. A floating charge is created by way of hypothecation or lien. The assets under floating charge keep on changing because the borrowing company is permitted to use them for producing final goods for sale e.g. in case of a company which manufactures leather goods, the raw material in the form of leather, which is subject matter of floating charge, shall be used to manufacture leather goods without seeking any permission from the lender. The raw material (i.e. leather) which was attached at the time of creation of A floating charge remains dormant until it becomes fixed or crystallises. On crystallisation, the security (i.e. raw material, stock-in-trade, etc.) becomes fixed and is available for realization so that borrowed money is repaid.



DUTY TO REGISTER CHARGES, ETC. [SECTION 77]

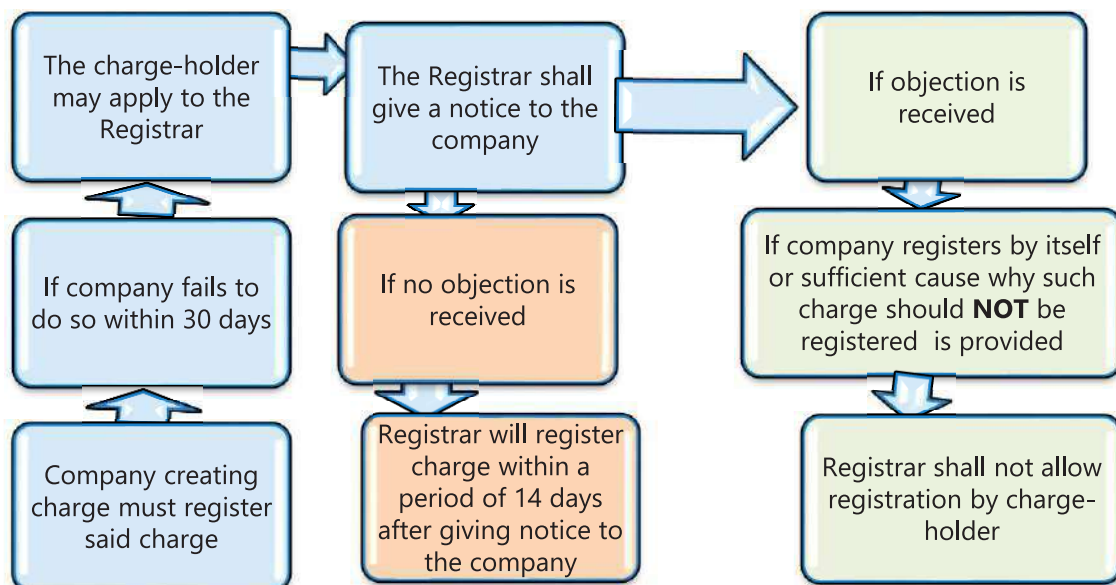


Section 77 of the Companies Act, 2013 contains provisions regarding registration of charges with the Registrar of Companies.

Latest Amendment

Nothing contained in this rule shall apply to any charge required to be created or modified by a banking company under section 77 in favour of the Reserve Bank of India when any loan or advance has been made to it on Promissory Note under section 17 of the Reserve Bank of India Act, 1934

APPLICATION FOR REGISTRATION OF CHARGE BY CHARGE-HOLDER [SECTION 78]



SECTION 77 TO APPLY IN CERTAIN MATTERS [SECTION 79]

Section 79 of the Act covers two situations. One relates to acquisition of any property already subject to charge by a company. Other relates to modification in the terms and conditions or modification in the extent of any charge already registered. In both the cases another registration (in place of existing one) becomes necessary and the provisions contained in section 77 relating to registration of charge shall equally apply.



A. Company acquiring any Property subject to Charge [Section 79 (a)]

In case of a property where charge is already registered and if it is sold with the permission of the holder of charge, it shall be the duty of the company acquiring it to get the charge registered in accordance with Section 77. In other words, the earlier charge should get vacated and, in its place, new charge should get registered by the company which has acquired it.

B. Modification of Charge when there is Change in Terms and Conditions, etc. [Section 79 (b)]

Section 79 (b) requires any modification in charge (i.e. change in terms and conditions or change in extent of any charge, etc.) to be registered by the company in accordance with Section 77.

Some other examples of 'modification' are as under:

1. where the charge is modified by varying any terms and conditions of the existing charge through an agreement;
2. where the modification is in pursuance of an agreement for enhancing or decreasing the limits;
3. where the modification is by ceding a pari passu charge;
4. where there is change in rate of interest (other than bank rate);
5. where there is change in repayment schedule of loan; (not applicable in case of working loans which are repayable on demand); and
6. where there is partial release of the charge on a particular asset or property.

C. Issue of Certificate of Modification

As per Rule 6, where the particulars of modification of charge is registered under section 79, the Registrar shall issue a certificate of modification of charge in Form CHG-3.

DEEMED NOTICE OF CHARGE [SECTION 80]

Section 80 of the Companies Act, 2013 deals with the deemed notice of charge from the date of its registration. Accordingly, where any charge on any property or assets of a company or any of its undertakings is registered under section 77, any person acquiring such property, assets, undertakings or part thereof or any share or interest therein shall be deemed to have notice of the charge from the date of such registration.

COMPANY TO REPORT SATISFACTION OF CHARGE [SECTION 82]

1. Intimation regarding Satisfaction of Charge

Section 82 of the Act of 2013, requires a company to give intimation of payment or satisfaction in full of any charge earlier registered, to the Registrar in the prescribed form. The intimation needs to be given within a period of 30 days from the date of such payment or satisfaction.

Extended period of intimation: Proviso to Section 82 (1) extends the period of intimation from thirty days to three hundred days. Accordingly, it is provided that the Registrar may, on an application by the company or the charge holder, allow such intimation of payment or satisfaction to be made within a period of **three hundred days** of such payment or satisfaction on payment of prescribed additional fees.



2. Notice to the Holder of Charge by the Registrar

On receipt of intimation, the Registrar shall cause a notice to be sent to the holder of the charge calling upon him to show cause within such time as specified in the notice but not exceeding 14 days, as to why payment or satisfaction in full should not be recorded. If no cause is shown by the charge-holder, the Registrar shall order entering of a memorandum of satisfaction in the register of charges kept by him and accordingly, he shall inform the company of having done so.

However, no notice is required to be sent, in case the intimation to the Registrar in this regard is in the specified form¹⁹ and signed by the holder of charge.

3. No Effect of Section 82 on the Powers of the Registrar

According to sub-section (4), Section 82 shall not be deemed to affect the powers of the Registrar to make an entry in the register of charges under section 83 or otherwise than on receipt of an intimation from the company i.e. even if no intimation is received by him from the company.

4. Issue of Certificate

As per Rule 8 (2), in case the Registrar enters a memorandum of satisfaction of charge in full, he shall issue a certificate of registration of satisfaction of charge in Form No. CHG-5.

POWER OF REGISTRAR TO MAKE ENTRIES OF SATISFACTION AND RELEASE IN ABSENCE OF INTIMATION FROM COMPANY [SECTION 83]

Section 83 of the Act of 2013 empowers the Registrar to make entries with respect to the satisfaction and release of charges even if no intimation has been received by him from the company.

Accordingly, with respect to any registered charge if an evidence is shown to the satisfaction of Registrar that the debt secured by charge has been paid or satisfied in whole or in part or that the part of the property or undertaking charged has been released from the charge or has ceased to form part of the company's property or undertaking, then he may enter in the register of charges a memorandum of satisfaction that:

- the debt has been satisfied in whole or in part; or
- the part of the property or undertaking has been released from the charge or has ceased to form part of the company's property or undertaking.

This power can be exercised by the Registrar despite the fact that no intimation has been received by him from the company.

Information to affected parties: The Registrar shall inform the affected parties within 30 days of making the entry in the register of charges.

Issue of Certificate: As per Rule 8 (2), in case the Registrar enters a memorandum of satisfaction of charge in full, he shall issue a certificate of registration of satisfaction of charge in Form No. CHG-5.



INTIMATION OF APPOINTMENT OF RECEIVER OR MANAGER [SECTION 84]

Section 84 of the Act of 2013 is about the appointment of a receiver or manager and of giving intimation thereof to the company and the Registrar.

Accordingly,

- if any person obtains an order for the appointment of a receiver or a person to manage the property which is subject to a charge, or
- if any person appoints such receiver or person under any power contained in any instrument,

he shall give notice of such appointment to the company and the Registrar along with a copy of the order or instrument within 30 days from the passing of the order or making of the appointment.

In turn, the Registrar shall, on payment of the prescribed fees, register particulars of the receiver, person or instrument in the register of charges.

On ceasing to hold such appointment, the person appointed as above shall give a notice to that effect to the company and the Registrar. In turn, the Registrar shall register such notice.



QUESTION & ANSWERS



Question 1:

May 2008, 2016

ABC Limited realized on 2nd November, 2018 that particulars of charge created on 12th September, 2018 in favour of a Bank were not filed with the Registrar of Companies for Registration. What procedure should the company follow to get the charge registered with the Registrar of Companies? Would the procedure be different if the charge was created on 12th September, 2018 instead of 12th September, 2018? Explain with reference to the relevant provisions of the Companies Act, 2013.



Question 2.

Mr. Antriksh purchased a commercial property in Delhi belonging to NRT Limited after entering into an agreement with the company. At the time of registration, Mr. Antriksh comes to know that the title deed of the company is not free and the company expresses its inability to get the title deed transferred in his name contending that he ought to have the knowledge of charge created on the property of the company. Explain, whether the contention of NRT Limited is correct?

(ICAI Module, May'18 RTP, Nov'19 Mock Test)



Solution:

According to section 80 of the Companies Act, 2013, where any charge on any property or assets of a company or any of its undertakings is registered under **section 77** of the Companies Act, 2013, any person acquiring such property, assets, undertakings or part thereof or any share or interest therein shall be deemed to have notice of the charge from the date of such registration.

Thus, **Section 80** clarifies that if any person acquires a property, assets or undertaking in respect of which a charge is already registered, it would be deemed that he has complete knowledge of charge from the date of its registration. Mr. Antriksh, therefore, was ought to have been careful while purchasing property and should have noticed beforehand that NRT Limited had already created a charge on the property.

In view of above, the contention of NRT Limited is correct.



Question 3.

Explain the provisions of the Companies Act, 2013 relating to Rectification by Central Government in Register of Charges.

(ICAI Module)



Solution:

Section 87 of the Act of 2013 and Rule 12 empowers the Central Government to order rectification of Register of Charges in the following cases of default:

- (i) when there was omission in giving intimation to the Registrar with respect to payment or satisfaction of charge within the specified time;



- (ii) when there was omission or mis-statement of any particulars in any filing previously made to the Registrar. Such filing may relate to any charge or any modification of charge or with respect to any memorandum of satisfaction or other entry made under **Section 82** (Company to report satisfaction of charge) or **Section 83** (Power of Registrar to make entries of satisfaction and release).

Before directing that the 'time for giving the intimation of payment or satisfaction shall be extended' or the 'omission or mis-statement shall be rectified', the Central Government needs to be satisfied that such default was accidental or due to inadvertence or because of some other sufficient cause or it did not prejudice the position of creditors or shareholders. The application in Form CHG-8 shall be filed by the company or any interested person and order of rectification shall be made by the Central Government on such terms and conditions as it deems just and expedient.



Question 4:

DN Limited hypothecated its plant to a Nationalised Bank and availed a term loan. The Company registered the charge with the Registrar of Companies. The Company settled the term loan in full, The Company requested the Bank to issue a letter confirming the settlement of the term loan. The Bank did not respond to the request. State the relevant provisions of the Companies Act, 2013 to register the satisfaction of charge in the above circumstance. State the time frame up to which the Registrar of Companies may allow the Company to intimate satisfaction of charges. (5 Marks)



Solution:

Intimation regarding Satisfaction of Charge

Section 82 of the Companies Act, 2013, requires a company to give intimation of payment or satisfaction in full of any charge earlier registered, to the Registrar in the prescribed form. The intimation needs to be given within a period of 30 days from the date of such payment or satisfaction.

Extended period of intimation: Proviso to Section 82 (1) extends the period of intimation from thirty days to three hundred days. Accordingly, it is provided that the Registrar may, on an application by the company or the charge holder, allow such intimation of payment or satisfaction to be made within a period of 300 days of such payment or satisfaction on payment of prescribed additional fees.



Question 6:

Rose (Private) Limited on 3rd April 2019 obtained ₹ 30 lakhs working capital loan by offering its Stock and Accounts Receivables as security and ₹ 5 Lakhs adhoc overdraft on the personal guarantee of a Director of Rose (Private) Limited, from a financial institution.

- (i) Is it required to create charge for working capital loan and adhoc overdraft in accordance with the provisions of the Companies Act, 2013?
- (ii) State the provisions relating to extension of time and procedure for registration of charges in case the above charge was not registered within 30 days of its creation.



Solution:

As per the provisions of Section 2(16) of the Companies Act, 2013, “charge” means an interest or lien created on the property or assets of a company or any of its undertakings or both as security and includes mortgage.

- (i) Whenever a company obtains working capital loans from financial institutions by offering stock and Accounts Receivables as security, Rose (Private) Limited is required to create a charge on such property or assets in favour of the lender. Hence, for ₹ 30 Lakhs working capital loan, it is required to create a charge on it.

Rose (Private) Limited is not required to create a charge for ₹ 5 Lakh adhoc overdraft on the personal guarantee of a director. Since charge is always created on the property or assets of a company and personal guarantee of director is not a property or asset of company.

- (ii) As per the provisions of Section 77 of the Companies Act, 2013, in case the above charge was not registered within 30 days of creation of the charge, the Registrar may, on an application by the company, allow such registration to be made within a period of 60 days of such creation (i.e. another 30 days are granted after the expiry of original 30 days), on payment of additional fees as prescribed.

Procedure for Extension of Time Limit: For seeking extension of time, the company is required to make an application to the Registrar in the prescribed form. It should be supported by a declaration from the company signed by its company secretary or a director that such belated filing shall not adversely affect the rights of any other intervening creditors of the company.

The application so made must satisfy the Registrar that the company had sufficient cause for not filing the particulars and the instrument of charge, if any, within the original period of thirty days. Only then he will allow registration of charge within the extended period. Further, requisite additional fee or advalorem fee, as applicable, must also be paid.



CHAPTER WISE - CLASS TEST



Question 1.

Explain the term 'charge'. State the circumstances under which necessity to create a charge arises. What is the time limit for registration of charge with the registrar?

(May'18-6 Marks)



Solution:

Charge: According to **section 2(16)** of the Companies Act, 2013 "charge" has been defined as an interest or lien created on the property or assets of a company or any of its undertakings or both as security and includes a mortgage.

Why creating a charge is a necessity for companies? The answer to this lies in the setup of raising capital by the companies. Generally, companies depend on share capital and borrowed capital for funding their projects. When the company raises money through borrowings, they may issue debentures or by obtaining loans from banks/ financial institutions. These banks/ financial institutions need a surety regarding the repayment of their funds. Thus, they create a mortgage or hypothecation on the assets of the company for safe and secured lending of the funds. This creation of right on the assets and properties of the borrower companies is known as a charge on assets.

Once charge is registered and filed, it becomes information in public domain as to how much company has borrowed against its assets and from whom.



Question 2.

State, with reasons, whether the following statements are True or False?

- (i) The Registrar of Companies is not bound to issue notice to the holder of charge, if the company gives intimation of satisfaction of charge in the specified form and signed by the holder of charge.
- (ii) The Registrar of Companies may allow the company or holder of charge to file intimation within a period of 300 days of the satisfaction of charge on payment of fee and additional fees as may be prescribed.

(May'19-2 Marks)



Solution:

- (i) According to the proviso to **section 82(2)** of the Companies Act, 2013, no notice shall be required to be sent, in case the intimation to the Registrar in this regard is in the specified form and signed by the holder of charge.
Hence, the given statement is True.
- (ii) As per **section 77** of the Companies Act, 2013, it shall be duty of the company creating a charge within or outside India, on its property or assets or any of its undertakings, whether tangible or otherwise and situated in or outside India, to register the particulars of the charge signed by the company and the charge holder together with the instruments, if any, creating such charge in such form, on payment of such fees and in such manner as may be prescribed, with the registrar within 30 days of creation. The Registrar may, on an application by the company, allow such registration to be made within a period of three hundred days of such creation on payment of such additional fees as may be prescribed.
Hence, the given statement is True.



Question 3.

DN Limited hypothecated its plant to a Nationalised Bank and availed a term loan. The Company registered the charge with the Registrar of Companies. The Company settled the term loan in full, The Company requested the Bank to issue a letter confirming the settlement of the term loan. The Bank did not respond to the request. State the relevant provisions of the Companies Act, 2013 to register the satisfaction of charge in the above circumstance. State the time frame up to which the Registrar of Companies may allow the Company to intimate satisfaction of charges.

(Nov'19-5 Marks)



Solution:

Intimation regarding Satisfaction of Charge

Section 82 of the Companies Act, 2013, requires a company to give intimation of payment or satisfaction in full of any charge earlier registered, to the Registrar in the prescribed form. The intimation needs to be given within a period of 30 days from the date of such payment or satisfaction.

Extended period of intimation: Proviso to **Section 82 (1)** extends the period of intimation from thirty days to three hundred days. Accordingly, it is provided that the Registrar may, on an application by the company or the charge holder, allow such intimation of payment or satisfaction to be made within a period of 300 days of such payment or satisfaction on payment of prescribed additional fees.



MCQs



Question 1:

Any person acquiring property, on which charge is registered under section 77, shall be deemed to have notice of the charge from:

- (a) the expiry of thirty days of such charge
- (b) the date of application for registration of the charge
- (c) the date of acquiring the property
- (d) the date of such registration



Solution:

- (d) the date of such registration



Question 2.

A charge was created by Cygnus Softwares Limited on its office premises to secure a term loan of ₹ 1 crore availed from Next Gen Commercial Bank Limited through an instrument of charge executed by both the parties on 16 th February, 2023. Inadvertently, the company could not get the charge registered with the concerned Registrar of Companies (ROC) within the first statutory period permitted by law and the default was made known to it by the lending banker with a stern warning to take immediate steps for rectification. The latest date within which the company must register the charge with the ROC so as to avoid paying ad valorem fees for registration of the charge is:

- (a) 27th April, 2023
- (b) 17th April, 2023
- (c) 2nd May, 2023
- (d) 16th June 2023



Solution:

- (b) 17th April, 2023



Question 3.

The instrument creating a charge or modification thereon shall be preserved for a period of _____ years from the date of satisfaction of charge by the company.

- (a) 5
- (b) 7
- (c) 8
- (d) 15



Solution:

- (c) 8



Question 4.

An interest or lien created on the property or assets of a company or any of its undertakings or both as security is known as:

- (a) Debt
- (b) Charge
- (c) Liability
- (d) Hypothecation



Solution:

- (b) Charge



Question 5.

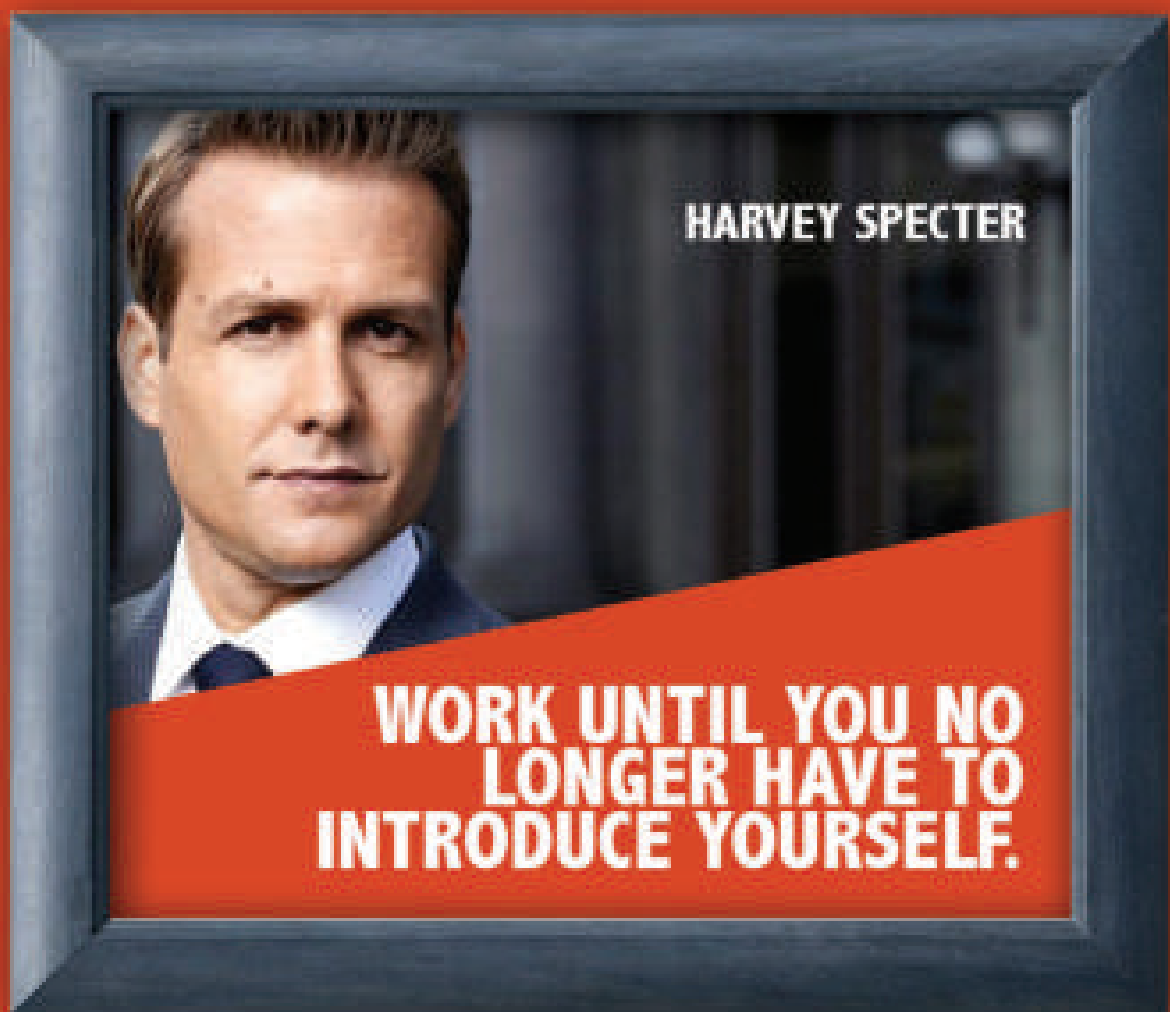
Who cannot inspect the register of charges and instrument of charges, during business hours, without paying any fees:

- (a) Any member of the company
- (b) The Creditor of the company
- (c) Persons other than member and creditor of the company
- (d) No person is allowed to inspect the register of charges



Solution:

- (c) Persons other than member and creditor of the company



HARVEY SPECTER

**WORK UNTIL YOU NO
LONGER HAVE TO
INTRODUCE YOURSELF.**



07 MANAGEMENT & ADMINISTRATION



Declaration of beneficial interest in shares

If legal owner i.e. name on shares & beneficial owner i.e. investment by are different, then section 89 and 90 apply.

Section 89

- (1) Where the name of a person is entered in the register of members of a company as the holder of shares in that company but who does not hold the beneficial interest in such shares, such person shall make a declaration to the company specifying the name and other particulars of the person who holds the beneficial interest in such shares.
 - (2) Every person who holds or acquires a beneficial interest in share of a company shall make a declaration to the company specifying the nature of his interest, particulars of the person in whose name the shares stand registered in the books of the company.
 - (3) Where any change occurs in the beneficial interest in such shares, the person shall, within a period of thirty days from the date of such change, make a declaration to the company.
 - (4) The Central Government may make rules to provide for the manner of holding and disclosing beneficial interest and beneficial ownership under this section.
 - (5) If any person fails to make a declaration as required under sub-section (1) or sub-section (2) or sub-section (3), he shall be liable to a penalty of fifty thousand rupees and in case of continuing failure, with a further penalty of two hundred rupees for each day after the first during which such failure continues, subject to a maximum of five lakh rupees.
 - (6) Where any declaration under this section is made to a company, the company shall make a note of such declaration in the register concerned and shall file, within thirty days from the date of receipt of declaration by it, a return in the prescribed form with the Registrar
 - (7) If a company, required to file a return under sub-section (6), fails to do so before the expiry of the time specified therein, the company and every officer of the company who is in default shall be liable to a penalty of one thousand rupees for each day during which such failure continues, subject to a maximum of five lakh rupees in the case of a company and two lakh rupees in case of an officer who is in default.
- Exercise rights of member eg. Voting/ bonus/ rights issue
 - Receive dividends

Eg. Guardian is a legal owner and minor is a beneficial owner.

Section 90

Disclosure of significant beneficial ownership to company:

1. Every individual, who acting alone or together, or through one or more persons or trust, including a trust and persons resident outside India, holds beneficial interests, of not less than twenty-five per cent. or such other percentage as may be prescribed, in shares of a company or the right to exercise, or the actual exercising of significant influence or control shall make a declaration to the company, specifying the nature of his interest and other particulars.
2. Company to maintain register of such significant beneficial ownership.
3. Such register shall be open for inspection by members for fees.
4. Company to file return of such significant beneficial owners & changes to ROC
5. If a person who is significant beneficial owner but does not give declaration to company then - **company to give NOTICE to such person.**
6. Such person to give information asked in notice to company in **30 days.**
7. If such person fails to give information to company OR gives unsatisfactory information then company to apply to NCLT in **15 days** for an order suspending ALL rights attached to the significant beneficial owner.
8. NCLT after giving OOBH pass an order of restriction in **60 days**
9. The company or the person aggrieved by the order of the tribunal may make an application to the tribunal for relaxation or lifting of the restrictions placed within a period of one year from the date of such order:
10. **Failure by person to file declaration:** Companies Amendment Act, 2020
Penalty 50000 + 1000 per day Maximum 2 lacs
11. Wilful wrong declaration penalty under section 447.
12. Company fails to:
 - a. Maintain register OR
 - b. Allow inspection OR
 - c. File with ROC

Incase of officer :

Penalty 1 lac + 500 per day maximum 5 lacs
Companies Amendment Act, 2020

Company :

Penalty 25000 + 200 per day Maximum 1 lac
Companies Amendment Act, 2020

“significant beneficial owner” in relation to a reporting company means an individual referred to in subsection (1) of section 90, who acting alone or together, or through one or more persons or trust, possesses one or more of the following rights or entitlements in such reporting company, namely:-

- (i) holds indirectly, or together with any direct holdings, not less than 10% of the shares;
- (ii) holds indirectly, or together with any direct holdings, not less than 10% of voting rights in the shares;
- (iii) has right to receive or participate in not less than 10% of the total distributable dividend, through indirect holdings alone, or together with any direct holdings;
- (iv) has right to exercise, or actually exercises, significant influence or control, in any manner other than through direct holdings alone.

Significant influence: The term “significant influence” was previously not defined specifically for the rules, and hence, to provide clarity, the following definition has been inserted through SBO rules: “Significant influence” means the power to participate, directly or indirectly, in the financial and operating policy decisions of the reporting company but is not control or joint control of those policies. [Rule 2 (1) (i)]



General meeting

As per section 122 :- provisions of chapter VII shall be not applicable to OPC

Annual general meeting - Section 96

1. Time limit for conducting

- 1st AGM - ≤ 9 months from the end of financial year- No extension of time limit.
- Subsequent AGM - ≤ 6 months from the end of F.Y. - May be extended by ROC by 3 months.
- Time gap between 2 AGMs ≤ 15 months.
- 1 AGM in every calendar year.
- ROC can ignore requirement of 1 AGM in calendar year during extension.
- Delay in completion of "Audit" cannot be a "separate reason" of extension.
- If police seizes BOA of company, then company exempted from AGM.

It is general meeting called for emergency
No time limit to conduct EGM.

Extraordinary general meeting - Section 98 & 100

Proper authority to call AGM is BOD.

2. Meeting called by:

- EGM can be called by:
 - BOD
 - Requisitionists (member)
 - NCLT

3. Mandatory:

AGM to be held in every calendar year is a statutory requirement

To conduct EGM is NOT mandatory

4. Business to be transacted:

Both ordinary and special business shall be transacted at AGM

All business done at EGM shall be deemed to be special business.

5. Day of holding general meeting

- AGM held on any day which is not declared by CG as "National holiday"
- If CG declares a national holiday after company issues notice of AGM it shall not be a national holiday for that AGM.
- CG may exempt a company from this requirement.

EGM shall be held on a 'working day', other than national holiday



6. Time of conducting meeting:

AGM to be conducted during business hours **9:00 AM to 6:00 PM** but it may continue after 6:00 PM

EGM may be conducted at anytime-
No specific provision

7. Place of holding meeting:

a. AGM to be held at registered office of the company OR within city of register office OR any place as central government may approve.
b. AGM of unlisted company may be held at any place in India if consent by all members in advance (UNANIMOUS APPROVAL).

EGM to be held at registered office OR City of registered office.
No specific provision

8. Default in holding meeting

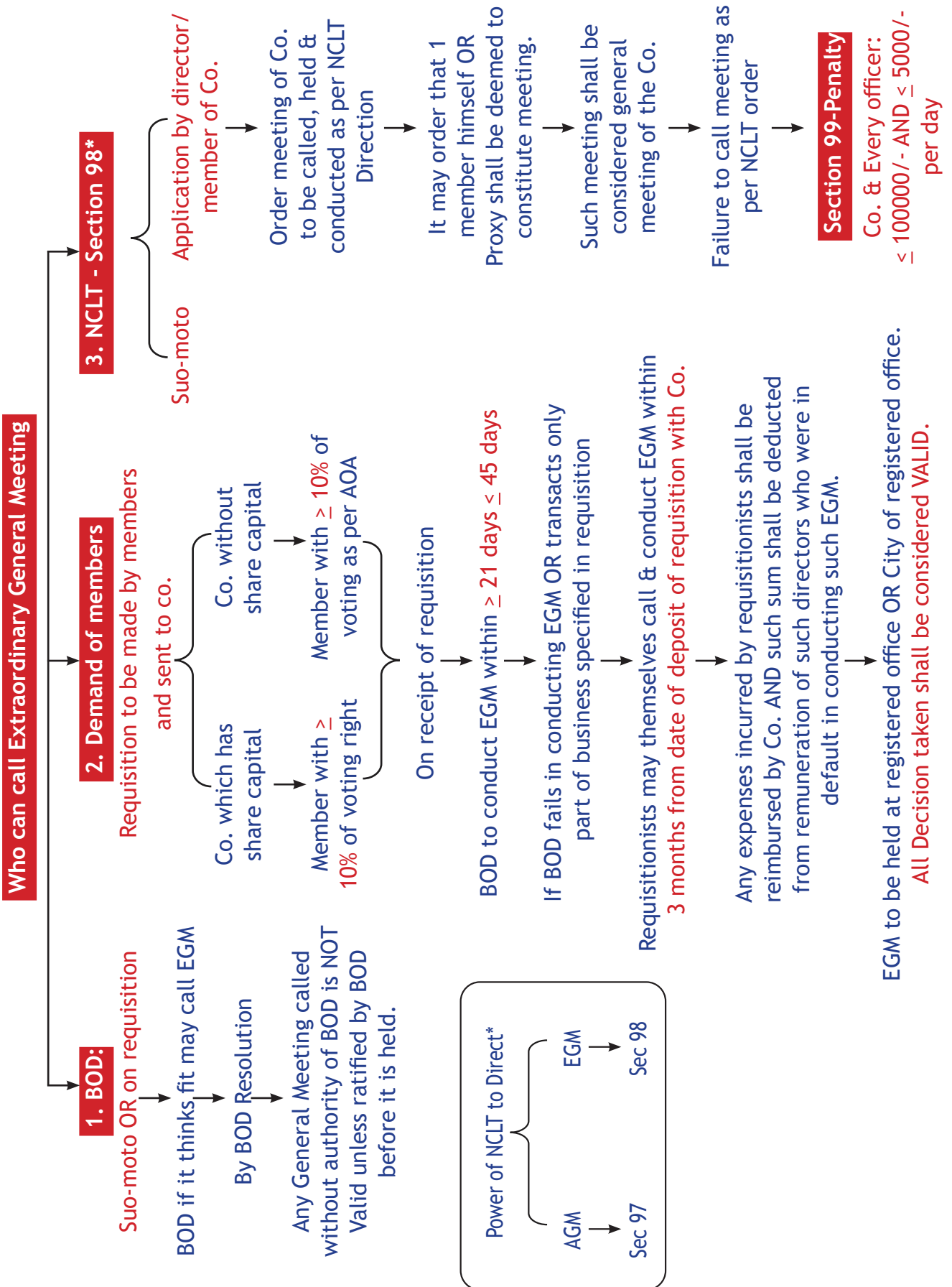
Any member may apply to NCLT to direct company to conduct AGM
Company and officer: **Penalty $\leq$ 1L AND $\leq$ 5000/- per day Section 99**

No penalty provision: But if demanded by members then members get power to conduct on own.

9. Report on meeting:

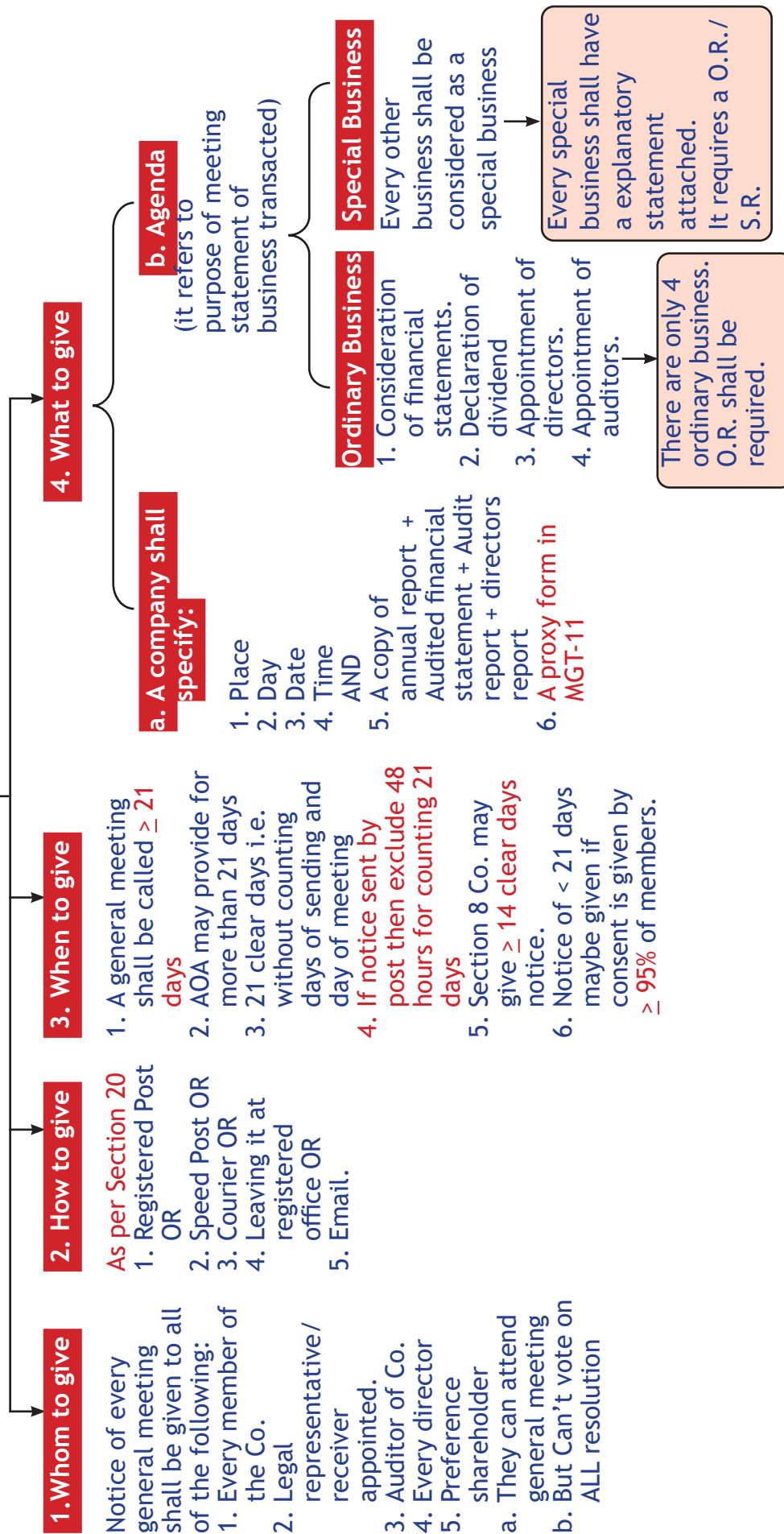
Every listed public company to prepare report on AGM in form **MGT-15** and file with ROC in **30 days from AGM. Section 121**

No such report required.





Notice of General Meeting - Section 101



Default in complying with Notice - Section 101:

Accidental omission to give notice OR Non-receipt of notice shall not invalidate general meeting.

If omission to send notice is not accidental - Meeting Invalid

Section 102 Explanatory statement shall have the following facts:

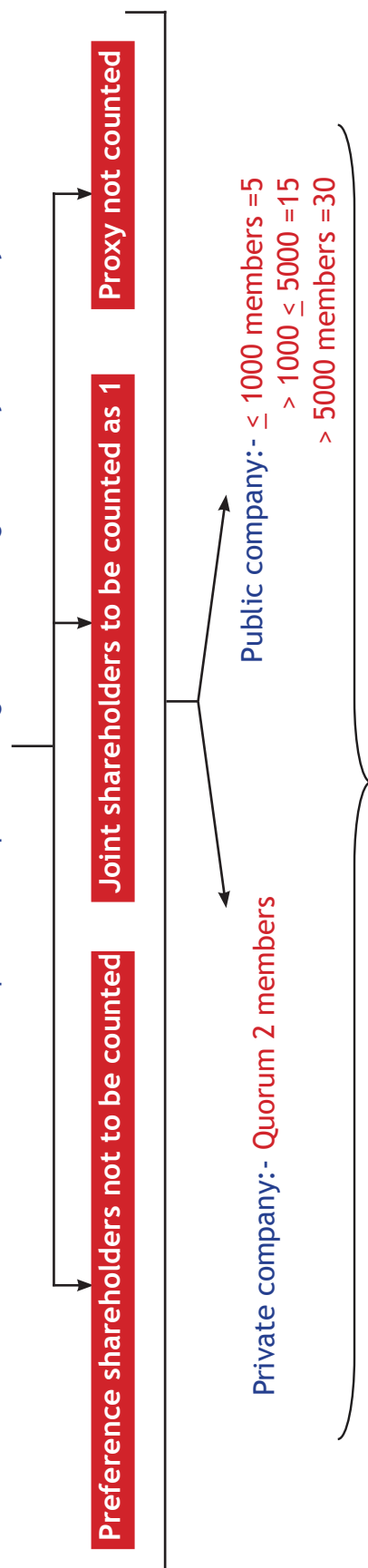
1. Financial Interest of every director, manager & KMP in each item.
2. In case of Business affecting other Co., shareholding interest of every promoter, director, manager AND KMP of at least 2% in such other Co.

Penalty : Every Promoter/Director/ Manager/ other KMP who is in default ≤ 50000 or 5 times the amount of benefit (whichever is high)



QUORUM - Section 103

Minimum numbers of members required to be present at general meeting to validly transact any business.



1. **Representative of company** if it hold shares of the other company' shall be deemed to be a member **u/s 113** and counted for quorum
2. **Representative of CG/SG** in case of government company shall be deemed to be member **u/s 112** and counted for quorum.

- Quorum to be present **within half an hour** of schedule:

- If quorum is not present then:

- a. Meeting shall stand adjourned to next week, same time and same place unless it is a national holiday.
- b. Adjourn meeting such other time and place as BOD may determine OR
- c. If EGM called by members, it shall stand cancelled

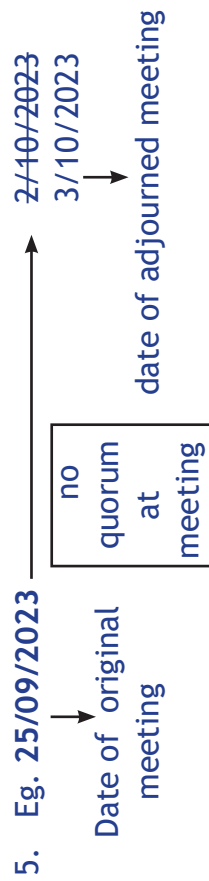
Adjournment of general meeting





Adjourned meeting:

1. Should notice be given?
Yes $\geq$ 3 days notice individually OR advertisement in 1 English and 1 vernacular newspaper
2. Can there be change in agenda? NO
3. What is the quorum?
 - a. In case of adjournment due to lack of quorum: Number of members $\geq$ 2 shall be deemed as quorum
 - b. Adjournment for any other reason: Quorum same as original general meeting.
4. Effective date of resolution? **Section 116**
Resolution passed at adjourned general meeting shall be effective from the date of adjourned meeting AND not from any prior date



- a. General meeting held on 3/10/2023, is the time limit of 6 months violated? :- **No**
- b. Adjourned meeting on 3/10/2023, is company liable for penalty of belated general meeting? :- **No**
- c. Extension required from ROC for conducting general meeting after 6 months? :- **No approval**

Adjournments - Temporary suspension at the general meeting.

Postponement - Implies putting off meeting before commencement.

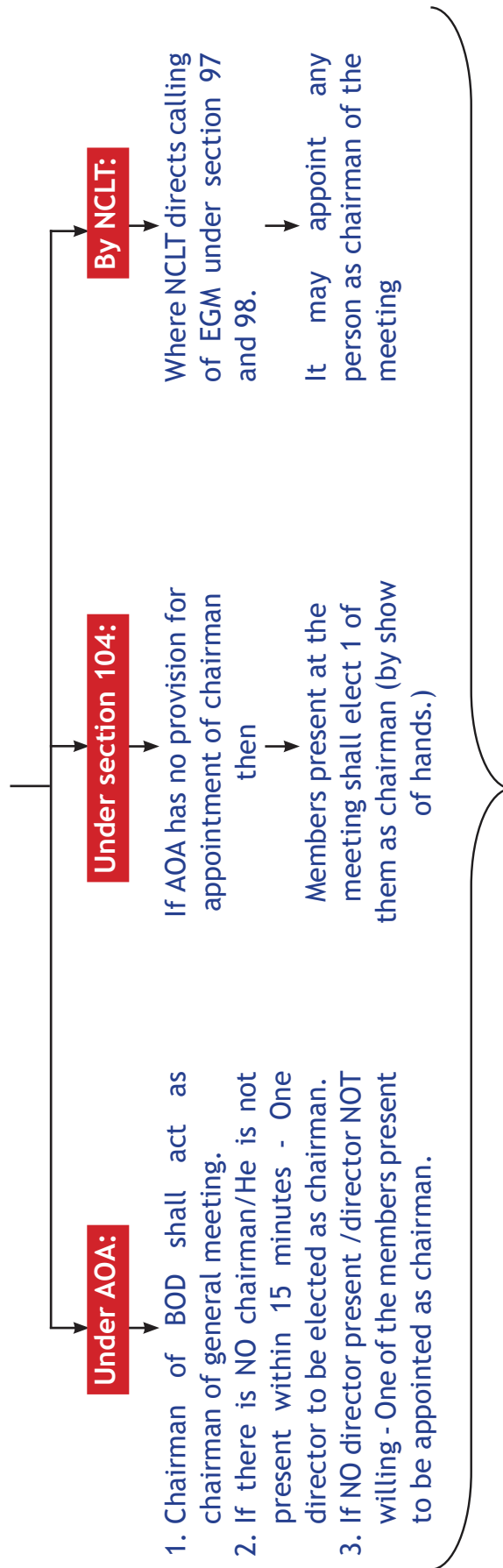
Cancellation - Such meeting NO longer exists proceedings are NOT suspended by exhausted (EGM called by Requisitionists.)



Chairman of meeting - Section 104 :

He is the presiding officer of the meeting

Appointment of chairman



In case of equality of votes, chairman shall have the second OR casting vote
He may cast such vote different from original vote



Proxy - Section 105

1st meaning

Means a person appointed by member of Co. to attend & vote on his behalf @ meeting

2nd meaning

It means a document by which such (agent) person is appointed. It shall be in Form MGT-11

Terms and Conditions:

1. Every member of Co. entitled to vote can appoint proxy.
2. A proxy may/may not be member of the Co. However, in case of **Section 8 Co. only member of Co. can be proxy.**
3. A person can act as proxy on behalf of **≤ 50** members AND holding in aggregate **≤ 10%** voting rights.
4. But for acting as proxy of 1 member voting power shall not be counted.

5. A co. shall along with notice of every general meeting send a proxy form. **Default - 5,000/-**
6. A member willing to appoint a proxy shall deposit form with Co. **≥ 48 hours** before to General meeting. **AOA may provide < 48 hours before.**

7. Proxy form shall be writing & signed by appointing member If appointer is Co. under Common seal (If Any)
8. Proxy cannot be counted in Quorum.

9. **Proxy cannot inspect list of proxies & Minutes Book.**

10. **Proxy can demand a Poll & vote in poll method.**

11. Proxy can be revoked as follows:

1. By deposit of new proxy within stipulated time.
2. Member himself attends the meeting
3. Death OR insanity of member
4. Transfer of shares.

Provided Co. receive Info.

12. **Member entitled to vote @ meeting may inspect proxy list beginning 24 hours prior until end of meeting.**

By giving atleast 3days advance notice.

Minutes Register - Section 118

1. **Minutes are a record of business done at meetings.**
2. A distinct minute book shall be maintained for:
 1. General meeting of members
 2. Meeting of Creditors
 3. Board meeting
 } Separate Books
3. Minutes must be recorded within **30 days** of meeting along with date of such recording.
4. Co. may maintain minutes in loose leaf form and are bound at reasonable intervals.
5. Every page of minutes book shall be signed OR initials put AND last page must be dated and signed.

In BOD Meeting: In General Meeting:

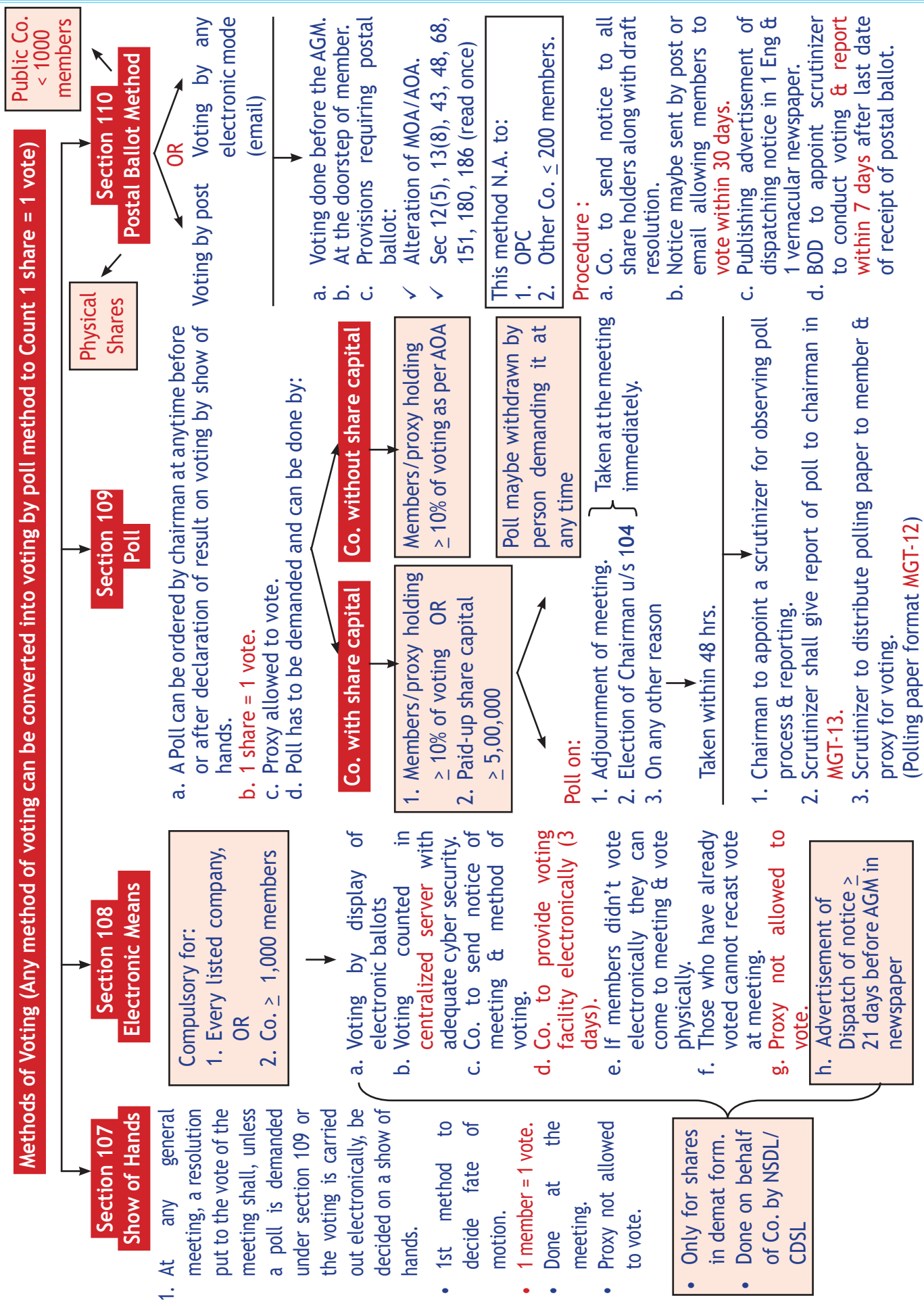
In resolution by postal ballot :

chairman of the said meeting within the aforesaid period of 30 days or in the event of the death or inability of that chairman within that period, by a director duly authorised by the Board

6. All appointments made at any meeting shall be included in the minutes of the meeting.
7. Chairman may in his opinion **NOT include in minutes:**
 1. Any defamatory matter OR
 2. Irrelevant/ immaterial matter OR
 3. Matter detrimental to interest of Co.
 } Negative Points
8. Preservation of minutes: (of G.M. OR BOD Meeting)
 1. Kept at the registered office of the Co. AND
 2. Shall be preserved permanently.
 3. Kept in custody of Company Secretary/ Director.
9. **Tampering with minutes:**
Imprisonment ≤ 2 years AND Penalty ≥ 25,000 ≤ 1,00,000



Section 106 Restriction on voting rights. (1) Notwithstanding anything contained in this Act, the articles of a company may provide that no member shall exercise any voting right in respect of any shares registered in his name on which any calls or other sums presently payable by him have not been paid, or in regard to which the company has exercised any right of lien.
(2) A company shall not, except on the grounds specified in sub-section (1), prohibit any member from exercising his voting right on any other ground.





Section 88 - Register of members, etc.

Section 88(1) of the Companies Act, 2013 seeks to provide that every company shall keep and maintain the register of members, register of debenture-holders and register of any other security holders.

- **Maintenance of Register of members:** Section 88(1)(a) requires a register of members to be maintained and that the holding of **each class** of equity and preference shares by each **member residing in or outside India** will have to be shown **separately** in the register of members. The form and manner in which these registers are to be maintained, is contained in Rule 3 of the Companies (Management & Administration) Rules, 2014; whereas Rule 5 provides for the maintenance of the register of members.
- **Time period for entries in register:** As per Rule 5, entries have to be made in the Register within **7 days** of the date of approval by the Board or Committee thereof by approving the allotment or transfer as the case may be.
- **Place where register shall be maintained:** Rule 5 also states that the registers shall be maintained at the **registered office** of the company unless a special resolution is passed in a general meeting authorising the keeping of the register at any other place within the city, town or village in which the registered office is situated or any other place in India in which more than 1/10th of the total members entered in the register of members reside.
- **Other informations also to be referred in register:** Any order passed by the authority attaching the shares or relating to dividends is also required to be referred in the register of members. Hypothecation and pledge of shares is also required to be entered in the register of members as per Rule 5(7) and 5(8).
- **Updation of records of members:** Rule 5 also states that the changes relating to the status of the member should be effectively captured and updated accordingly in the relevant register. If any change occur in the status of a member or debenture-holder or any other security holder whether due to death or insolvency or change of name or due to transfer to Investor Education Protection Fund or due to any other reason, entries shall be made in the respective registers.
- **Index of names:** Section 88(2) mentions that every register maintained under section 88(1) shall include an index of names included therein. The relevant rule here is, Rule 6 of the Companies (Management & Administration) Rules, 2014 which state that the maintenance of index is not necessary where the number of members is less than 50. It also states that the company shall make the necessary entries in the index simultaneously with the entry for allotment or transfer of any security in such Register.
- **Register index of beneficial owner to be maintained of a depository:** Section 88(3) is basically an enabling provision, which sets out that the register and index of beneficial owners maintained by a depository under section 11 of the Depositories Act, 1996, shall be deemed to be the corresponding register and index for the purposes of this Act.
- **Penalty on failure to maintain register:** Section 88(5) If a company does not maintain a register of members or debenture-holders or other security holders or fails to maintain them in accordance with the provisions of sub-section (1) or sub-section (2), the company shall be liable to a penalty of three lakh rupees and every officer of the company who is in default shall be liable to a penalty of fifty thousand rupees."

Companies Amendment Act, 2020



SECTION 91 - POWER TO CLOSE REGISTER OF MEMBERS OR DEBENTURE- HOLDERS OR OTHER SECURITY HOLDERS:

The section seeks to provide that a company may close the register of members, debenture-holders and other security holders by giving minimum **7 days' notice** or such lesser period as specified by Securities Exchange Board of India ('SEBI').

Section 91(1) further states that the registers may be closed for any period not exceeding 30 days at any one time and for an aggregate period of 45 days in one year.

ANNUAL RETURN [SECTION 92-94]

The provisions of preparation and filing of annual return of a company are contained in section 92 of the Companies Act, 2013.

The section is particularly important from the compliance point of view, since this is an annual compliance and essentially captures all the important events that have taken place in the company during the financial year. Every company is required to file with the RoC, the annual return as prescribed in section 92, in Form MGT- 7 as per Rule 11(1) of the Companies (Management & Administration) Rules, 2014.

The particulars contained in an annual return, to be filed by every company are as follows-

1. Its registered office, principal business activities, particulars of its holding, subsidiary and associate companies.
2. Its shares, debentures and other securities and shareholding pattern
3. Its indebtedness
4. Its members and debenture-holders along with the changes therein since the close of the previous financial year
5. Its promoters, directors, key managerial personnel along with changes therein since the close of the previous financial year.
6. Meetings of members or a class thereof, Board and its various committees along with attendance details.
- *7. Remuneration of directors and key managerial personnel
8. Penalty or punishment imposed on the company, its directors or officers and details of compounding of offences and appeals made against such penalty or punishment.
9. Matters relating to certification of compliances, disclosures.
10. Details in respect of shares held by or on behalf of the Foreign Institutional Investors including their names, addresses, countries of incorporation, registration and percentage of shareholding held by them.

Penalty : If any company fails to file its annual return under sub-section (4) before the expiry of the period specified therein, such company and its every officer who is in default shall be liable to a penalty of ten thousand rupees and in case of continuing failure with further penalty of One Hundred rupees for each day after the first during which such failure continues, subject to a maximum of two lakh rupees in case of a company and fifty thousand rupees in case of an officer who is in default.



Section 94 - Place of keeping and inspection of registers, returns, etc.

Preservation of register of members etc. and annual return-

1. **Preservation of register of members:** Rule 15 of the Companies (Management & Administration) Rules, 2014 states that the **register of members** along with the index shall be preserved **permanently** and shall be kept in the custody of company secretary of the company or any other person authorised by the Board for such purpose; and
2. **Preservation of register of debenture holders/ other security holders:** The register of debenture-holder or any other security holder along with the index shall be preserved for a period of 8 years from the date of redemption of debentures or securities, as the case may be, and shall be kept in the custody of the company secretary of the company or any other person authorized by the Board for such purpose.
3. **Copies of documents filled with ROC to be preserved:** Copies of all annual returns prepared under section 92 and copies of all certificates and documents required to be annexed thereto shall be preserved for a period of 8 years from the date of filing with the RoC.
4. **Preservation of foreign register:** shall be preserved permanently, unless it is discontinued and all the entries are transferred to any other foreign register or to the principal register. Foreign register of debenture-holder or any other security holder shall be preserved for a period of 8 years from the date of redemption of debenture or securities.

Penalty for refusing the inspection or making any extract or copy required -

- If any inspection or the making of any extract or copy required under this section is refused, the company and every officer of the company who is in default, shall be liable for each such default, to a penalty of ₹ 1,000 for every day subject to a maximum of ₹ 1,00,000 during which the refusal or default continues.

Latest Amendment

the following particulars of the register or index or return in respect of the members of a company shall not be made available for any inspection under sub-section (2) or for taking extracts or copies under sub-section (3) of section 94, namely: —

- (i) address or registered address (in case of a body corporate);
- (ii) e-mail ID
- (iii) Unique Identification Number
- (iv) PAN Number

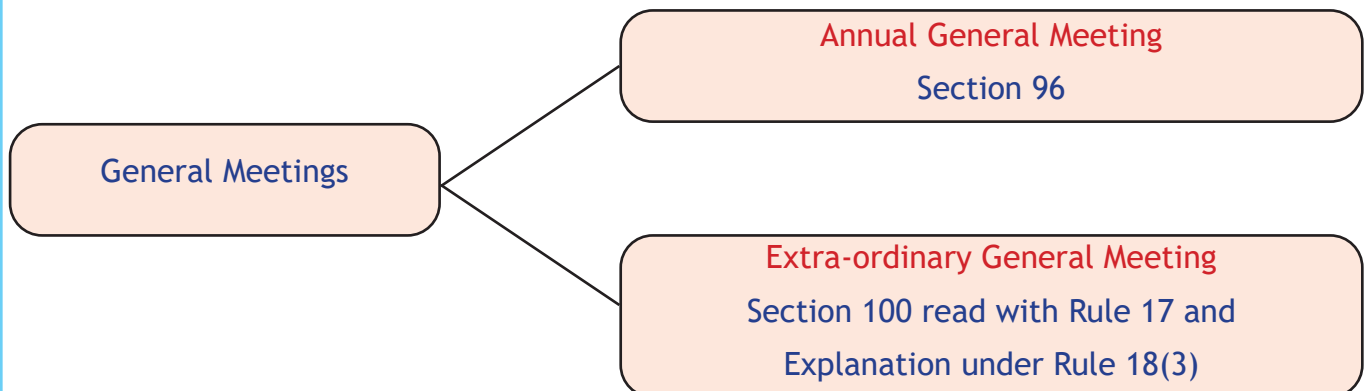
Section 95 - Registers, etc. to be evidence-

The section simply seeks to provide that the registers, indices and copies of annual return shall be prima facie evidence of any matter directed or authorised to be inserted therein by or under this Act.



MEETINGS

Now that we have understood the basic terms which are required to call, convene and conduct the meeting properly, let us discuss the provisions related to meetings given in the Companies Act, 2013. The Act describes two types of general meeting to be held in a company which are-



SECTION 96-ANNUAL GENERAL MEETING ('AGM')

- Section 96(1) of the Companies Act, 2013 states that every company, whether public or private, except One Person Company, shall hold an annual general meeting every year and that the gap between two AGMs shall not be more than 15 months.
- The company shall specify the meeting as such [i.e. as AGM] in the notices calling it.
- In case of the First AGM of a company, it shall be held within a period of 9 months from the date of closing of the 1st financial year (i.e. April to March next year).
- In any other case, AGM shall be held within a period of 6 months from the date of closing of its financial year.
- The section further states that where a company holds its first AGM as aforesaid, it shall not be necessary for the company to hold any AGM in the year of its incorporation.
- Moreover, the Registrar may grant an extension by 3 months, for holding the AGM to any company for special reasons, except in the case of first AGM of the company.

“SECTION 97: POWER OF TRIBUNAL TO CALL ANNUAL GENERAL MEETING

- (1) If any default is made in holding the annual general meeting of a company under section 96, the Tribunal may, notwithstanding anything contained in this Act or the articles of the company, on the application of any member of the company, call, or direct the calling of, an annual general meeting of the company and give such ancillary or consequential directions as the Tribunal thinks expedient:
Provided that such directions may include a direction that one member of the company present in person or by proxy shall be deemed to constitute a meeting.
- (2) A general meeting held in pursuance of sub-section (1) shall, subject to any directions of the Tribunal, be deemed to be an annual general meeting of the company under this Act.



SECTION 98: POWER OF TRIBUNAL TO CALL MEETINGS OF MEMBERS, ETC

- (1) If for any reason it is impracticable to call a meeting of a company, other than an annual general meeting, in any manner in which meetings of the company may be called, or to hold or conduct the meeting of the company in the manner prescribed by this Act or the articles of the company, the Tribunal may, either suo motu or on the application of any director or member of the company who would be entitled to vote at the meeting,—
- (a) order a meeting of the company to be called, held and conducted in such manner as the Tribunal thinks fit; and
 - (b) give such ancillary or consequential directions as the Tribunal thinks expedient, including directions modifying or supplementing in relation to the calling, holding and conducting of the meeting, the operation of the provisions of this Act or articles of the company:
- Provided that such directions may include a direction that one member of the company present in person or by proxy shall be deemed to constitute a meeting.
- (2) Any meeting called, held and conducted in accordance with any order made under sub-section (1) shall, for all purposes, be deemed to be a meeting of the company duly called, held and conducted.”

Punishment for default in complying with the provisions of section 96 to 98-

Section 99 lists out the punishment for contravention of section 96 to 98, i.e. default in holding a meeting of the company as AGM or on the directions issued by the Tribunal. It states that the company and every officer of the company who is in default, shall be punishable with fine which may extend to ₹ 1,00,000 and in the case of a continuing default, with a further fine which may extend to ₹ 5,000 for every day during which the default continues.

SECTION 121: REPORT ON ANNUAL GENERAL MEETING

This section is applicable to listed public companies and states that they shall prepare a report in the Form MGT - 15 as prescribed in Rule 31 of the Companies (Management and Administration) Rules, 2014, on each AGM including the confirmation to the effect that the meeting was convened, held and conducted as per the provisions of this Act and the rules made thereunder.

- The company shall file with the Registrar a copy of the report referred to in sub-section (1) within 30 days of the conclusion of the annual general meeting with such fees as may be prescribed, or with such additional fees as may be prescribed.
- If the company fails to file the report under sub-section (2) before the expiry of the period specified therein, such company shall be liable to a penalty of one lakh rupees and in case of continuing failure, with further penalty of five hundred rupees for each day after the first during which such failure continues, subject to a maximum of five lakh rupees and every officer of the company who is in default shall be liable to a penalty which shall not be less than twenty-five thousand rupees and in case of continuing failure, with further penalty of five hundred rupees for each day after the first during which such failure continues, subject to a maximum of one lakh rupees.



SECTION 100: EXTRA-ORDINARY GENERAL MEETINGS

Who can call an EGM?

1. **The Board** may, whenever it deems fit, call an extraordinary general meeting of the company.
Provided that an extraordinary general meeting of the company, other than of the wholly owned subsidiary of a company incorporated outside India, shall be held at a place within India;
2. **The Board shall on the requisition of -**
 - (a) In the case of company having a share capital, such number of members who hold, on the date of receipt of requisition, at least 1/10th of such paid-up capital of the company as on that date carries the right of voting;
 - (b) In the case of company not having a share capital, such number of members who hold, on the date of receipt of requisition, at least 1/10th of total voting power of all the members having on the said date a right to vote.

Call an EGM of the company within the period specified in sub-section (4). Other provisions related to calling of meeting by requisitionists

1. The requisition shall set out the matters for the consideration of which the meeting is to be called and shall be signed by the requisitionists and sent to the registered office of the company.
2. If the Board does not, within twenty-one days from the date of receipt of a valid requisition in regard to any matter, proceed to call a meeting for the consideration of that matter on a day not later than forty-five days from the date of receipt of such requisition, the meeting may be called and held by the requisitionists themselves within a period of three months from the date of the requisition. [Sub section (4)]
3. A meeting under sub-section (4) by the requisitionists shall be called and held in the same manner in which the meeting is called and held by the Board.
4. Any reasonable expenses incurred by the requisitionists in calling a meeting under sub-section (4) shall be reimbursed to the requisitionists by the company and the sums so paid shall be deducted from any fee or other remuneration under section 197 payable to such of the directors who were in default in calling the meeting.

Calling of Extraordinary general meeting by requisitionists.

- (1) The members may requisition convening of an extraordinary general meeting in accordance with sub-section (4) of section 100, by providing such requisition in writing or through electronic mode at least clear twenty-one days prior to the proposed date of such extraordinary general meeting.
- (2) Where the meeting is not convened, the requisitionists shall have a right to receive list of members together with their registered address and number of shares held and the company concerned is bound to give a list of members together with their registered address made as on twenty first day from the date of receipt of valid requisition together with such changes, if any, before the expiry of the forty-five days from the date of receipt of a valid requisition.



- (3) The notice of the meeting shall be given by speed post or registered post or through electronic mode. Any accidental omission to give notice to, or the non-receipt of such notice by, any member shall not invalidate the proceedings of the meeting.

APPLICABILITY OF THIS CHAPTER TO ONE PERSON COMPANY [SECTION 122]

- (1) The section states that the provisions of section 98 and section 100 to 111 shall not apply to One Person Company.
- (2) The ordinary businesses as mentioned under section 102(2)(a), which a company is required to transact at an AGM, shall be transacted in the case of One Person Company, as provided in Sub-section (3).
- (3) For the purposes of section 114, any business which is required to be transacted at an annual general meeting or other general meeting of a company by means of an ordinary or special resolution, it shall be sufficient if, in case of One Person Company, the resolution is communicated by the member to the company and entered in the minutes-book required to be maintained under section 118 and signed and dated by the member and such date shall be deemed to be the date of the meeting for all the purposes under this Act.
- (4) Notwithstanding anything in this Act, where there is only one director on the Board of Director of a One Person Company, any business which is required to be transacted at the meeting of the Board of Directors of a company, it shall be sufficient if, in case of such One Person Company, the resolution by such director is entered in the minutes book required to be maintained under section 118 and signed and dated by such director and such date shall be deemed to be the date of the meeting of the Board of Directors for all the purposes under this Act.

SECTION 101: NOTICE OF A MEETING

Section 101 of the Companies Act, 2013 states the length of notice for calling a meeting. It states that in order to properly call a general meeting the notice should be sent at least **21 clear days'** 7 before the meeting, to all the members, legal representative of any deceased member or the assignee of insolvent members, the auditors and directors, in writing or electronic mode or other prescribed mode.

Mode of sending the notice:

As per Rule 18 of the Companies (Management & Administration) Rules, 2014, sending of notices through electronic mode has been statutorily recognized by the Act.

- The said rule mentions that a notice may be sent through e-mail as a-
 - Text; or
 - As an attachment to e-mail; or
 - As a notification providing electronic link; or
 - Uniform Resource Locator for accessing such notice.

Length of serving the notice - 21 clear days:

Note that, the section mentions that the notice shall be sent 21 clear days' before the date of meeting. It's quite obvious to question as to what the term 'clear days' means. 21 clear days mean that the date on which notice is served and the date of meeting are excluded for sending the notice. A company cannot curtail by its articles of association the requirement of 21 clear days.



Who is entitled to receive the notice of the general meeting? (Section 101(3))

The notice of every meeting of the company shall be given to—

- (a) every member of the company, legal representative of any deceased member or the assignee of an insolvent member;
- (b) the auditor or auditors of the company; and
- (c) every director of the company.

Meetings held at shorter notice-

Generally, general meetings need to be called by giving at least a notice of 21 clear days. However, a general meeting may be called after giving shorter notice than that specified in this sub-section if consent, in writing or by electronic mode, is accorded thereto—

- (i) in the case of an annual general meeting, by not less than **ninty-five per cent.** of the members **entitled to vote thereat**; and
- (ii) in the case of **any other general meeting**, by members of the company—
 - (a) holding, if the **company has a share capital**, majority in number of members entitled to vote and who represent not less than ninety-five per cent. of such part of the **paid-up share capital** of the company as **gives a right to vote at the meeting**; or
 - (b) having, if the company has **no share capital**, not less than ninty-five per cent. of the **total voting power** exercisable at that meeting:

Contents of the Notice - Section 101(2):

A valid notice must state the day, date, hour of the meeting and place of the meeting and shall contain a statement of business to be transacted in that meeting. It must be issued on the authority of the Board of Directors under the name of an authorised official.

Omission to send notice - Section 101(4):

Section 101(4) states that any accidental omission to give notice to, or non-receipt of such notice to any member or other person who is entitled to such notice for any meeting shall not invalidate the proceedings of the meeting.

This essentially means, that the omission must not be designed or deliberate. Failure to send notice to a member, under a belief that it will not reach him at the address mentioned in the register of members is deliberate and not accidental, even if the belief is based on a mistaken impression.

The onus is on the company to prove that the omission was not deliberate.

*EXPLANATORY STATEMENT TO BE ANNEXED TO NOTICE (SECTION 102)

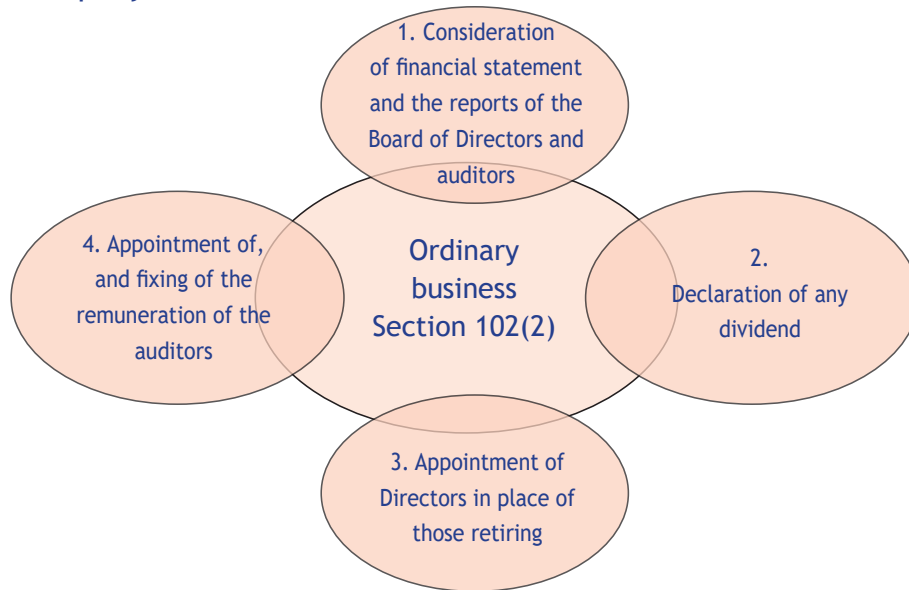
Section 102 of the Companies Act, 2013 mentions that where any **special business** is to be transacted at the company's general meeting, then an 'Explanatory Statement' should be annexed to the notice calling such general meeting, which must specify,

- (a) the nature of concern or interest, financial or otherwise, if any, in respect of each items of—
 - (i) every director and the manager, if any;
 - (ii) every other key managerial personnel; and
 - (iii) relatives of the persons mentioned in sub-clauses (i) and (ii);



(b) any other information and facts that may enable members to understand the meaning, scope and implications of the items of business and to take decision thereon.

Ordinary business are the following business which are transacted at the annual general meeting of the company-



Extract of Sub section (4) of Section 102

Penalty for contravention of the provisions of this section-

Without prejudice to the provisions of sub-section (4), if any default is made in complying with the provisions of this section, every promoter, director, manager or other key managerial personnel of the company who is in default shall be liable to a penalty of fifty thousand rupees or five times the amount of benefit accruing to the promoter, director, manager or other key managerial personnel or any of his relatives, whichever is higher.

QUORUM FOR MEETINGS [SECTION 103]

The said section of the Companies Act, 2013 states that unless the articles of the company provide for a larger number, the quorum for the meeting shall be as follows-

Public Company -	Private Company -
1. If number of members is not more than 1000, quorum shall be 5 members personally present 2. if the number of members is more than 1000 but upto 5000, then the quorum shall be 15 members personally present 3. If the number of members exceed 5000, then quorum shall be 30 members personally present.	Quorum -2 members personally present



Adjourned Meeting due to want of Quorum-

If the quorum is not present within half-an-hour from the time appointed for holding a meeting of the company—

- (a) the meeting shall stand adjourned to the same day in the next week at the same time and place, or to such other date and such other time and place as the Board may determine; or
- (b) the meeting, if called by requisitionists under section 100, shall stand cancelled:

Provided that in case of an adjourned meeting or of a change of day, time or place of meeting under clause (a), the company shall give not less than three days notice to the members either individually or by publishing an advertisement in the newspapers (one in English and one in vernacular language) which is in circulation at the place where the registered office of the company is situated.

- Where quorum is not present in the adjourned meeting also within half an hour, then the members present shall form the quorum.

CHAIRMAN OF MEETING [SECTION 104]

Election of chairman by members: Section 104 of the Companies Act, 2013 seeks to provide that unless the articles of association of the Company otherwise provide, the members, personally present, shall elect among themselves to be the Chairman by show of hands.

Demand of poll: The section further provides that if a poll is demanded on the election of the Chairman, the Chairman elected by show of hands shall continue to be the Chairman of the meeting until some other person is elected as Chairman as a result of poll, and such other elected person shall be the Chairman for rest of the meeting.

Right to cast casting vote: The Chairman has a casting vote in Board Meetings and general meetings, if specifically empowered by the articles of the Company. A casting vote means that in event of the equality of vote on a particular business being transacted at the meeting, the Chairman of the meeting shall have a right to cast a second vote. If there is no provision in the articles for a casting vote, an ordinary resolution on which there is equality of votes is deemed to be dropped.

Proxies [Section 105]

The section provides following laws related to proxy:

- Section 105 of the Companies Act, 2013 deals with the provisions of proxy for meetings. Sub-section (1) provides that any member of a company who is entitled to attend and vote at a meeting of the company shall be entitled to appoint another person as a proxy to attend and vote at the meeting on his behalf. However, a proxy shall not have the right to speak at such meeting and shall not be entitled to vote except on a poll.
- A person appointed as proxy shall act on behalf of such member or number of members not exceeding fifty and holding in aggregate not more than 10 per cent of the total share



capital of the company carrying voting rights. However, a member who is holding more than 10 per cent of the total share capital of the Company carrying voting rights, may appoint a single person as a proxy and such person shall not act as a proxy for any other person or shareholder.

- As per Rule 19(3) of the Companies (Management & Administration) Rules, 2014, the appointment of proxy shall be in the Form MGT - 11.
- Section 105(4) of the Act provides that a proxy received 48 hours before the meeting will be valid even if the articles provide for a longer period.
- Section 105(8) provides for inspection of proxies during the meeting and 24 hours before the meeting before its commencement, and the inspection is to be given only during business hours. At least 3 days' notice in writing is required to be given to the company for conducting the inspection.
- Penalty for default-
 - If default is made in complying with sub-section (2), every officer of the company who is in default shall be liable to penalty of five thousand rupees.
 - For refusing the inspection to members at any time during the business hours, the company and every officer who is in default, shall be punishable with fine upto ₹ 10,000 and where the contravention is a continuing one, with a further fine upto ₹ 1,000 per day of default.
- Rule 19 of the Companies (Management & Administration) Rules, 2014 provides as under-
 - Restriction on the maximum number of members (50) and shareholding (10 percent) that a proxy holder can represent.
 - Only a member can be a proxy holder in a company registered under section 8 of the Companies Act, 2013.

VOTING [SECTION 106-109]

Ever pondered as to why is voting important in the meetings? The meeting takes place with an agenda or say, the decisions to be taken by the company's members which are crucial for the working of the company. So, the meeting takes place to discuss and decide upon the topics which are important - thus this decision requires consensus of the members attending the meeting. This consensus is reached through voting. As per the Companies Act, 2013, the voting in a meeting can take place in the following ways-

VOTING BY SHOW OF HANDS [SECTION 107]

- The general meaning set out by this section of the Companies Act, 2013 is that unless the voting is demanded by way of poll or by electronic means, the voting should be by way of show of hands in the first instance.
- Also, section 107(2) states that the declaration by the Chairman of the meeting in the minutes books shall be the conclusive evidence that the resolution is passed.



VOTING THROUGH ELECTRONIC MEANS [SECTION 108]

Companies providing its members to exercise right to vote by electronic means: Every company which has listed its equity shares on a recognised stock exchange and every company having not less than one thousand members shall provide to its members facility to exercise their right to vote on resolutions proposed to be considered at a general meeting by electronic means:

Procedure: A company which provides the facility to its members to exercise voting by electronic means shall comply with the following procedure, namely:-

- (i) **Notice of meeting:** The notice of the meeting shall be sent to all the members, directors and auditors of the company either-
 - (a) by registered post or speed post; or
 - (b) through electronic means, namely, registered e-mail ID of the recipient; or
 - (c) by courier service;
- (ii) **Notice to be hosted on website:** the notice shall also be placed on the website, if any, of the company and of the agency forthwith after it is sent to the members;
- (iii) **Notice containing the particular:** the notice of the meeting shall clearly state -
 - (a) that the company is providing facility for voting by electronic means and the business may be transacted through such voting;
 - (b) that the facility for voting, either through electronic voting system or ballot or polling paper shall also be made available at the meeting and members attending the meeting who have not already cast their vote
 - (c) that the members who have cast their vote by remote e-voting prior to the meeting may also attend the meeting but shall not be entitled to cast their vote again;
- (iv) **the notice shall:**
 - (a) indicate the process and manner for voting by electronic means;
 - (b) provide the details about the login ID;
 - (c) specify the process and manner for generating or receiving the password and for casting of vote in a secure manner.
- (v) **Publication of notice:** the company shall cause a public notice by way of an **advertisement** to be published, immediately on completion of dispatch of notices for the meeting under clause (i) of sub-rule (4) but at least twenty- one days before the date of general meeting, at least once in a vernacular newspaper and at least once in English language in an English newspaper having country-wide circulation,
- (vi) **Time for opening of e-voting:** the facility for remote e-voting shall remain open for **not less than three days** and shall close at **5.00 p.m.** on the date preceding the **date of the general meeting**;



- (vii) **Option for remote e-voting:** During the period when facility for remote e- voting is provided, the members of the company, holding shares either in physical form or in dematerialized form, as on the cut-off date, may opt for remote e-voting:
Provided that once the vote on a resolution is cast by the member, he shall not be allowed to change it subsequently or cast the vote again:
- (viii) At the end of the remote e-voting period, **the facility shall forthwith be blocked:**
- (ix) **Appointment of scrutinizer:** The Board of Directors shall appoint one or more scrutinizer, who may be Chartered Accountant in practice, Cost Accountant in practice, or Company Secretary in practice or an Advocate, or any other person who is not in employment of the company and is a person of repute who, in the opinion of the Board can scrutinize the voting and remote e-voting process in a fair and transparent manner:
- (x) **Function of scrutinizer:** the scrutinizer shall be willing to be appointed and be available for the purpose of ascertaining the requisite majority;
- (xi) **Role of Chairman:** The Chairman shall, at the general meeting, at the end of discussion on the resolutions on which voting is to be held, allow voting, with the assistance of scrutinizer, by use of ballot or polling paper or by using an electronic voting system for all those members who are present at the general meeting but have not cast their votes by availing the remote e-voting facility.
- (xii) **Counting of votes:** The scrutinizer shall, immediately after the conclusion of voting at the general meeting, first count the votes cast at the meeting,
- (xiii) **Access to details:** For the purpose of ensuring that members who have cast their votes through remote e-voting do not vote again at the general meeting, the scrutinisier shall have access, after the closure of period for remote e-voting and before the start of general meeting, to details relating to members, such as their names, folios, number of shares held
- (xiv) **Maintenance of Register:** The scrutinisier shall maintain a register either manually or electronically to record the assent or dissent received,
- (xv) **Safe Custody of register:** The register and all other papers relating to voting by electronic means shall remain in the safe custody of the scrutinisier until the Chairman considers, approves and signs the minutes and thereafter, the scrutinisier shall hand over the register and other related papers to the company.



DEMAND FOR POLL [SECTION 109]

The section discusses four things -

- Who can demand poll at the meeting;
 - What should be the time for taking the poll;
 - Appointment of Scrutinizer for poll; and
 - Manner of taking poll and result thereof.
- Section 109 provides that before or on declaration of result of the voting on any resolution by a show of hands, the Chairman of the meeting on his own, or on demand made by the 'specified' members order for a poll.

Members who can demand for poll -

- In case of a company having a **share capital**, by the members present in person or proxy, where allowed, and having not less than **1/10th of the total voting power or holding shares** on which an aggregate sum of **not less than ₹ 5,00,000** or such **higher** amount has been prescribed has been paid - up.
- In the case of **any other company**, by any member or members present in person or by proxy, where allowed, and having **not less than 1/10th of the total voting power**.
- The section further provides that the demand for poll may be withdrawn by the persons who made the demand, at any time.
- A poll demanded for adjournment of the meeting or appointment of Chairman of the meeting shall be taken forthwith.
- A poll demanded on any question other than adjournment of the meeting or appointment of Chairman shall be taken at such time, not being later than 48 hours from the time when the demand was made, as the Chairman of the meeting may direct.
- Where a poll is to be taken, the Chairman of the meeting shall appoint a scrutinizer for observing the poll process and votes given on poll and to report thereon.
 - The Chairman of the meeting shall ensure that -
 - (a) The Scrutinizers are provided with the Register of Members, specimen signatures of the members, Attendance Register and Register of Proxies.
 - (b) The Scrutinizers shall arrange for Polling papers and distribute them to the members and proxies present at the meeting; in case of joint shareholders, the polling paper shall be given to the first named holder or in his absence to the joint holder attending the meeting as appearing in the chronological order in the folio and the Polling paper shall be in Form No. MGT.12.
 - (c) The Scrutinizers shall count the votes cast on poll and prepare a report thereon addressed to the Chairman.
 - (d) Where voting is conducted by electronic means under the provisions of section 108 and rules made thereunder, the company shall provide all the necessary support, technical and otherwise, to the Scrutinizers in orderly conduct of the voting and counting the result thereof.
 - (e) The Scrutinizers' report shall state total votes cast, valid votes, votes in favour and against the resolution including the details of invalid polling papers and votes comprised therein.
 - (f) The Scrutinizers shall submit the Report to the Chairman who shall counter-sign the same.
 - (g) The Chairman shall declare the result of Voting on poll. The result may either be announced by him or a person authorized by him in writing.



POSTAL BALLOT [SECTION 110]

Shareholders who are unable to attend the meetings, there should a requirement which will enable them to vote by postal ballot for key decisions¹⁵.

Extract of the Act

- “(1) Notwithstanding anything contained in this Act, a company—
- (a) shall, in respect of such items of business as the Central Government may, by notification, declare to be transacted only by means of postal ballot; and
 - (b) may, in respect of any item of business, other than ordinary business and any business in respect of which directors or auditors have a right to be heard at any meeting, transact by means of postal ballot.
- (2) If a resolution is assented to by the requisite majority of the shareholders by means of postal ballot, it shall be deemed to have been duly passed at a general meeting convened in that behalf.”
- Manner in which postal ballot shall be conducted is prescribed in Rule 22 of the Companies (Management & Administration) Rules, 2014. The same is described as follows-
 - Where a company is required or decides to pass any resolution by way of postal ballot, it shall send a notice to all the shareholders, along with a draft resolution explaining the reasons therefor and requesting them to send their assent or dissent in writing on a postal ballot because postal ballot means voting by post or through electronic means within a period of thirty days from the date of dispatch of the notice.
 - An advertisement shall be published at least once in a vernacular newspaper in the principal vernacular language of the district in which the registered office of the company is situated, and having a wide circulation in that district, and at least once in English language in an English newspaper having a wide circulation in that district, about having dispatched the ballot papers.
 - The notice of the postal ballot shall also be placed on the website of the company forthwith after the notice is sent to the members and such notice shall remain on such website till the last date for receipt of the postal ballots from the members.
 - The Board of directors shall appoint one scrutinizer, who is not in employment of the company and who, in the opinion of the Board can conduct the postal ballot voting process in a fair and transparent manner.
 - The scrutinizer shall be willing to be appointed and be available for the purpose of ascertaining the requisite majority.
 - Postal ballot received back from the shareholders shall be kept in the **safe custody of the scrutinizer** and after the receipt of assent or dissent of the shareholder in writing on a postal ballot, **no person shall deface or destroy the ballot paper or declare the identity of the shareholder.**
 - The scrutinizer shall submit his report as soon as possible after the last date of receipt of postal ballots but not later than seven days thereof;
 - The assent or dissent received after thirty days from the date of issue of notice shall be treated as if reply from the member has not been received.
 - The results shall be declared by placing it, **along with the scrutinizer's report, on the website of the company.**



7. CIRCULATION OF MEMBER'S RESOLUTIONS [SECTION 111]

Circulation of members' resolution and statements: Students should carefully note the circumstances in which the members can make use of the administrative machinery of a company for introducing resolutions for consideration at next annual general meeting or for circulation of statements in regard to any resolution to be proposed at an extraordinary general meeting or business to be dealt with at any general meeting. Such circumstances are stated below:

- (1) **Notice to members:** As per section 111 of the Companies Act, 2013, a company shall, on requisition in writing of such number of members, as required in section 100 (Calling of EGM), give notice to members of any resolution which may properly be moved and is intended to be moved at a meeting; and circulate to members any statement with respect to the matters referred to in proposed resolution or business to be dealt with at that meeting.
- (2) **Exemption from serving notice:** A company shall not be bound under this section to give notice of any resolution or to circulate any statement, unless-
 - (a) a copy of the requisition signed by the requisitionists (or two or more copies which, between them, contain the signatures of all the requisitionists) is deposited at the registered office of the company,- (i) in the case of a requisition requiring notice of a resolution, not less than six weeks before the meeting; (ii) in the case of any other requisition, not less than two weeks before the meeting; and
 - (b) there is deposited or tendered with the requisition, a sum reasonably sufficient to meet the company's expenses in giving effect thereto.

Where however, after a copy of a requisition requiring notice of a resolution has been deposited at the registered office of the company, an annual general meeting is called on a date within six weeks after the copy has been deposited, the copy, although not deposited within the time required by this subsection, shall be deemed to have been properly deposited for the purposes thereof.
- (3) **Exception from circulation of any statement:** The company shall not be bound to circulate any statement, if on the application either on behalf of the company or of any other person who claims to be aggrieved, then the Central Government, by order, declares that the rights conferred are being abused to secure needless publicity for defamatory matter.
- (4) **Order to bear the cost:** An order made may also direct that the cost incurred by the company shall be paid to the company by the requisitionists, notwithstanding that they are not parties to the application.
- (5) **Default in contravention of the provision:** If any default is made in complying with the provisions of this section, the company and every officer of the company who is in default shall be liable to a penalty of twenty-five thousand rupees.



REPRESENTATION OF THE PRESIDENT & GOVERNORS IN MEETING OF COMPANIES TO WHICH THEY ARE MEMBER [SECTION 112]

Section 112 of the Companies Act, 2013 provides that the President of India or the Governor of a State, if he is a member of a company, may appoint such person as he thinks fit to act as his representative at any meeting and such other person shall be entitled to exercise the same rights and powers including the right to vote to proxy and postal ballot, as the President or, as the case may be, the Governor could exercise as a member of the company.

REPRESENTATIONS OF CORPORATIONS MEETING OF COMPANIES AND CREDITORS [SECTION 113]

Section 113 of the Companies Act, 2013 seeks to provide that where a body corporate is member or creditor of the company, they may authorize a person to act as its representative in the meeting of the company. The provision is as under-

- (1) **Appointment of representative by a body corporate:** A body corporate, whether a company within the meaning of this Act or not, may-
 - (a) if it is a member of company-by resolution of its Board of Directors or other governing body, authorise such person as it thinks fit to act as its representative at any meeting of the company, or at any meeting of any class of members of the company;
 - (b) if it is a creditor, including a holder of debentures, of a company-, by resolution of its directors or other governing body, authorise such person as it thinks fit to act as its representative at any meeting of any creditors of the company held in pursuance of this Act or of any rules made thereunder, or in pursuance of the provisions contained in any debenture or trust deed, as the case may be.
- (2) **Powers and rights of an authorised person:** A person authorised by resolution as above, shall be entitled to exercise the same rights and powers, including the right to vote by proxy and by postal ballot, on behalf of the body corporate which he represents as that body could exercise if it were an individual member, creditor or holder of debentures of the company.

RESOLUTIONS [SECTION 114-117]

Difference between Motion & Resolution—

- Most matters come before a meeting by way of a motion recommending that the meeting may express approval or disapproval or take certain action or order something to be done.
- A motion is a proposal, and a resolution is the adoption of a motion duly made and seconded. But every motion need not be followed by a resolution, as where a motion is made for the adjournment of the meeting.
- A motion whether it is passed for the closure of discussion or adjournment, etc. can be passed by an ordinary resolution unless there is a specific provisions in the articles.



SECTION 114-ORDINARY & SPECIAL RESOLUTION:

Ordinary Resolution—

Section 114(1) Simply put, the votes cast in the favour of the resolution, by any mode of voting should exceed the votes cast against it.

Special Resolution—

As per Section 114(2) of the Act, In simple words, a resolution shall be a special resolution, when it is duly specified in the notice, calling the general meeting and votes cast in favour is 3 times the votes cast against the resolution.

RESOLUTIONS REQUIRING SPECIAL NOTICE [SECTION 115]

Section 115 of the Companies Act, 2013 states that where any provision of this Act specifically requires or Articles of Association of a company so require that a special notice is required for passing any resolution, then the notice of the intention to move such resolution shall be given to the company by such number of members holding not less than 1% of the total voting power, or holding shares on which such aggregate sum not exceeding five lakh rupees, as may be prescribed, has been paid-up. In such a case, the company shall give its members notice of the resolution in the manner as prescribed in Rule 22 of the Companies (Management & Administration) Rules, 2014.

As per section 115 of the Act, **special notice is required in the following cases -**

- (a) To appoint as auditor a person other than a retiring auditor (Section 140 of the Act);
- (b) To stand for directorship by a person other than retiring director 14 days' notice is required under section 160(1) of the Act;
- (c) To remove a director under section 169(2) or to appoint a person to fill the vacancy caused by the dismissal of a director under section 169 at the same meeting.

Rule 23-Special Notice—

1. A special notice required to be given to the company shall be signed, either individually or collectively by such number of members holding not less than one percent of total voting power or holding shares on which an aggregate sum of not less than 5,00,000 rupees has been paid up on the date of the notice.
2. The afore-mentioned notice shall be sent by members to the company not earlier than 3 months but at least 14 days before the date of meeting at which the resolution is to be moved, exclusive of the day on which the notice is given and the day of the meeting.
3. The company shall immediately after receipt of the notice, give its members notice of the resolution at least seven days before the meeting, exclusive of the day of dispatch of notice and day of the meeting, in the same manner as it gives notice of any general meetings.
4. Where it is not practicable to give the notice in the same manner as it gives notice of any general meetings, the notice shall be published in English language in English newspaper and in vernacular language in a vernacular newspaper, both having wide circulation in the State where the registered office of the Company is situated and such notice shall also be posted on the website, if any, of the Company.
5. The notice shall be published at least seven days before the meeting, exclusive of the day of publication of the notice and day of the meeting.



RESOLUTIONS PASSED AT ADJOURNED MEETING [SECTION 116]

The section simply states that where a resolution is passed at an adjourned meeting of-

- A company; or
- The holder of any class of shares in a company; or
- The Board of Directors of a company,

And states that if a meeting is adjourned then the date of passing of the resolution shall be the date on which it is actually passed and not an earlier date.

RESOLUTIONS AND AGREEMENTS TO BE FILED [SECTION 117]

[Section 117(1)]

“A copy of every resolution or any agreement, in respect of matters specified in sub-section (3) together with the explanatory statement under section 102, if any, annexed to the notice calling the meeting in which the resolution is proposed, shall be filed with the Registrar within thirty days of the passing or making thereof in such manner and with such fees as may be prescribed:

Section 117(3) states that the following resolutions and agreements shall be filed with the RoC in Form MGT - 14 within 30 days of its passing -

- Special Resolutions
- Resolutions which have been agreed to by all the members of a company, but which, if not so agreed to, would not have been effective for their purpose unless they had been passed as special resolutions;
- Any resolution of the Board of Directors of a company or agreement executed by a company, relating to the appointment, re-appointment or renewal of the appointment, or variation of the terms of appointment, of a managing director;

Penalty under the Act-

Section 117(2) If any company fails to file the resolution or the agreement under sub-section (1) before the expiry of the period specified therein, such company shall be liable to a penalty of ten thousand rupees and in case of continuing failure, with a further penalty of one hundred rupees for each day after the first during which such failure continues, subject to a maximum of two lakh rupees and every officer of the company who is in default including liquidator of the company, if any, shall be liable to a penalty of ten thousand rupees and in case of continuing failure, with a further penalty of one hundred rupees for each day after the first during which such failure continues, subject to a maximum of fifty thousand rupees.

Companies Amendment Act, 2020



MINUTES (SECTION 118)

Section 118 prescribes that Every company shall cause minutes of the proceedings of every general meeting of any class of shareholders or creditors, and every resolution passed by postal ballot and every meeting of its Board of Directors or of every committee of the Board, to be prepared and signed in such manner as may be prescribed and kept within 30 days of the conclusion of every such meeting concerned, or passing of resolution by postal ballot in books kept for that purpose with their pages consecutively numbered. [Sub section (1)]

- The minute book shall be consecutively numbered.
- In the case of a Board Meeting or a meeting of a committee of the Board, the minutes shall also contain-
 - The names of the directors present at the meeting; and
 - In the case of each resolution passed at the meeting, the names of the directors, if any, dissenting from, or not concurring with the resolution.
- Any of the following matter shall not be included in the minutes of the meeting, which in the opinion of the Chairman of the meeting-
 - Is or could reasonably be regarded as defamatory of any person; or
 - Is irrelevant or immaterial to the proceedings; or
 - Is detrimental to the interests of the company.
- Penalty for contravention-
 - If any default is made in complying with the provisions of this section in respect of any meeting, the company shall be liable to a penalty of ₹ 25,000 and every officer of the company who is in default shall be liable to a penalty of ₹ 5,000.
 - If a person is found guilty of tampering with the minutes of the proceedings of the meeting, he shall be punishable with imprisonment for a term which may extend to 2 years and with fine which shall not be less than ₹ 25,000 but which may extend to ₹ 1,00,000.

Rule 25 of the Companies (Management & Administration) Rules, 2014 prescribes the procedure for maintenance of minutes of proceedings of general meeting, meeting of Board of Directors and other meetings and resolutions passed by postal ballot as follows-

- A distinct minute book shall be maintained for each type of meeting namely:
 - (i) general meetings of the members;
 - (ii) meetings of the creditors
 - (iii) meetings of the Board; and
 - (iv) meetings of each of the committees of the Board.
- The minutes of proceedings of each meeting shall be entered in the books maintained for that purpose along with the date of such entry within thirty days of the conclusion of the meeting.
- Each page of every such book shall be initialled or signed and the last page of the record of proceedings of each meeting or each report in such books shall be dated and signed -
 - (i) in the case of minutes of proceedings of a meeting of the Board or of a committee thereof, by the chairman of the said meeting or the chairman of the next succeeding meeting;
 - (ii) in the case of minutes of proceedings of a general meeting, by the chairman of the same meeting within the aforesaid period of thirty days or in the event of the death or inability of that chairman within that period, by a director duly authorised by the Board for the purpose;



(iii) In case of every resolution passed by postal ballot, by the chairman of the Board within the aforesaid period of thirty days or in the event of there being no chairman of the Board or the death or inability of that chairman within that period, by a director duly authorized by the Board for the purpose.

- The minute books of general meetings, shall be kept at the registered office of the company and shall be preserved permanently and kept in the custody of the company secretary or any director duly authorised by the board.
- The minute-books of the Board and committee meetings shall be preserved permanently and kept in the custody of the company secretary of the company or any director duly authorized by the Board for the purpose and shall be kept in the registered office or such place as Board may decide.

INSPECTION OF MINUTE-BOOKS OF GENERAL MEETING [SECTION 119]

How shall the inspection take place?

As per section 119 of the Companies Act, 2013, the books containing the minutes of the proceedings of any general meeting of a company shall-

- Be kept at the registered office of the company; and
- Be open for inspection, during business hours, by any member, without charge, subject to such reasonable restrictions as specified in the articles of the company or as imposed in the general meeting. However, at least 2 hour in each business day shall be allowed for inspection [Sub - Section (1)].

Any member shall be entitled to be furnished, within seven working days after he has made a request in that behalf to the company, and on payment of such fees as may be prescribed, with a copy of any minutes referred [Sub - Section (2)].

What is the penalty for contravention of the provisions of the Act? [Sub section (3)]

If any inspection under sub - section (1), is refused by the company to the member, or if the copy of minute-book is not furnished within the time specified under sub - section (2), then the company shall be liable to a penalty of ₹ 25,000 and every officer of the company who is in default shall be liable to a penalty of ₹ 5,000 for each such refusal or default as the case may be.

Power of Tribunal [Sub - Section (4)]

In the case of any such refusal or default, the Tribunal may, without prejudice to any action being taken under sub-section (3), by order, direct an immediate inspection of the minute-books or direct that the copy required shall forthwith be sent to the person requiring it.

Rule 26-Copy of minute book of general meeting-

Any member shall be entitled to be furnished, within seven working days after he has made a request in that behalf to the company, with a copy of any minutes of any general meeting, on payment of such sum as may be specified in the articles of association of the company, but not exceeding a sum of ten rupees for each page or part of any page:

Provided that a member who has made a request for provision of soft copy in respect of minutes of any previous general meetings held during a period immediately preceding three financial years shall be entitled to be furnished, with the same free of cost.



MAINTENANCE AND INSPECTION OF DOCUMENTS IN ELECTRONIC FORM [SECTION 120]

The said section seeks to provide that any document, record, register or minute, etc., required to be kept by a company or allowed to be inspected or copies given to any person by a company under this Act, may be kept or inspected or copies given, as the case may be, in electronic form in such form and manner as may be specified in Rule 27, 28 and 29 of the Companies (Management and Administration) Rules, 2014.

- Rule 27 of the Companies (Management and Administration) Rules, 2014 talks about the maintenance and inspection of documents in electronic form. It states that every listed company or a company having at least 1000 shareholders, debenture-holders and other security holders, may maintain its records, as required to be maintained under the Act or rules made thereunder, in electronic form.
- Rule 28 sets out the security of records maintained in electronic forms and mentions that the Managing Director, Company Secretary or any other director or officer of the company as the Board may decide shall be responsible for the maintenance and security of electronic records.
- Rule 29 states that where a company maintains its records in electronic form, any duty imposed by the Act or rules made there under to make those records available for inspection or to provide copies of the whole or a part of those records, shall be construed as a duty to make the records available for inspection in electronic form or to provide copies of those records containing a clear reproduction of the whole or part thereof, as the case may be on payment of not exceeding 10 rupees per page.

QUESTION & ANSWERS



Question 1:

Nov. 2007

XYZ Limited called its Annual General meeting on 28th September, 2018. The notice of the meeting was posted on 6th September, 2018. With reference to the provisions of the Companies Act, 2013 examine whether the notice given by the company was valid.



Solution:

Day of holding the AGM	28th September, 2018.
Day of dispatch of notice	6th September, 2018.
Days to be excluded	- Day of holding the AGM (i.e. 28th September, 2018) - Day of dispatch of notice (6th September, 2018) 2 days for service of notice (i.e. 7th and 8th September, 2018)
Number of days notice given	19 days.
Number of days notice required u/s 101	21 days.
1. AGM has not been validly called	since 21 days notice of the AGM has not been given to the members.
2. The notice is short	By 2 days.
3. The shortfall may be condoned	If consent is given for such shorter notice by at least 95% of the members entitled to vote at such AGM.



Question 2:

May. 2015

The Annual General Meeting of KMP Limited was held on 30th April, 2018. The Articles of Association of the company is silent regarding the quorum of the General Meeting. Only 10 members were personally present in the above meeting, out of the total 2,750 members of the company. The Chairman adjourned the meeting for want of quorum. Referring to the provisions of the Companies Act, 2013, examine the validity of Chairman's decision.



Solution:

The required quorum is

- 15 members personally present since the total number of members of the company exceed 1,000 but does not exceed 5,000.

The AGM shall automatically adjourn

- To the same day, time and place in the next week, or to such other date, time and place as the Board may determine, since the quorum is not present within half an hour from the time fixed for the commencement of the meeting.



The question of adjournment by the chairman does not arise

- since, in case of absence of quorum, the meeting automatically adjourns without requiring any direction by the chairman regarding adjournment.



Question 3:

Nov. 2013

A, a shareholder, of a company, appointed B, as a proxy, to attend the general meeting of the shareholders. Later on, A, himself, attended the meeting and voted on a resolution. Decide whether A can do so?



Solution:

The appointment of B as proxy is revoked.

- when A, the member, himself attends the GM

Vote of A, the member, is valid

- since, when A, the member, himself attends the GM, the proxy is revoked, and so, A, the member, is entitled to vote.



Question 4:

May. 2017

A General Meeting was scheduled to be held on 15th April, 2016 at 4.00 P.M. As per the notice the members who are unable to attend the meeting in person can appoint a proxy and the proxy forms duly filled should be sent to the company so as to reach at least 48 hours before the meeting. Mr. X, a member of the company appoints Mr. Y as his proxy and the proxy form dated 10-04-2016 was deposited by Mr. Y with the company at its Registered Office on 11-04-2016. However, Mr. X changes his mind and on 12-04-2016 gives another proxy to Mr. Z and it was deposited on the same day with the company. Similarly, another member Mr. W also gives two separate proxies to two individuals named Mr. M and Mr. N. in the case of Mr. M, the proxy dated 12-04-2016 was deposited with the company on the same day and the proxy form in favour of Mr. N was deposited on 14-04-2016. All the proxies viz. Y, Z, M and N were present before the meeting.

According to the provisions of the Companies Act 2013, who would be the persons allowed to represent as proxies for members X and W respectively?



Solution:

Proxy appointed by Mr. X in favour of Mr. Y

- is dated 10.04.2016, and is deposited with the company on 11.04.2016.

Proxy appointed by Mr. X in favour of Mr. Z

- is dated 12.04.2016, and is deposited with the company on same day viz. 12.04.2016.

Mr. Z shall be allowed as Proxy for Mr. X in the GM

- since proxy form appointing Mr. Z as proxy was signed by the member, Mr. X later in point of time, and it was deposited with the company within the prescribed time, i.e. at least 48 hours before the GM.

Proxy appointed by Mr. W in favour of Mr. M

- is dated 12.04.2016, and is deposited with the company on same day viz. 12.04.2016.

Proxy appointed by Mr. W in favour of Mr. N

- is dated 12.04.2016, and is deposited with the company on 14.04.2016.

Proxy appointed by Mr. W in favour of Mr. N shall be rejected



- since, proxy form appointing N as proxy was not deposited with the company within the prescribed time, i.e. at least 48 hours before the GM.

Mr. M shall be allowed as proxy for Mr. W in the GM.

- since, by reason of rejection of proxy form in favour of Mr. N, only one valid proxy form in favour of Mr. M has reached the company within the prescribed time of at least 48 hours before the GM.



Question 5:

June. 2009

Annual General Meeting, of MGR Limited is convened on 28th December, 2018. Mr. J, who is a member of the company, approaches the company on 28th December, 2018 and demands inspection of proxies lodged with the company. Explain the legal position as stated under the Companies Act, 2013 in this regard.



Solution:

Mr. J is not entitled to inspect proxies

- since a member who intends to inspect the proxies has to give notice to the company of his intention to do so, at least 3 days before the commencement of the GM.



Question 6:

May 2018

Benson Limited issued a notice with the agenda for nine businesses to be transacted in the Annual General Meeting (two businesses were regarding appointment of Mr. Sahu and Mr. Pranav as directors). The chairman decided to move the resolutions for all the nine businesses together to save the time of the members present. Examine the validity of the resolutions.



Solution:

Moving a single resolution for 9 businesses (including two businesses for appointment of 2 directors) is not valid.

- Since it is prohibited as per the provisions of Sec. 162.



Question 7:

Nov 2010. May 2017

In a General Meeting of PQR Limited the chairman directed to exclude certain matters detrimental to the interest of the company from the minutes. M, a shareholder contended that the minutes of the meeting must contain fair and correct summary of the proceedings thereat. Decide whether the contention of M is maintainable under the provisions of the Companies Act, 2013.



Solution:

Chairman has the absolute discretion

- To determine whether a matter is detrimental to the interest of the company or not;
- To direct not to include in the minutes any matter which is detrimental to the interest of the company.

Refusal by Chairman is valid

- Since the matter discussed in GM is, in the opinion of the Chairman, detrimental to the interest of the company.

Contention of M is not tenable

- In view of the above stated legal position.



Question 8:

May 2006, 2013, Nov, 2017

To remove the Managing Director, 40% members of Global Ltd. submitted requisition for holding extra-ordinary general meeting. The company failed to call the said meeting and hence the requisitionists held the meeting. Since the Managing Director did not allow the holding of meeting at the registered office of the Company, the said meeting was held at some other place and a resolution for removal of the Managing Director was passed. Examine the validity of the said meeting and resolution passed therein in the light of the provisions of the Companies Act, 2013.



Solution:

The requisition is valid

- Assuming that the requisitionists hold at least 10% of the paid up share capital of the company;
- Since the requisition need not disclose the reasons behind the resolutions proposed at the EGM *LIC v Escorts*.

Holding of EGM at a place other than the registered office is valid

- Since the Board failed to call the EGM within the time prescribed u/s 100, thereby entitling the members to call, hold and conduct the EGM;
- Since the registered office was kept lock, and so it was not possible for the requisitionists to hold the EGM in the same manner in which GMs are ordinarily held, viz. at the registered office of the company.

Resolution removing the MD is valid

- Since the EGM was called, held and conducted, and the resolution removing MD was passed in accordance with the provisions of the Act [*R Chettiar v M Chettiar*]



Question 9.

Primal Limited is a company incorporated in India. It owns two subsidiaries- Privy Limited (in which it holds 75% shares) and Malvy Limited (a wholly owned subsidiary). Both the subsidiaries are incorporated outside India. The Board of Directors of Primal Limited intends to call an Extraordinary General Meeting (EGM) of Primal Limited on urgent basis. Advise the Board of Directors on the following:

- EGM be held in India
- EGM be held in Netherlands

(May'19 RTP)



Solution:

According to section 100 of the Companies Act, 2013, the Board may, whenever it deems fit, call an extraordinary general meeting of the company.

Provided that an extraordinary general meeting of the company, other than of the wholly owned subsidiary of a company incorporated outside India, shall be held at a place within India.

In the light of the above provisions:

- The Board of Directors can call the EGM in India.
- The Board of Directors cannot call the EGM of Primal Limited outside India as it is a company incorporated in India.



Question 10:

PQ Limited is a public company having its registered office in Mumbai. It has 3680 members. The company sent notice to all its members for its Annual general Meeting to be held on 2nd September 2019 (Monday) at 11 :00 AM at its registered office. On the day of meeting there were only 12 members personally present upto 11:30 AM. The Chairman adjourned the meeting to same day in next week at the same time and place.

On the day of adjourned meeting only 10 members were personally present. The Chairman initiated the meeting after 11:30 AM and passed the resolutions after discussion as per the agenda of the meeting given in the notice. Comment whether the AGM conducted after adjournment is valid or not as per the provisions of section 103 of Companies Act 2013 by explaining the relevant provisions in this regard.

What would be your answer in the above case, if PQ Limited is a Private company?

(2 + 2 = 4 Marks)



Solution:

According to section 103 of the Companies Act, 2013, unless the articles of the company provide for a larger number, in case of a public company, fifteen members personally present may fulfil the requirement of quorum, if the number of members as on the date of meeting is more than one thousand but up to five thousand.

If the specified quorum is not present within half-an-hour from the time appointed for holding a meeting of the company, the meeting shall stand adjourned to the same day in the next week at the same time and place, or to such other date and such other time and place as the Board may determine.

If at the adjourned meeting also, a quorum is not present within half-an-hour from the time appointed for holding meeting, the members present shall be the quorum.

In the instant case, there were only 12 members personally present on the day of meeting of PQ Limited upto 11:30 AM. This was not in compliance with the required quorum as per the law. In the adjourned meeting also, the required quorum was not present but in the adjourned meeting, the members present shall be considered as quorum in line with the provisions of section 103.

Hence, the AGM conducted by PQ Limited after adjournment is valid.

As per the provisions of section 103(1)(b), in case of a private company, two members personally present, shall be quorum for the meeting of a company. Therefore, in case, PQ Limited is a private company, then only two members personally present shall be the quorum for AGM and there was no need for adjournment.



Question 11:

A company received a proxy form 54 hours before the time fixed for the start of the meeting. The company refused to accept the proxy form on the ground that the Articles of the company provided that a proxy form must be filed 60 hours before the start of the meeting. Define proxy and decide under the provisions of the Companies Act, 2013, whether the proxy holder can compel the company to admit the proxy in this case?

(3 Marks)



Solution:

Section 105 of the Companies Act, 2013 deals with the provisions of proxy for meetings.

Section 105(1) of the Act provides that any member of a company entitled to attend and vote



at a meeting of the company shall be entitled to appoint another person as a proxy to attend and vote at the meeting on his behalf.

Further, Section 105(4) of the Act provides that a proxy received 48 hours before the meeting will be valid even if the articles provide for a longer period.

In the given case, the company received a proxy form 54 hours before the time fixed for start of the meeting. The Company refused to accept proxy on the ground that articles of the company provides filing of proxy before 60 hours of the meeting. In the said case, in line with requirement of the above stated legal provision, a proxy received 48 hours before the meeting will be valid even if the articles provide for a longer period. Accordingly, the proxy holder can compel the company to admit the proxy.



Question 12:

- (a) Examine the validity of the following statements in respect of Annual General Meeting (AGM) as per the provisions of the Companies Act, 2013:
- (i) The first AGM of a company shall be held within a period of six months from the date of closing of the first financial year.
 - (ii) The Registrar may, for any special reason, extend the time within which the first AGM shall be held.
 - (iii) Subsequent (second onwards) AGMs should be held within 6 months from closing of the financial year.
 - (iv) There shall be a maximum interval of 15 months between two AGMs. (4 Marks)



Solution:

According to section 96 of the Companies Act, 2013, first annual general meeting of the company should be held within 9 months from the closing of the first financial year.

Hence, the statement that the first AGM of a company shall be held within a period of six months from the date of closing of the first financial year is incorrect.

- (i) According to proviso to section 96(1), the Registrar may, for any special reason, extend the time within which any annual general meeting, other than the first annual general meeting, shall be held, by a period not exceeding three months.
Thus, the Registrar cannot extend (for any reason) the time period within which the first AGM shall be held. Given statement is incorrect.
- (ii) According to section 96, subsequent AGM (i.e. second AGM onwards) of the company should be held within 6 months from the closing of the financial year.
Hence, the given statement is correct.
- (iii) According to section 96, the gap between two annual general meetings should not exceed 15 months.
Hence, the given statement is correct, that there shall be a maximum interval of 15 months between two AGMs.



Question 13:

Explain the provisions of e-voting in an annual general meeting in the following cases as per the Companies Act, 2013:

- (i) 'A' and his wife 'B' has joint Demat Account in Alfa Investment Ltd. in such a case, who will cast the vote in e-voting system?



- (ii) AGM is going to be held on 07-09-2020. Then what will be the e- voting period and the time of closing? (4 Marks)



Solution:

Joint shareholders must concur in voting unless the articles provide to the contrary.

The voting in case of joint shareholders is done in the order of seniority, which is determined on the basis of the order in which their names appear in the register of members/ shareholders. The joint- holders have a right to instruct the company as to the order in which their names are to appear in the register.

As per Rule 21 of the Companies (Management and Administration) Rules, 2014, the Scrutinizers shall arrange for Polling papers and distribute them to the members and proxies present at the meeting; in case of joint shareholders, the polling paper shall be given to the first named holder or in his absence to the joint holder attending the meeting as appearing in the chronological order in the folio.

Thus, in the given case, 'A' or his wife 'B', whosoever names appears first in chronological order in the register of members/ shareholders shall be entitled to vote.

- ii) Time period for e-voting: The facility for remote e-voting shall remain open for not less than three days and shall close at 5.00 p.m. on the date preceding the date of the general meeting.

Thus, if the Annual General Meeting is going to be held on 7.9.2020, the facility for remote e- voting shall open on 4.9.2020 and close at 5.00 p.m. on 6.9.2020.



CHAPTER WISE - CLASS TEST



Question 1.

Neemrana Infotech Ltd. was incorporated on 1.4.2017. No General Meeting of the company has been held so far. Explain the provisions of the Companies Act, 2013 regarding the time limit for holding the first annual general meeting of the Company and the power of the Registrar to grant extension of time for the First Annual General Meeting.

(Nov'19 RTP)



Solution:

According to Section 96 of the Companies Act, 2013, every company shall be required to hold its first annual general meeting within a period of 9 months from the closing of its first financial year.

Also, if a company holds its first annual general meeting as aforesaid, it shall not be necessary for the company to hold any annual general meeting in the year of its incorporation:

It also provide that the Registrar may, for any special reason, extend the time within which any annual general meeting, other than the first annual general meeting, shall be held, by a period not exceeding three months.

In the given case, taking the first financial year of Neemrana Infotech Ltd is for the period 1st April 2017 to 31st March 2018, the first annual general meeting of the company should be held on or before 31st December, 2018.

According to section 99, if any default is made in holding a meeting of the company in accordance with section 96, the company and every officer of the company who is in default shall be punishable with fine which may extend to one lakh rupees and in the case of a continuing default, with a further fine which may extend to five thousand rupees for every day during which such default continues.

Even though the Registrar of Companies is empowered to grant extension of time for a period not exceeding 3 months for holding the annual general meetings, such power does not apply in the case of the first annual general meeting. Thus, the company and its directors will be liable under section 99 of the Companies Act, 2013 for the default if the annual general meeting was held after 31st December, 2018.



Question 2.

Mr. Pink held 100 partly paid up shares of Red Limited. The company asked him to pay the final call money on the shares. Due to some unavoidable circumstances he was unable to pay the amount of call money to the company. At a general meeting of the shareholders, the chairman disallowed him to cast his vote on the ground that the articles do not permit a shareholder to vote if he has not paid the calls on the shares held by him. Mr. Pink contested the decision of the Chairman. Referring to the provisions of the Companies Act, 2013 decide whether the contention of Mr. Pink is valid.

(Nov'19 RTP)



Solution:

Section 106 (1) of the Companies Act, 2013 states that the articles of a company may provide that no member shall exercise any voting right in respect of any shares registered in his name on which any calls or other sums presently payable by him have not been paid, or in regard to which the company has exercised any right of lien.

In the present case the articles of the company do not permit a shareholder to vote if he has



not paid the calls on the shares held by him. Therefore, the chairman at the meeting is well within its right to refuse him the right to vote at the meeting and Mr. Pink's contention is not valid.



Question 3.

Rijwan Limited, a listed company, is in the business of garment manufacturing and has its registered office at 123, N Tower, Commercial Beta Complex, Biwadi, Rajasthan. The company has called its 6th Annual General Meeting at 3 PM on 22nd August, 2019 at Ansal Plaza, Bhiwadi. Some of the members of the company have opposed to calling of the meeting at Ansal Plaza. The company has approached you to advise them in this regard. Suppose, Rijwan Limited is an unlisted company and wants to call their 6th AGM at Jaipur, will your answer differ?

(Nov'19 RTP)



Solution:

According to section 96(2) of the Companies Act, 2013, every annual general meeting shall be called during business hours, that is, between 9 a.m. and 6 p.m. on any day that is not a National Holiday and shall be held either at the registered office of the company or at some other place within the city, town or village in which the registered office of the company is situate.

Provided, that annual general meeting of an unlisted company may be held at any place in India if consent is given in writing or by electronic mode by all the members in advance.

Thus, in the first case, the company is right in calling the Annual General meeting at Ansal Plaza.

In the second scenario, in case of an unlisted company, annual general meeting may be held at any place in India if consent is given in writing or by electronic mode by all the members in advance. Hence, if consent is given in writing or by electronic mode by all the members in advance, the AGM can be called at Jaipur, otherwise not.



Question 4.

At a General meeting of a XYZ Limited, a matter was to be passed by a special resolution. Out of 40 members present, 20 voted in favour of the resolution, 5 voted against it and 5 votes were found invalid. The remaining 10 members abstained from voting. The Chairman of the meeting declared the resolution as passed. With reference to the provisions of the Companies Act, 2013, examine the validity of the Chairman's declaration

(Nov'19 Mock Test)



Solution:

Under Section 114(2) of the Companies Act, 2013, for a valid special resolution to be passed at a meeting of members of a company, the following conditions need to be satisfied:

- (i) The intention to propose the resolution, as a special resolution must have been specified in the notice calling the general meeting or other intimation given to the members;
- (ii) The notice required under the Companies Act must have been duly given of the general meeting;
- (iii) The votes cast in favour of the resolution (whether by show of hands or electronically or on a poll, as the case may be) by members present in person or by proxy or by postal ballot are not less than 3 times the number of votes, if any, cast against the resolution by members so entitled and voting.



Thus, in terms of the requisite majority, votes cast in favour have to be compared with votes cast against the resolution. Abstentions or invalid votes, if any, are not to be taken into account.

Accordingly, in the given problem, the votes cast in favour (20) being more than 3 times of the votes cast against (5), and presuming other conditions of Section 114(2) are satisfied, the decision of the Chairman is in order.



Question 5.

As per the provisions of the Companies Act, 2013, every company is required to file with the Registrar of Companies, the Annual Return as prescribed in section 92, in Form MGT -7. Explain the particulars required to be contained in it.?

(May'18- 6 Marks)



Solution:

Every company is required to file with the Registrar of Companies, the annual return as prescribed in section 92, in Form MGT - 7 as per Rule 11(1) of the Companies (Management & Administration) Rules, 2014.

The particulars contained in an annual return, to be filed by every company are as follows-

1. Its registered office, principal business activities, particulars of its holding, subsidiary and associate companies;
2. Its shares, debentures and other securities and shareholding pattern
3. Its indebtedness;
4. Its members and debenture-holders along with the changes therein since the close of the previous financial year;
5. Its promoters, directors, key managerial personnel along with changes therein since the close of the previous financial year;
6. Meetings of members or a class thereof, Board and its various committees along with attendance details;
7. Remuneration of directors and key managerial personnel;
8. Penalty or punishment imposed on the company, its directors or officers and details of compounding of offences and appeals made against such penalty or punishment;
9. Matters relating to certification of compliances, disclosures;
10. Details in respect of shares held by or on behalf of the Foreign Institutional Investors including their names, addresses, countries of incorporation, registration and percentage of shareholding held by them;
11. Such other matters as may be prescribed.



Question 6.

Members of ZA Ltd. holding less than 1% of total voting power want the company to give a special notice to move a resolution for appointment of an auditor other than retiring auditor. Explain whether members have complied with relevant provisions of the Companies Act, 2013 in making their request. (Nov'18- 3 Marks)



Solution:

Resolutions requiring special notice [Section 115]

Section 115 of the Companies Act, 2013 states that where any provision of this Act specifically



requires or Articles of Association of a company so require that a special notice is required for passing any resolution, then the notice of the intention to move such resolution shall be given to the company by such number of members holding not less than 1% of the total voting power, or holding shares on which such aggregate sum not exceeding 5,00,000/- has been paid-up. In such a case, the company shall give its members notice of the resolution in the manner as prescribed in Rule 22 of the Companies (Management & Administration) Rules, 2014. Further, Section 115 of the Act specifies that special notice is required to appoint as auditor a person other than a retiring auditor under Section 140 of the Act.

According to the given facts in the question, there is non-compliance of requirement of section 115 as stated above i.e. the notice of the intention to move such resolution as to appointment of auditor other than retiring auditor was given by members of ZA Ltd. holding less than 1% of the total voting power.



Question 7.

KMN Ltd. scheduled its annual general meeting to be held on 11th March, 2018 at 11:00 A.M. The company has 900 members. On 11th March, 2018 following persons were present by 11:30 A.M.

1. P1, P2 & P3 shareholders
2. P4 representing ABC Ltd.
3. P5 representing DEF Ltd.
4. P6 & P7 as proxies of the shareholders
 1. Examine with reference to relevant provisions of the Companies Act, 2013, whether quorum was present in the meeting.
 2. What will be your answer if P4 representing ABC Ltd., reached in the meeting after 11:30 A.M.?

(Nov'18-4 Marks)



Solution:

According to section 103 of the Companies Act, 2013, unless the articles of the company provide for a larger number, the quorum for the meeting of a Public Limited Company shall be 5 members personally present, if number of members is not more than 1000.

1. (1) P1, P2 and P3 will be counted as three members.
(2) If a company is a member of another company, it may authorize a person by resolution to act as its representative at a meeting of the latter company, then such a person shall be deemed to be a member present in person and counted for the purpose of quorum. Hence, P4 and P5 representing ABC Ltd. and DEF Ltd. respectively will be counted as two members.
(3) Only members present in person and not by proxy are to be counted. Hence, proxies whether they are members or not will have to be excluded for the purposes of quorum. Thus, P6 and P7 shall not be counted in quorum.
In the light of the provision of the Act and the facts of the question, it can be concluded that the quorum for Annual General Meeting of KMN Ltd. is 5 members personally present. Total 5 members (P1, P2, P3, P4 and P5) were present. Hence, the requirement of quorum is fulfilled.
2. The section further states that, if the required quorum is not present within half an hour, the meeting shall stand adjourned for the next week at the same time and place or such



other time and place as decided by the Board of Directors.

Since, P4 is an essential part for meeting the quorum requirement, and he reaches after 11:30 AM (i.e. half an hour after the starting of the meeting), the meeting will be adjourned as provided above.

3. In case of lack of quorum, the meeting will be adjourned as provided in section 103. In case of the adjourned meeting or change of day, time or place of meeting, the company shall give not less than 3 days' notice to the members either individually or by publishing an advertisement in the newspaper.
4. Where quorum is not present in the adjourned meeting also within half an hour, then the members present shall form the quorum.



Question 8.

'X' a member of LKM Ltd. is holding 250 shares, which are partly paid. The company held its general meeting where voting right was denied to 'X' claiming he has not paid the calls on the shares held by him. Examine the validity of company's denial to 'X' with reference to the relevant provisions of the Companies Act, 2013, assuming that Articles of association of the Company do not restrict the voting right of such members. (Nov'18- 4 Marks)



Solution:

Restriction on voting rights [Section 106 of the Companies Act, 2013]

According to the said Section:

1. Notwithstanding anything contained in this Act, the articles of a company may provide that no member shall exercise any voting right in respect of any shares registered in his name on which any calls or other sums are presently payable by him have not been paid, or in regard to which the company has exercised any right of lien.
2. A company shall not, except on the grounds specified in sub-section (1), prohibit any member from exercising his voting right on any other ground.

In the given question, Mr. X (member) holding 250 shares of LKM Ltd. has not paid certain calls on the shares. The company has denied his voting rights in the general meeting though the Articles of association of the company does not contain any restriction in the voting rights of such members.

On examination of the above provisions of the Act and the facts of the case, LKM Ltd.'s denial to 'X' for exercising his voting rights is not valid.



Question 9.

Madurai Ltd. issued a notice for holding of its Annual general meeting on 7th November 2018. The notice was posted to the members on 16th October 2018. Some members of the company allege that the company had not complied with the provisions of the Companies Act, 2013 with regard to the period of notice and as such the meeting was valid. Referring to the provisions of the Act, decide:

1. Whether the meeting has been validly called?
2. If there is a shortfall, state and explain by how many days does the notice fall short of the statutory requirement?
3. Can the delay in giving notice be condoned? (May'19- 6 Marks)



Solution:

According to section 101(1) of the Companies Act, 2013, a general meeting of a company may be called by giving not less than clear twenty-one days' notice either in writing or through electronic mode in such manner as may be prescribed.

Also, it is to be noted that 21 clear days mean that the date on which notice is served and the date of meeting are excluded for sending the notice.

Further, Rule 35(6) of the Companies (Incorporation) Rules, 2014, provides that in case of delivery by post, such service shall be deemed to have been effected - in the case of a notice of a meeting, at the expiration of forty eight hours after the letter containing the same is posted.

Hence, in the given question:

1. A 21 days' clear notice must be given. In the given question, only 19 clear days' notice is served (after excluding 48 hours from the time of its posting and the day of sending and date of meeting). Therefore, the meeting was not validly called.
2. As explained in (i) above, notice falls short by 2 days.
3. The Companies Act, 2013 does not provide anything specific regarding the condonation of delay in giving of notice. Hence, the delay in giving the notice calling the meeting cannot be condoned.



Question 10.

Give the points of distinction between ordinary resolution and special resolution.

(May'19-5 Marks)



Solution:

Difference between ordinary resolution and Special resolution

Ordinary Resolution—

Section 114(1) of the Companies Act, 2013 states that a resolution shall be ordinary resolution, if the notice required under this Act has been duly given and it is required to be passed by the votes cast, whether on a show of hands, or electronically or on a poll, as the case may be, in favour of the resolution, including the casting vote of the Chairman, if any, of the Chairman, by members, who, being entitled so to do, vote in person, or where proxies are allowed, by proxy or by postal ballot, exceed the votes, if any cast against the resolution by members, so entitled and voting.

Simply put, the votes cast in the favour of the resolution, by any mode of voting should exceed the votes cast against it.

Special Resolution—

As per Section 114(2) of the Act, a resolution shall be a special resolution, when-

- (a) The intention to propose the resolution as a special resolution has been duly specified in the notice calling the general meeting or other intimation given to the members of the resolution;
- (b) The notice required under this Act has been duly given; and
- (c) The votes cast in favour of the resolution, whether on a show of hands, or electronically or on a poll, as the case may be, in favour of the resolution, including the casting vote of the Chairman, if any, of the Chairman, by members, who, being entitled so to do, vote in person, or where proxies are allowed, by proxy or by postal ballot, are required to be not less than 3 times the number of the votes, if any, cast against the resolution by members so entitled and voting.



Question 11.

(i) Explain the provisions of the Companies Act, 2013 relating to quorum for general meeting of a public company having total 30 members, of which, two members are bodies corporate and one member is the President of India.

Whether the representatives appointed by body corporate and President of India to participate in the general meeting shall be counted for quorum and can such representatives cast vote at that general meeting? (May'19- 3 Marks)

(ii) If a member of a listed company who has casted his vote through electronic voting can attend general meeting of the company and change his vote subsequently and can he appoint a proxy? (May'19- 2 Marks)



Solution:

(i) According to section 103(1)(a)(i) of the Companies Act, 2013, unless the articles of the company provide for a larger number, in case of public company, if the number of members as on the date of meeting is not more than one thousand, five members personally present shall be the quorum for a meeting of the company. In the instant case, the quorum for the public company will be 5 members personally present. In the said company, two members are bodies corporate and one member is the President of India.

Only members present in person and not by proxy are to be counted. Hence, proxies whether they are members or not will have to be excluded for the purposes of quorum. As per section 113 of the Companies Act, 2013, if a company is a member of another company, it may authorize a person by resolution to act as its representative at a meeting of the latter company, then such a person shall be deemed to be a member present in person and counted for the purpose of quorum and shall be entitled to vote.

As per section 112 of the Companies Act, 2013, the President of India, if he is a member of a company, may appoint such a person as he thinks fit, to act as his representative at any meeting of the company. A person so appointed shall be deemed to be a member of such a company and thus considered as member personally present and shall be entitled to vote.

(ii) According to Rule - 20(4)(iii)(C) of the Companies (Management and Administration) Rules, 2014, the notice of the meeting shall clearly state that the members who have cast their vote by remote e-voting prior to the meeting may also attend the meeting but shall not be entitled to cast their vote again.

In the instant case, a member of a listed company who has casted his vote through electronic voting can attend general meeting of the company but cannot change his vote subsequently and is not permitted to appoint a proxy.

MCQs



Question 1:

The Annual General Meeting (AGM) of Green Limited was held on 31.8.2022. Suppose the Chairman of the company after two days of AGM went abroad for next 31 days. Due to the unavailability of the Chairman, within time period prescribed for submission of copy of report of AGM with the registrar, the report as required was signed by two Directors of the company, of which one was additional Director of the company. Comment on the signing of this report of AGM.



- (a) Yes, the signing is in order as the report can be signed by any director in the absence of Chairman.
- (b) No, the signing is not in order as only the Chairman is authorised to sign the report
- (c) Yes, the signing is in order, as in the absence of Chairman at least two directors should sign the report.
- (d) No, the signing is not in order, since in case the Chairman is unable to sign, the report shall be signed by any two directors of the company, one of whom shall be the Managing director, if there is one and company secretary of the company.



Solution:

- (d) No, the signing is not in order, since in case the Chairman is unable to sign, the report shall be signed by any two directors of the company, one of whom shall be the Managing director, if there is one and company secretary of the company.



Question 2.

The AGM shall be called by giving 21 clear days' notice. However, it can be called by giving shorter notice if members entitled to vote at that meeting give their consent in writing or by electronic mode. In such cases how many members have to give their consent?

- (a) 75% of members entitled
- (b) 90% of members entitled
- (c) 91% of members entitled
- (d) 95% of members entitled



Solution:

- (d) 95% of members entitled



Question 3.

Which among the following companies is not required to provide its members the facility to exercise right to vote by electronic mode under the provisions of the Companies Act, 2013?

- (a) B Limited, whose equity shares (the company is having both equity as well as preference shares) are listed on a recognised stock exchange.
- (b) A Limited, whose equity shares (only type of share the company is having) are listed on a recognised stock exchange
- (c) C Limited, whose preference shares (the company is having both equity as well as preference shares) are listed on a recognised stock exchange
- (d) D Limited, whose equity shares as well as preference shares are listed on a recognised stock exchange.



Solution:

- (c) C Limited, whose preference shares (the company is having both equity as well as preference shares) are listed on a recognised stock exchange

**KOI TUMHE TAB TAK NAHI
HARA SAKTA ... JAB TAK TUM
KHUD SE NA HAAR JAO**



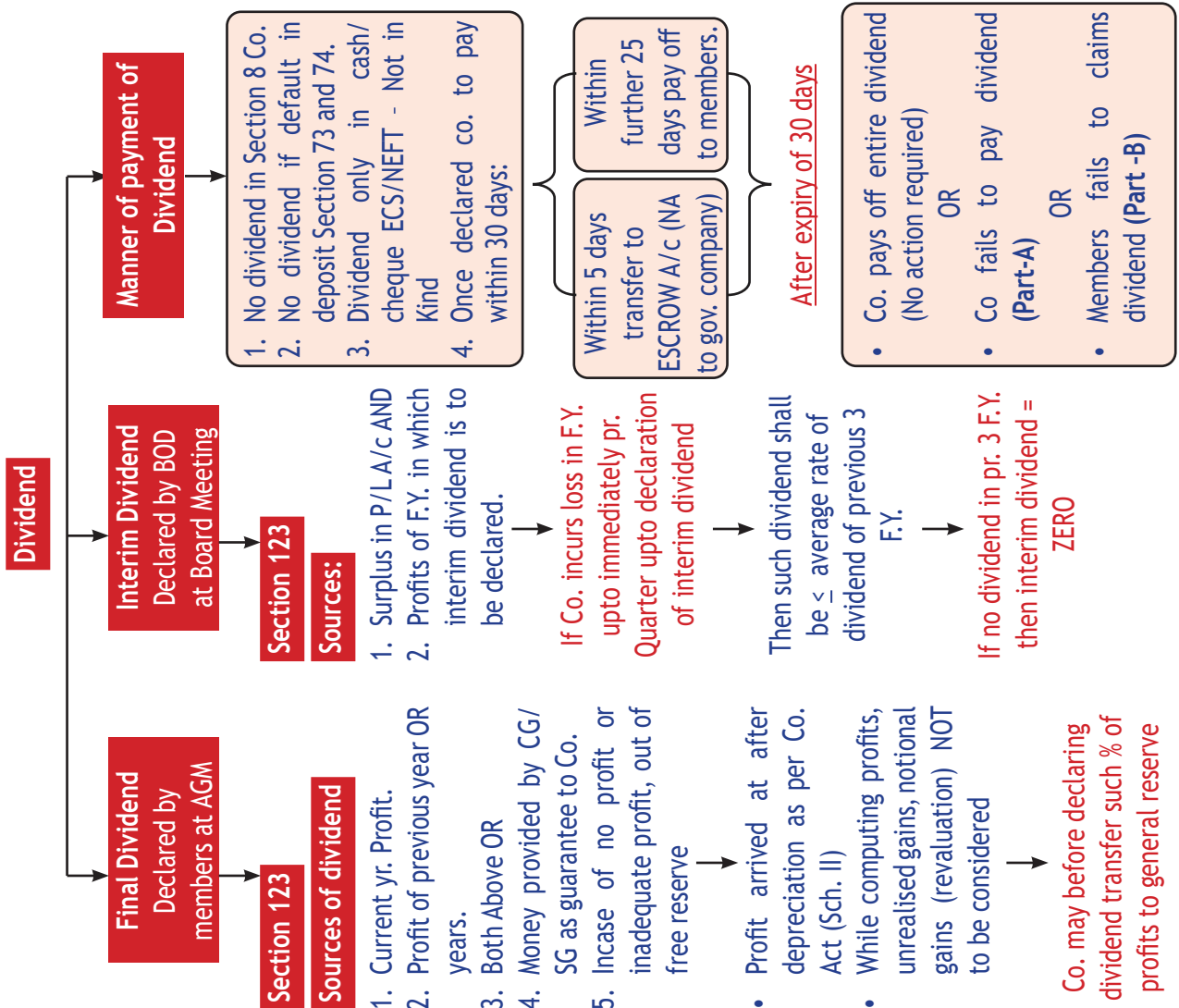


08

DECLARATION AND PAYMENT OF DIVIDEND



Section 2(35) - Dividend includes Interim Dividend



PART A: Co. fails to pay dividend after expiry of 30 days (Section 127)

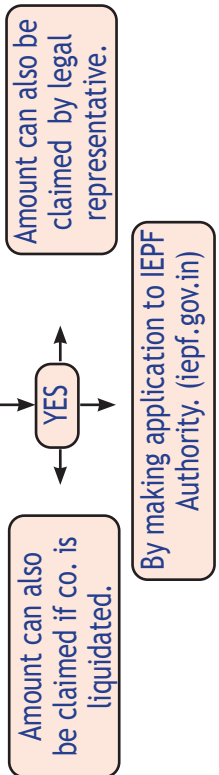
1. Co. to pay int to members @ 18% p.a. from 31st day.
2. Director liable for - imprisonment < 2 years AND Penalty 1,000/day.
3. No liability if:

- a. Dividend not paid out of operation of law
- b. Dividend is under court dispute.
- c. Co. unable to pay in a demanded manner and informed member about the same.
- d. Adjusted against arrears of courts.
- e. Any other reason where co. not at fault for failure to pay.

PART B: If member fails to claim dividend (Section 124 & 125)

1. If member fails to claim in 30 days, dividend kept in the same escrow A/c for **UPTO** further 7 days i.e. total 30+7 = 37days.
2. After expiry of 37 days i.e. **MAXIMUM** on 38th day unclaimed dividend to be transferred to "Unpaid Dividend A/c" by Co. "New Escrow"
3. Within 90 days of transfer, Co. to upload details of such members on its website - So members can claim
4. If Co. fails to transfer unclaimed dividend to unpaid dividend A/c:
 - a. Co. to pay interest @ 12% p.a. to members who did not claim.
 - b. Co. liable for penalty 1 Lac + 500 per day Maximum 10 Lacs.
 - c. Officers liable for penalty 25000 + 100 per day Maximum 2 Lacs
5. Any money which remains unclaimed from unpaid dividend A/c for 7 years shall be transferred to IEPF A/c.

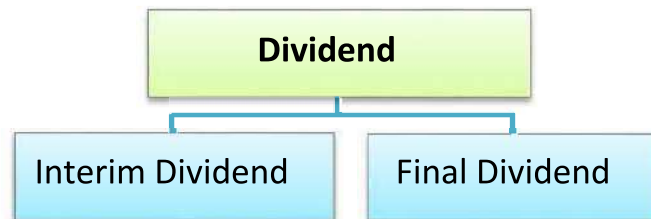
Can an investor who failed to claim dividend for 7 years 37 days claim his dividend from IEPF A/c (i.e. CG)??





TYPES OF DIVIDEND

Dividend payable on the basis of Time (When declared)



Interim Dividend

Section 123 (3) and also section 123 (4) contain provisions regarding interim dividend. Following points are noteworthy:

- Interim dividend is declared by the Board of Directors.
- It can be declared during any financial year.
- Further, it can be declared at any time during the period from closure of the financial year till holding of the Annual General Meeting (AGM).
- The declaration of interim dividend is done out of profits before the final passing of the accounts and therefore, effectively, interim dividend is said to be declared and paid between two AGMs.
- The sources for declaring interim dividend include:
 - Surplus in the profit and loss account; or
 - Profits of the financial year in which such dividend is sought to be declared; or
 - Profits generated in the financial year till the quarter preceding the date of declaration of the interim dividend.
- If the company has incurred loss during the current financial year up to the end of the quarter immediately preceding the date of declaration of interim dividend, such interim dividend shall not be declared at a rate higher than the average dividends declared by the company during the immediately preceding three financial years.
- All provisions which are applicable to the payment of dividend shall also apply in case of interim dividend.

Final Dividend

- When the dividend is declared at the Annual General Meeting of the company, it is known as 'final dividend'.
- The rate of dividend recommended by the Board cannot be increased by the members.

PROVISIONS REGARDING DECLARATION AND PAYMENT OF DIVIDEND

A. Sources for Declaration of Dividend

According to Section 123 (1), the dividend for any financial year shall be declared or paid from the following sources:

- (a) **Profits of the current financial year**- Profits arrived at after providing for depreciation in accordance with Schedule II.
- (b) **Profits of any previous financial year or years**- Profits of any previous financial year(s) arrived at after providing for depreciation in accordance with Schedule II



and remaining undistributed i.e. credit balance in profit and loss account and free reserves. It is to be noted that only free reserves⁴ and no other reserves are to be used for declaration or payment of dividend⁵.

- (c) Both (a) and (b).

Note 1: Before declaration of any dividend, carried over previous losses and depreciation not provided in previous year or years are required to be set off against profit of the company for the current year⁶.

Note 2: In computing profits any amount representing unrealised gains, notional gains or revaluation of assets and any change in carrying amount of an asset or of a liability on measurement of the asset or the liability at fair value shall be excluded⁷.

Note 3: Capital profits are not same as distributable profits because they are not earned in the normal course of business; and therefore, normally not available for distribution as dividend.

- (d) **Provision of money by the Government-** Money provided by the Central Government or a State Government for the payment of dividend by the company in pursuance of a guarantee given by that Government.

B. Transfer to Reserves

As per First Proviso to Section 123 (1), it is not mandatory for a company to transfer a particular percentage of its profits to reserves before the declaration of any dividend in any financial year. Thus, a company may, as per its discretion, transfer any appropriate percentage of its profits to reserves before the declaration of dividend.

C. Declaration of Dividend when there is Inadequacy or Absence of Profits

As per Second Proviso to Section 123 (1), in the event of inadequacy or absence of profits in any financial year, a company may declare dividend out of the accumulated profits of previous years which have been transferred to the free reserves. However, such declaration shall be subject to the following conditions⁸:

- (a) The rate of dividend declared shall not exceed the average of the rates at which dividend was declared by the company in the immediately preceding three years.

However, **this condition** shall not apply if the company has not declared any dividend in each of the three preceding financial year.

- (b) The total amount to be drawn from such accumulated profits shall not exceed 10% of its paid-up share capital and free reserves as appearing in the latest audited financial statement. In other words:

Total amount that can be drawn from accumulated profits	≤	10% of (paid up share capital + free reserves)



(c) The amount so drawn shall first be utilised to set off the losses incurred in the financial year in which dividend is declared and only thereafter, any dividend in respect of equity shares shall be declared.

(d) The balance of reserves after such withdrawal shall not fall below 15% of its paid-up share capital as appearing in the latest audited financial statement.

D. Depositing of Amount of Dividend

In terms of section 123(4), the amount of the dividend (including interim dividend), shall be deposited in a separate account maintained with a scheduled bank. This is to be done **within 5 days** from the date of declaration of dividend⁹.

E. Payment of Dividend

Section 123(5) contains provisions regarding payment of dividend. These are stated as under:

(a) Dividend shall be payable only to the registered shareholder or to his order or to his banker.

In case a shareholder informs the company to pay dividend to a particular banker and if the payment is so made by the company, then it shall be deemed to be made to the shareholder himself.

(b) Dividends are payable in cash and not in kind. Dividends that are payable to the shareholders in cash may also be paid by cheque or dividend warrant or through any electronic mode.

(c) **Applicability of Section 123 (5) to Nidhis:** In terms of Notification No. GSR 465 (E), dated 05-06-2015, this sub-section shall apply to the Nidhis, subject to the modification that any dividend payable in cash may be paid by crediting the same to the account of the member, if the dividend is not claimed within 30 days from the date of declaration of the dividend.

F. Prohibition on Declaration of Dividend

Following prohibitions are applicable:

(i) **Prohibition in case of any Defaulting Company:** Section 123 (6) contains prohibition on declaration of dividend by a company. It specifically provides that a company which fails to comply with the provisions of section 73 (Prohibition on acceptance of deposits from member) and section 74 (Repayment of deposits, etc., accepted before the commencement of this Act of 2013) shall not, so long as such failure continues, declare any dividend on its equity shares.

(ii) **Prohibition in case of Section 8 Companies:** According to section 8 (1), a company having licence under Section 8 (Formation of companies with charitable objects, etc.) is prohibited from paying any dividend to its members. Its profits are intended to be applied only in promoting the objects for which it is formed.



UNPAID DIVIDEND ACCOUNT (UDA)

Section 124 of the Act contains the provisions relating to Unpaid Dividend Account (UDA). These are as follows:

- (1) **Unpaid or Unclaimed Dividend to be transferred to the Unpaid Dividend Account-** In case a dividend has been declared by a company but has not been paid or claimed within 30 days from the date of declaration, the company shall, within 7 days from the expiry of the 30 days, transfer the total amount of unpaid or unclaimed dividend to a special account called the Unpaid Dividend Account (UDA). The UDA shall be opened by the company in any scheduled bank.
- (2) **Preparing of Statement of the Unpaid Dividend-** Within 90 days of transferring any amount to the Unpaid Dividend Account, the company shall prepare a statement containing the names, their last known addresses and the unpaid dividend to be paid to each person and place such statement on its web- site, if any, and also on any other web-site approved by the Central Government for this purpose.
- (3) **Payment of Interest if default is made in transferring the Amount-** If any default is made in transferring the total unpaid dividend amount or any part thereof to the Unpaid Dividend Account, the company shall pay, from the date of such default, interest at the rate of twelve per cent per annum on the amount not so transferred to the said account. The interest accruing on such amount shall enure to the benefit of the members of the company in proportion to the amount remaining unpaid to them.
- (4) **Claimant to apply for payment of Claimed Amount-** Any person claiming to be entitled to any money transferred to the Unpaid Dividend Account may apply to the company concerned for payment of the money so claimed.
- (5) **Transfer of Unclaimed Amount to Investor Education and Protection Fund (IEPF)-** Any money transferred to the Unpaid Dividend Account which remains unpaid or unclaimed for 7 years from the date of such transfer shall be transferred by the company along with interest accrued thereon to the IEPF.
- (6) **Transfer of Shares to IEPF-** All shares in respect of which dividend has not been paid or claimed for 7 consecutive years or more shall be transferred by the company in the name of Investor Education and Protection Fund along with a statement containing the prescribed details.
Right of Owner of 'transferred shares' to Reclaim- Any claimant of shares so transferred to IEPF shall be entitled to reclaim the 'transferred shares' from Investor Education and Protection Fund in accordance with the prescribed procedure and on submission of prescribed documents.
- (7) **Punishment for Contravention-** If a company fails to comply with any of the requirements of this section, such company shall be liable to a penalty of one lakh rupees and in case of continuing failure, with a further penalty of five hundred rupees for each day after the first during which such failure continues, subject to a maximum of ten lakh rupees



and every officer of the company who is in default shall be liable to a penalty of twenty-five thousand rupees and in case of continuing failure, with a further penalty of one hundred rupees for each day after the first during which such failure continues, subject to a maximum of two lakh rupees. Companies Amendment Act, 2020

INVESTOR EDUCATION AND PROTECTION FUND (IEPF)

The relevant provisions are given as under:

1. **Credit of Specified Amounts to the Fund:** Following specified amounts shall be credited to the Fund:
 - (a) **Amount given by the Central Government-** The amount given by the Central Government by way of grants after due appropriation made by Parliament;
 - (b) **Donations by the Central Government-** Donations given by the Central Government, State Governments, companies or any other institution for the purposes of the Fund;
 - (c) **Amount lying in the Unpaid Dividend Account-** The amount lying in the Unpaid Dividend Account (UDA) of companies transferred to the Fund under section 124(5) i.e. remaining unpaid and unclaimed for a period of seven years;
 - (d) **Income from Investments-** The interest or other income received out of investments made from the Fund;
 - (e) **Application Money-** The application money received by companies for allotment of any securities and due for refund (only if such amount has remained unclaimed and unpaid for a period of seven years from the date it became due for payment);
 - (f) **Matured Deposits-** Matured deposits with companies other than banking companies (only if such amount has remained unclaimed and unpaid for a period of seven years from the date it became due for payment);
 - (g) **Matured Debentures-** Matured debentures with companies (only if such amount has remained unclaimed and unpaid for a period of seven years from the date it became due for payment);
 - (h) **Interest-** Interest accrued on the amounts referred to in clauses (h) to (j);
 - (i) **Amount received from Sale Proceeds-** Amount received from sale proceeds of fractional shares arising out of issuance of bonus shares, merger and amalgamation for seven or more years;
 - (j) **Redemption Amount-** Redemption amount of preference shares remaining unpaid or unclaimed for seven or more years; and
2. **Utilization of the Fund:** According to section 125 (3) the Fund shall be utilized for:
 - (a) refund of unclaimed dividends, matured deposits, matured debentures, the application money due for refund and interest thereon;
 - (b) promotion of investors' education, awareness and protection;
 - (c) reimbursement of legal expenses incurred in pursuing class action suits under sections 37 and 245 by members, debenture-holders or depositors as may be sanctioned by the Tribunal; and
 - (d) any other purpose incidental thereto in accordance with the rules framed under the Investor Education and Protection Fund Authority (Accounting, Audit, Transfer and Refund) Rules, 2016.



3. Other Provisions governing the IEPF

- (i) **Provision of required Resources by the Central Government for Administration of the Fund-** The Central Government may provide to the Authority such offices, officers, employees and other resources in accordance with the IEPF Authority (Appointment of Chairperson and Members, holding of Meetings and provision for Offices and Officers) Rules, 2016.
- (ii) **Audit of the Fund-** The accounts of the Fund shall be audited by the Comptroller and Auditor-General of India at such intervals as may be specified by him. Such audited accounts together with the audit report thereon shall be forwarded annually by the Authority to the Central Government.
- (iii) **Preparation of Annual Report by the Authority-** For each financial year, the Authority shall prepare in the prescribed form and at prescribed time its annual report giving full account of its activities during the financial year and forward a copy thereof to the Central Government. In turn, the Central Government shall cause the annual report and the audit report given by the Comptroller and Auditor- General of India to be laid before each House of Parliament.

RIGHT OF DIVIDEND, RIGHTS SHARES AND BONUS SHARES TO BE HELD IN ABEYANCE PENDING REGISTRATION OF TRANSFER OF SHARES

According to Section 126, in case any instrument of transfer of shares has been delivered by a shareholder for registration and the transfer of such shares has not been registered by the company, such company shall take the following steps:

- (a) transfer the dividend in relation to such shares to the Unpaid Dividend Account. Such action of transferring dividend to Unpaid Dividend Account may not be initiated by the company if it is authorised by the registered holder of such share in writing to pay such dividend to the transferee specified in the instrument of transfer; and
- (b) keep in abeyance in relation to such shares any offer of rights shares under section 62 (1) (a) and any issue of fully paid-up bonus shares in pursuance of first proviso to section 123 (5).

PUNISHMENT FOR FAILURE TO DISTRIBUTE DIVIDENDS WITHIN 30 DAYS

Section 127 of the Act contains time limit for distribution of dividends and punishment for failure to distribute dividend on time. Certain exemptions from punishments are also provided. These provisions are stated as under:

A. Punishment for Failure

In case a company fails to pay declared dividends or fails to post dividend warrants within 30 days of declaration, following punishments are applicable:

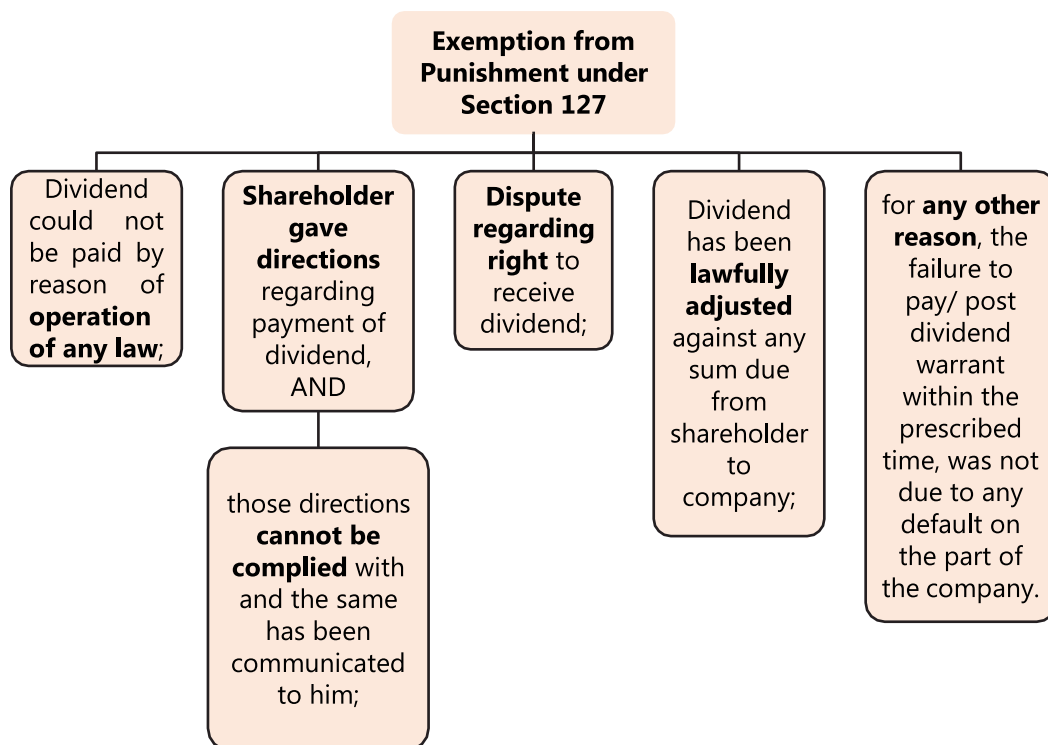
- (i) Every **director** of the company shall be punishable with imprisonment maximum up to two years, if he is knowingly a party to the default. Further, he shall also be liable to pay minimum fine of ₹ 1,000 for every day during which such default continues.
- (ii) The company shall be liable to pay simple interest at the rate of 18% p.a. during the period for which such default continues.



B. Exemption from Punishment

Under the following cases where the company has failed to pay declared dividend within 30 days of declaration, no offence shall be deemed to have been committed and therefore, no punishment is attracted:

- (a) where the dividend could not be paid by reason of the operation of any law;
- (b) where a shareholder has given directions to the company regarding the payment of the dividend and those directions cannot be complied with and the same has been communicated to him;
- (c) where there is a dispute regarding the right to receive the dividend;
- (d) where the dividend has been lawfully adjusted by the company against any sum due to it from the shareholder;
- (e) where, for any other reason, the failure to pay the dividend or to post the warrant within the prescribed period of 30 days was not due to any default on the part of the company.





QUESTION & ANSWERS



Question 1

A Public Company has been declaring dividend at the rate of 20% on equity shares during the last 3 years. The Company has not made adequate profits during the year ended 31st March, 2015, but it has got adequate reserves which can be utilized for maintaining the rate of dividend at 20%. Advise the Company as to how it should go about if it wants to declare dividend at the rate of 20% for the year 2014-15 as per the provisions of the Companies Act, 2013.



Solution:

As per Rule 3 of the Companies (Declaration and Payment of Dividend) Rules, 2014, in the event of adequacy or absence of profits in any year, a company may declare dividend out of surplus subject to the fulfillment of the following conditions:

- The rate of dividend declared shall not exceed the average of the rates at which dividend was declared by it in the three years immediately preceding that year;
Provided that this sub -rule shall not apply to a company, which has not declared any dividend in each of the three preceding financial year.
- The total amount to be drawn from such accumulated profits shall not exceed one-tenth of the sum of its paid-up share capital and free reserves as appearing in the latest audited financial statement;
- The amount so drawn shall first be utilized to set off the losses incurred in the financial year in which dividend is declared before any dividend in respect of equity shares is declared;
- The balance of reserves after such withdrawal shall not fall below 15% of its paid up share capital as appearing in the latest audited financial statement.

In the given case therefore, the company can declare a dividend of 20% provided it has the required residual reserve, after such payment, of 15% of its paid up capital as appearing in its latest audited financial statement. The company should have the dividend recommended by the Board and put up for the approval of the members at the Annual General Meeting as the authority to declare lies with the members of the company.

[Note: Vide Notification dated 29th May, 2015, sub-rule (5) of Rule 3 of the Companies (Declaration and Payment of Dividend) Rules 2014 has been omitted by the Companies (Declaration and Payment of Dividend) Second Amendment Rules, 2015]



Question 2

The Annual General Meeting of ABC Limited declared a dividend at the rate of 30 percent payable on paid up equity share capital of the Company as recommended by Board of Directors on 30th April, 2014. But the Company was unable to post the dividend warrant to Mr. Ranjan, an equity shareholder of the Company, up to 30th June, 2014. Mr. Ranjan filed a suit against the Company for the payment of dividend along with interest at the rate of 20 percent per annum for default period.



Decide in the light of provisions of the Companies Act, 2013, whether Mr. Ranjan would succeed? Also state the directors' liability in this regard under the Act.



Solution:

Section 127 of the Companies Act, 2013 lays down the penalty for non-payment of dividend within the prescribed time period. Under section 127 where a dividend has been declared by a company but has not been paid or the warrant in respect thereof has not been posted within thirty days from the date of declaration to any shareholder entitled to the payment of the dividend:

- a) every director of the company shall, if he is knowingly a party to the default, be punishable with imprisonment which may extend to two years and with fine which shall not be less than one thousand rupees for every day during which such default continues; and
- b) the company shall be liable to pay simple interest at the rate of eighteen per cent per annum during the period for which such default continues.

Therefore, in the given case Mr Rajan will not succeed in his claim for 20% interest as the limit under section 127 is 18% per annum.



Question 3

X & Co. Ltd. Made a loss of ₹ 20 Lakhs after providing for depreciation for the year ended 31st March, 2015 and as a result the company was not in a position to declare any dividend for the said year out of profits. However, the Board of Directors of the company announced the declaration of dividend of 15% on the equity shares payable out of free reserves. The paid up share capital of the company and its free reserves as on 31st March, 2015 (as per the audited Balance Sheet) are ₹ 2 Crores & 10 Crores respectively. The average dividend declared by the company in the last 3 years is 25%. Examine the validity of Declaration of Dividend.



Solution:

- 1) Dividend shall be declared or paid by a company for any financial year only-
 - a) out of the profits of the company for that year arrived at after providing for depreciation in accordance with the provisions of Section 123(2), or
 - b) out of the profits of the company for any previous financial year or years arrived at after providing for depreciation in accordance with the provisions of that sub-section and remaining undistributed, or
[Note: Such depreciation shall be provided in accordance with the provisions of Schedule II]
 - c) out of both; or
 - d) out of money provided by the Central Government or a State Government for the payment of dividend by the company in pursuance of a guarantee given by that Government
- 2) Declaration of dividend out of accumulated profits -
As per Rule 3 of the Companies (Declaration and Payment of Dividend) Rules, 2014, dividend can be declared out of the profits transferred to the Reserves by complying with the following conditions -
 - a) The rate of dividend declared shall not exceed the average of the rates at which



dividend was declared by it in the 3 years immediately preceding that year: However, this rule will not apply if a company has not declared any dividend in each of the three preceding financial year

- b) The total amount to be drawn from such accumulated profits shall not exceed one-tenth of the sum of its paid-up share capital and free reserves as appearing in the latest audited financial statement.
- c) The amount so drawn shall first be utilised to set off the losses incurred in the financial year in which dividend is declared before any dividend in respect of equity shares is declared.
- d) The balance of reserves after such withdrawal shall not fall below 15% of its paid up share capital as appearing in the latest audited financial statement.

In the given case,

- a) The average rate of Dividend declared by the Company during the preceding 3 Financial Years is 25%. So, for the current Financial Year, the rate of dividend shall not exceed 25% i.e ₹ 50 Lakhs.
- b) The maximum amount that may be drawn from the reserves shall not exceed 10% of (₹ 2 Crore + ₹ 10 Crore), i.e ₹ 1.2 Crore.
- c) Out of the amount drawn from the reserves (viz. ₹ 1.2 Crore), loss for the current financial year (viz. ₹ 0.20 Crore) shall first be set off. Thus, maximum amount that can be utilized for dividend shall be ₹ 1.2 Crore less ₹ 0.20 Crore i.e ₹ 1 Crore (i.e rate of dividend shall not exceed 50%)
- d) After the dividend is declared out of reserves, the balance of reserves shall not fall below 15% of paid up share capital, viz. 15% of ₹ 2 Crore, viz. ₹ 30 Lakh. Thus, maximum amount that can be utilized for dividend shall be ₹ 10 crore less ₹ 30 lakh, viz ₹ 9.7 Crore (i.e rate of dividend shall not exceed 85%)

Thus, in the present case, the maximum rate of dividend that may be distributed in accordance with the conditions contained in Rule 3 of the Companies (Declaration and Payment of Dividend) Rules, 2014 is 25%. Therefore, the decision of the Board of Directors to announce a dividend of 15% on equity shares is valid.



Question 4

The Board of Directors of XYZ Company Limited at its meeting declared a dividend on its paid-up equity share capital which was later on approved by the company's Annual General Meeting. In the meantime the directors at another meeting of the Board decided by passing a resolution to divert the total dividend to be paid to shareholders for purchase of investments for the company. As a result dividend was paid to shareholders after 45 days. Examining the provisions of the Companies Act, 2013, state:

- (i) Whether the act of directors is in violation of the provisions of the Act and also the consequences that shall follow for the above act of directors?
- (i) What would be your answer in case the amount of dividend to a shareholder is adjusted by the company against certain dues to the company from the shareholder?



Solution:

Payment of dividend; delay in payment; adjustment against dues (Section 127 of the Companies Act, 2013):

According to Section 127 of the Companies Act, 2013, where a dividend has been declared by a company but has not been paid or the warrant in respect thereof has not been posted within thirty days from the date of declaration to any shareholder entitled to the payment of the dividend, every director of the company shall, if he is knowingly a party to the default, is liable for the punishment under the said section.

In the present case, the Board of Directors of XYZ Company Limited at its meeting declared a dividend on its paid-up equity share capital which was later on approved by the company's Annual General Meeting. In the meantime the directors at another meeting of the Board decided by passing a resolution to divert the total dividend to be paid to shareholders for purchase of investment for the company. As a result dividend was paid to shareholders after 45 days.

- (i) The Board of Directors of XYZ Company Limited violated section 127 of the Companies Act, 2013 as it failed to pay dividend to shareholders within 30 days due to their decision to divert the total dividend to be paid to shareholders for purchase of investment for the company.

Consequences: The following are the consequences for the violation of above provisions:

- a) Every director of the company shall, if he is knowingly a party to the default, be punishable with imprisonment which may extend to two years and shall also be liable for a fine which shall not be less than one thousand rupees for every day during which such default continues.
- b) The company shall also be liable to pay simple interest at the rate of 18% p.a. during the period for which such default continues.
- (ii) If the amount of dividend to a shareholder is adjusted by the company against certain dues to the company from the shareholder, then failure to pay dividend within 30 days shall not be deemed to be an offence under Proviso to section 127 of the Companies Act, 2013.



Question 5

XYZ, a Government Company (100% paid up capital is held by a State Government) has been declaring dividend at the rate of 20% during the last 3 years. has not made adequate profits during the year ended 31st March, 2015, but it has got adequate reserves which can be utilized for maintaining the rate of dividend at 20%. State in the light of the Companies Act, 2013 whether the XYZ company can declare dividend for the year The Company 2014-15.



Solution:

As per the Second proviso to Section 123(1) of the Companies Act, 2013, where a company, owing to inadequacy or absence of profits in any financial year, proposes to declare dividend out of the accumulated profits earned by it in previous years and transferred by the company to the reserves, such declaration of dividend shall be made only in accordance with prescribed Rule 3 of the Companies (Declaration and Payment of Dividend) Rules, 2014.

Vide Notification No. G.S.R. 463(E), dated 5th June 2015 Central Government directed that this proviso to section 123(1), shall not apply to a Government Company where the entire



paid up share capital is held by the Central Government, or by any State Government or Governments or by the Central Government and one or more State Governments.

In the given case, therefore, the XYZ, a Government Company cannot declare dividend out of accumulated Reserves in the financial year 2014-15



Question 6.

Star Computers Limited declared and paid dividend in time to all its equity holders for the financial year 2018-19, except in the following two cases:

1. Mrs. Sheela Bhatt, holding 250 shares had mandated the company to directly deposit the dividend amount in her bank account. The company, accordingly remitted the dividend but the bank returned the payment on the ground that there was difference in surname of the payee in the bank records. The company, however, did not inform Mrs. Sheela Bhatt about this discrepancy.
2. Dividend amount of ₹50,000 was not paid to the successor of Late Mr. Mohan, in view of the court order restraining the payment due to family dispute about succession. You are required to analyse these cases with reference to provisions of the Companies Act, 2013 regarding failure to distribute dividends.

(ICAI Module, Nov'19 Mock Test)



Solution:

- (i) **Section 127** of the Companies Act, 2013 provides for punishment for failure to distribute dividend on time. One of such situations is where a shareholder has given directions to the company regarding the payment of the dividend and those directions could not be complied with but the non-compliance was not communicated to him.
In the given situation, the company has failed to communicate to the shareholder Mrs. Sheela Bhatt about non-compliance of her direction regarding payment of dividend. Hence, the penal provisions under section 127 will be applicable.
- (ii) **Section 127**, inter-alia, provides that no offence shall be deemed to have been committed where the dividend could not be paid by reason of operation of law.
In the present case, the dividend could not be paid because it was not allowed to be paid by the court until the matter was resolved about succession. Hence, there will not be any liability on the company and its directors, etc.



Question 7.

1. YZ Medical Instruments Limited is a manufacturing company & has proposed a dividend @ 10% for the year 2018-19 out of the profits of current year. The company has earned a profit of ₹910 crores during 2018-19. The company does not intend to transfer any amount to the general reserves out of the profits. Is YZ Medical Instruments Limited allowed to do so? Comment.
2. Karan, holder of 5000 equity shares of ₹100 each of M/s. Rachit Leather Shoes Limited did not pay final call of ₹10 per share. M/s. Rachit Leather Shoes Limited declared dividend of 10%. Examine with reference to relevant provisions of the Companies Act, 2013, the amount of dividend Karan should receive.

(ICAI Module, May'19 Mock Test, Nov'18- 6 Marks)



Solution:

- (i) According to **section 123** of the Companies Act, 2013 a company may, before the declaration of any dividend in any financial year, transfer such percentage of its profits for that financial year as it may consider appropriate to the reserves of the company. Such transfer is not mandatory and the percentage to be transferred to reserves is at the discretion of the company.

As per the given facts, YZ Medical Instruments Limited has earned a profit of 910 crores for the financial year 2018-19. It has proposed a dividend @ 10%. However, it does not intend to transfer any amount to the reserves of the company out of the profits of current year.

As per the provisions stated above, the amount to be transferred to reserves out of profits for any financial year is at the discretion of the company acting through its Board of Directors. Therefore, at its discretion, if YZ Medical Instruments Limited decides not to transfer any profit to reserves before the declaration of dividend at 10%, it is legally allowed to do so.

- (ii) As per the proviso to section 127 of the Companies Act, 2013, no offence will be deemed to have been committed by a director for adjusting the calls in arrears remaining unpaid or any other sum due from a member against the dividend declared by the company. Thus, as per the given facts, M/s. Rachit Leather Shoes Limited can adjust the unpaid call money of ₹50,000 against the declared dividend of 10%, i.e. $5,00,000 \times 10/100 = 50,000$. Hence, call money of ₹50,000 not paid by Karan can be adjusted fully from the entitled dividend amount of ₹50,000 payable to him.



Question 8:

AB Limited is a public company having its registered office in Coimbatore. The company has incurred a net loss of ₹ 20 lakhs in the Financial Year (FY) 2019-20. The Board of Directors (BOD) wants to declare dividend for the FY 2019-20. The balances of the company as per the latest audited financial statements are as follows:

1. Equity Share Capital (₹ 10 each) - 100 lakhs
2. General Reserve - 150 lakhs
3. Debenture redemption Reserve - 50 lakhs

The company has not declared any dividend in the preceding three financial years. Decide whether AB Limited is allowed to declare dividend or not for the FY 2019-20 by explaining the relevant provisions of the Companies Act in this regard.

If allowed to declare dividend then state the maximum amount of dividend that can be paid by AB Limited as per the Section 123 of Companies Act 2013. (2 + 2 = 4 Marks)



Solution:

In the given case, AB Limited has not made adequate profits during the current year ending on 31st March, 2020, but it still wants to declare dividend. Therefore, Rule 3 of the Companies (Declaration and Payment of Dividend) Rules, 2014 will be applied.

According to the said rule, the required conditions are:

Condition I: The rate of dividend declared shall not exceed the average of the rates at which dividend was declared by the company in the three years immediately preceding that year. Since the company has not declared any dividend in the preceding three financial years,



hence condition I is not applicable in this case.

Condition II: The total amount to be drawn from such accumulated profits shall not exceed 10% of its paid-up share capital and free reserves as appearing in the latest audited financial statement.

Paid-up capital+Free reserves = ₹ (100+150) Lakhs (General reserves are free reserves)
= ₹ 250 Lakhs
10% thereof = ₹ 25 Lakhs

Condition III: The amount so drawn shall first be utilized to set off the losses incurred in the financial year in which dividend is declared before any dividend in respect of equity shares is declared.

The amount drawn as stated above	=	₹25	Lakhs
Less: loss for the financial year 2019-2020	=	₹20	Lakhs
Amount available	=	₹5	Lakhs

Hence, the quantum of dividend is further restricted to ₹ 5 lakhs.

Condition IV: The balance of reserves after such withdrawal shall not fall below 15% of its paid up share capital as appearing in the latest audited financial statement.

Accumulated Reserves	₹ 150 Lakhs
Proposed withdrawal declaration of dividend	₹ 5 Lakhs
Balance of Reserves	₹ 145 Lakhs

This is more than 15% of paid-up capital (i.e. 15% of ₹ 100 Lakhs) i.e. ₹ 15 lakhs. Thus, the company can declare a dividend of ₹ 5 lakhs.

Hence, by following above provisions, AB Limited is allowed to declare dividend for the FY 2019-2020 and the maximum amount of dividend that can be paid is ₹ 5 Lakhs.



Question 9:

ASR Limited declared dividend at its Annual General Meeting held on 31-12-2020. The dividend warrant to Mr. A, a shareholder was posted on 22nd January, 2021. Due to postal delay Mr. A received the warrant on 5th February, 2021 and encashed it subsequently. Can Mr. A initiate action against the company for failure to distribute the dividend within 30 days of declaration under the provisions of the Companies Act, 2013? (3 Marks)



Solution:

Section 127 of the Companies Act, 2013, requires that the declared dividend must be paid to the entitled shareholders within the prescribed time limit of thirty days from the date of declaration of dividend. In case dividend is paid by issuing dividend warrants, such warrants must be posted at the registered addresses within the prescribed time. Once posted, it is immaterial whether the same are received within thirty days by the shareholders or not.

In the given question, the dividend was declared on 31.12.2020 and the dividend warrant was posted within 30 days from date of declaration of dividend (posted on 22nd January, 2021). It is immaterial if Mr. A has received it on 5th February 2021 (i.e., post 30 days from 31.12.2020). Hence, Mr. A cannot initiate action against the company for failure to distribute the dividend within 30 days of declaration.



CHAPTER WISE - CLASS TEST



Question 1.

The Director of Happy Limited proposed dividend at 12% on equity shares for the financial year 2016-17. The same was approved in the annual general meeting of the company held on 20th September, 2017. The Directors declared the approved dividends. Analysing the provisions of the Companies Act, 2013, give your opinion on the following matters:

- (i) Mr. A, holding equity shares of face value of ₹10 lakhs has not paid an amount of 1 lakh towards call money on shares. Can the same be adjusted against the dividend amount payable to him?
- (ii) Ms. N was the holder of 1,000 equity shares on 31st March, 2017, but she has transferred the shares to Mr. R, whose name has been registered on 20th May, 2017. Who will be entitled to the above dividend?

(May'18 RTP, May'19- 2 Marks)



Solution:

- (i) The given problem is based on **Section 127** of the Companies Act, 2013. As per the law where the dividend is declared by a company and there remains calls in arrears and any other sum due from a member, in such case no offence shall be deemed to have been committed where the dividend has been lawfully adjusted by the company against any sum due to it from the shareholder.

As per the facts given in the question, Mr. A is holding equity shares of face value of 10 Lakhs and has not paid an amount of ₹1 lakh towards call money on shares. Referring to the above provision, Mr. A is eligible to get ₹1.20 lakh towards dividend, out of which an amount of ₹1 lakh can be adjusted towards call money due on his shares. ₹20,000 can be paid to him in cash or by cheque or in any electronic mode.

According to the above-mentioned provision, company can adjust sum of ₹1 lakh due towards call money on shares against the dividend amount payable to Mr. A.

- (ii) According to section 123(5), dividend shall be payable only to the registered shareholder of the share or to his order or to his banker. Facts in the given case state that Ms. N, the holder of equity shares transferred the shares to Mr. R whose name has been registered on 20th May 2017. Since, he became the registered shareholder before the declaration of the dividend in the Annual general meeting of the company held on 20th September 2017, so, Mr. Raj will be entitled to the dividend.



Question 2.

RST Ltd. declared dividend at the rate of 20% for the financial year 2017-2018 in the AGM scheduled on 15th June 2018. As RST Ltd. is left with certain unpaid and unclaimed dividend, it transferred amount of unpaid and unclaimed dividend to UDA (unpaid dividend account). After remaining unpaid and unclaimed for more than 2 years in the UDA, some of the entitled shareholders made liable RST Ltd. for noncompliance of section 124, and claimed for their unpaid dividend amount. RST Ltd. denies saying that there were certain legal issues on the entitlement of the dividend amount to the respective shareholders



State in the light of the given facts, whether the allegation marked by shareholders and claim for the divided amount, against RST Ltd. is justifiable? (May'19 RTP)



Solution:

As per **section 124** of the Companies Act, 2013, where a dividend has been declared by a company but has not been paid/claimed to/by shareholder within 30 days from the date of the declaration, the company shall, within 7 days from the date of expiry of the said period of 30 days, transfer the total amount of dividend which remains unpaid/unclaimed to the Unpaid Dividend Account.

The company shall, within a period of 90 days of making any transfer of an amount, prepare a statement containing the names, their last known addresses and the unpaid dividend to be paid to each person and place it on the web-site of the company, if any, and also on any other web-site approved by the Central Government for this purpose, in such form, manner and other particulars as may be prescribed.

Accordingly, in the given situation, RST Ltd. failed to give statement of Unpaid/unclaimed dividend and so liable for the said noncompliance of section 124 of the Companies Act, 2013. Any person claiming to be entitled to any money transferred under section 124(1) to the Unpaid Dividend Account of the company may apply to the company for payment of the money claimed. Since RST Ltd. failed to comply with the requirements of this section as to the preparing of a statement of unpaid dividend, so shall be punishable with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees and every officer of the company who is in default shall be punishable with fine which shall not be less than one lakh rupees but which may extend to 5 lakh rupees.



Question 3.

TAT Ltd. incurred loss in business upto current quarter of financial year 2017 -18. The company has declared dividend at the rate of 12%, 15% and 18% respectively in the immediate preceding three years. In spite of the loss, the Board of Directors of the company have decided to declare interim dividend @ 15% for the current financial year. Examine the decision of TAT Ltd. stating the provisions of declaration of interim dividend under the Companies Act.

(May'19 Mock Test, May'18- 4 Marks, May'19- 3 Marks, May'20 Mock Test)



Solution:

According to **section 123(3)** of the Companies Act, 2013, 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.

However, in case the company has incurred loss during the current financial year up to the end of the quarter immediately preceding the date of declaration of interim dividend, such interim dividend shall not be declared at a rate higher than the average dividends declared by the company during the immediately preceding three financial years.



In the instant case, Interim dividend by TAT Ltd. shall not be declared at a rate higher than the average dividends declared by the company during the immediately preceding three financial years [i.e. $(12+15+18)/3 = 45/3 = 15\%$]. Therefore, decision of Board of Directors to declare 15% of the interim dividend for the current financial year is tenable.



Question 4.

Komal Ltd. declares a dividend for its shareholders in its AGM held on 27th September, 2018. Referring to provisions of the General Clauses Act, 1897 and Companies Act, 2013, advice:

1. The dates during which Komal Ltd. is required to pay the dividend?
2. The dates during which Komal Ltd. is required to transfer the unpaid or unclaimed dividend to unpaid dividend account?

(Nov'18- 4 Marks, May'20 Mock Test)



Solution:

As per **section 9** of the General Clauses Act, 1897, for computation of time, the section states that in any legislation or regulation, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time to use the word “from” and for the purpose of including the last in a series of days or any other period of time, to use the word “to”.

1. Payment of dividend: In the given instance, Komal Ltd. declares dividend for its shareholder in its Annual General Meeting held on 27/09/2018. Under the provisions of **Section 127** of the Companies Act, 2013, a company is required to pay declared dividend within 30 days from the date of declaration, i.e. from 28/09/2018 to 27/10/2018. In this series of 30 days, 27/09/2018 will be excluded and last 30th day, i.e. 27/10/2018 will be included. Accordingly, Komal Ltd. will be required to pay dividend within 28/09/2018 and 27/10/2018 (both days inclusive).
2. Transfer of unpaid or unclaimed dividend: As per the provisions of **Section 124** of the Companies Act, 2013, where a dividend has been declared by a company but has not been paid or claimed within 30 days from the date of the declaration, to any shareholder entitled to the payment of the dividend, the company shall, within 7 days from the date of expiry of the said period of 30 days, transfer the total amount of dividend which remains unpaid or unclaimed to a special account to be opened by the company in that behalf in any scheduled bank to be called the “Unpaid Dividend Account” (UDA). Therefore, Komal Ltd. shall transfer the unpaid/unclaimed dividend to UDA within the period of 28th October, 2018 to 3rd November, 2018 (both days inclusive)



Question 5.

PQ Ltd. declared and paid 10% dividend to all its shareholders except Mr. Kumar, holding 500 equity shares, who instructed the company to deposit the dividend amount directly in his bank account. The company accordingly remitted the dividend, but the bank returned the payment on the ground that the account number as given by Mr. Kumar doesn't tally with the records of the bank. The company, however, did not inform Mr. Kumar about this discrepancy. Comment on this issue with reference to the provisions of the Companies Act, 2013 regarding failure to distribute dividend.

(May'19- 2 Marks)



Solution:

Section 127 of the Companies Act, 2013 provides for punishment for failure to distribute dividend on time. One of such situations is where a shareholder has given directions to the company regarding the payment of the dividend and those directions cannot be complied with and the same has not been communicated to the shareholder.

In the instant case, PQ Ltd. has failed to communicate to the shareholder Mr. Kumar about non-compliance of his direction regarding payment of dividend. Hence, the penal provisions under **section 127** will be attracted.



Question 6.

Referring to the provisions of the Companies Act, 2013, examine the validity of the following :

1. The Board of Directors of Anand Ltd. proposes to declare dividend at the rate of 20% to the equity shareholders, despite the fact that the company has defaulted in repayment of public deposits accepted before the commencement of this Act.
2. Whether a Company can declare dividend for the financial year in which it incurred loss.

(Nov'19- 5 Marks)



Solution:

1. **Section 123(6)** of the Companies Act, 2013, specifically provides that a company which fails to comply with the provisions of **section 73** (Prohibition of acceptance of deposits from public) and **section 74** (Repayment of deposits, etc., accepted before the commencement of this Act) shall not, so long as such failure continues, declare any dividend on its equity shares.

In the given instance, the Board of Directors of Anand Limited proposes to declare dividend at the rate of 20% to the equity shareholders, in spite of the fact that the company has defaulted in repayment of public deposits accepted before the commencement of the Companies Act, 2013. Hence, according to the above provision, declaration of dividend by the Anand Limited is not valid.

2. As per Second Proviso to **Section 123 (1)** of the Companies Act, 2013, in the event of inadequacy or absence of profits in any financial year, a company may declare dividend out of the accumulated profits of previous years which have been transferred to the free reserves. However, such declaration of dividend shall be subject to the conditions as prescribed under Rule 3 of the Companies (Declaration and Payment of Dividend) Rules, 2014.



MCQs



Question 1:

When the dividend is declared at the Annual General Meeting of the company, it is known as

- (a) Final Dividend
- (b) Interim Dividend
- (c) Dividend on preference shares
- (d) Scrip Dividend



Solution:

- (a) Final Dividend



Question 2.

Amount to be transferred to reserves out of profits before any declaration of dividend is

- (a) 5%
- (b) 7.5%
- (c) 10%
- (d) at the discretion of the company.



Solution:

- (d) at the discretion of the company.



Question 3.

The Board of Directors of Vidyut Limited are contemplating to declare interim dividend in the last week of July, 2022 but the company has incurred loss during the current financial year up to the end of June, 2022. However, it is noted that during the previous five financial years i.e., 2017-18, 2018-19, 2019-20, 2020-21 and 2021-22, the company had declared dividend at the rate of 8%, 9%, 12%, 11% and 10% respectively. Advise the Board as to the maximum rate at which they can declare interim dividend despite incurring loss during the current financial year.

- (a) Maximum at the rate of 10%.
- (b) Maximum at the rate of 11%.
- (c) Maximum at the rate of 10.5%.
- (d) Maximum at the rate of 11.5%.



Solution:

- (b) Maximum at the rate of 11%



Question 4.

The amount accumulated in the Investor Education and Protection Fund shall not be used for:

- (a) refunds in respect of unclaimed dividends, matured deposits, matured debentures, application money due for refund and interest thereon.
- (b) reimbursement of legal expenses incurred in pursuing class action suits under section 37 and 245.



- (c) grants or donation to the Central Government for the purpose of investor's education and training.
- (d) distribution of any disgorged amount among eligible and identifiable applicants who have suffered losses.



Solution:

- (c) grants or donation to the Central Government for the purpose of investor's education and training.



Question 5.

In case a company fails to pay declared dividends or fails to post dividend warrants within 30 days of declaration, company shall be liable to pay simple interest at the rate of during the period for which such default continues.

- (a) 6% p.a.
- (b) 12% p.a.
- (c) 15% p.a.
- (d) 18% p.a.



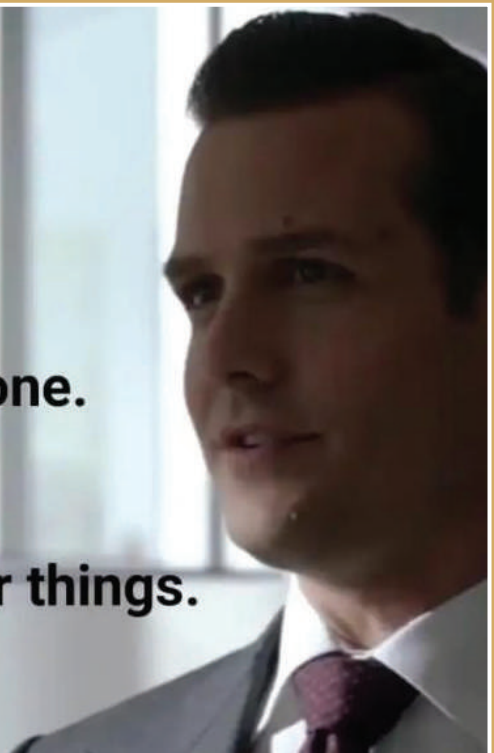
Solution:

- (d) 18% p.a

**What are your choices
when someone puts a
gun to your head?**

**You take the gun,
or you pull out a bigger one.
Or, you call their bluff.
Or, you do any one of a
hundred & forty six other things.**

- Harvey Specter





09

ACCOUNTS OF COMPANIES



BOA etc to be kept by Company - Section 128

1. BOA u/s 2(13) -

“Books of account” as defined in Section 2(13) includes records maintained in respect of—

- all sums of money received and expended by a company and matters in relation to which the receipts and expenditure take place;
- all sales and purchases of goods and services by the company;
- the assets and liabilities of the company; and
- the items of cost as may be prescribed under section 148 of the Companies Act 2013 (“Act”) in the case of a company which belongs to any class of companies specified under that section.

“Book and paper” and “book or paper” as defined in Section 2(12) include books of account, deeds, vouchers, writings, documents, minutes and registers maintained on paper or in electronic form;

2.

(1) Every company shall prepare and keep at its registered office BOA and other relevant books and papers and financial statement for every financial year which give a true and fair view of the state of the affairs of the company, including that of its branch office or offices, if any.

Provided that all or any of the books of account aforesaid and other relevant papers may be kept at such other place in India as the BOD may decide and where such a decision is taken, the company shall, within 7 days thereof, file with the Registrar a notice in writing giving the full address of that other place:

Provided further that the company may keep such books of account or other relevant papers in electronic mode in such manner as may be prescribed.

(2) Where a company has a branch office in India or outside India, it shall be deemed to have complied with the provisions of sub-section (1), if proper BOA relating to the transactions effected at the branch office are kept at that office and proper summarised returns periodically are sent by the branch office to the company at its registered office or the other place referred to in sub-section (1).

(3) The BOA and other books and papers maintained by the company within India shall be open for inspection at the registered office of the company or at such other place in India by ANY DIRECTOR during business hours, and in the case of financial information, if any, maintained outside the country, copies of such financial information shall be maintained and produced for inspection by any director subject to such conditions as may be prescribed.

Provided that the inspection in respect of any subsidiary of the company shall be done only by the person authorised in this behalf by a resolution of the BOD.



3. **Maintenance of books of account in electronic form (Latest Amendment)**
A company has an option of keeping books of account or other relevant papers in electronic mode.
(A) Such books of accounts or other relevant books or papers maintained in electronic mode shall remain accessible in India at all the times so as to be usable for subsequent reference.
(B) The information in the electronic record of the document shall be capable of being displayed in a legible form.
(C) The back-up of the books of account and other books and papers of the company maintained in electronic mode, including at a place outside India, if any, shall be kept in servers physically located in India on a daily basis.
(D) The company shall intimate to the Registrar on an annual basis at the time of filing of financial statement following relevant information related to service provider—
(a) the name of the service provider;
(b) the internet protocol address of service provider;
(c) the location of the service provider (wherever applicable);
(d) where the books of account and other books and papers are maintained on cloud, such address as provided by the service provider.
(E) where the service provider is located outside India, the name and address of the person in control of the books of account and other books and papers in India.
4. **BOA must be kept on:**
a. Accrual Basis
b. According to double entry system
c. Manual OR electronic mode
5. **Boa shall give true and fair view.**
6. **BOA shall be preserved for 8 years.** Where an investigation has been ordered in respect of a company, the Central Government may direct that the books of account may be kept for such period longer than 8 years, as it may deem fit and give directions to that effect.
7. **The following shall be responsible for maintenance of BOA etc:**
a. MD
b. WTD
c. CFO
d. Any person charged by BOD.
8. **Penalty for Non-maintenance:**
Penalty $\geq 50k \leq 5L$
Company Amendment Act, 2020



Financial statements - Section 129

1. **“Financial year” [Section 2(41)]**, in relation to any company or body corporate, means the period ending on the 31st day of March every year, and where it has been incorporated on or after the 1st day of January of a year, the period ending on the 31st day of March of the following year, in respect whereof financial statement of the company or body corporate is made up:

Provided that on an application made by a company or body corporate, which is a holding company or a subsidiary or associate company of a company incorporated outside India and is required to follow a different financial year for consolidation of its accounts outside India, the Tribunal may, if it is satisfied, allow any period as its financial year, whether or not that period is a year:

2. Financial statements u/s 2(40) - Includes as per Schedule III :

- a. Balance sheet
- b. P&L Statement
- c. CFS
- d. Notes to Accounts
- e. Statement of changes in equity.

3. **Laying of financial Statements [Section 129(2)]**

(1) The financial statements shall give a true and fair view of the state of affairs of the company or companies, comply with the accounting standards notified under section 133 and shall be in the form or forms as may be provided for different class or classes of companies in Schedule III:

Provided that the items contained in such financial statements shall be in accordance with the accounting standards:

Provided further that nothing contained in this sub-section shall apply to

A. any insurance or

B. banking company or

C. any company engaged in the generation or supply of electricity, or

D. to any other class of company for which a form of financial statement has been specified in the Act governing such class of company.

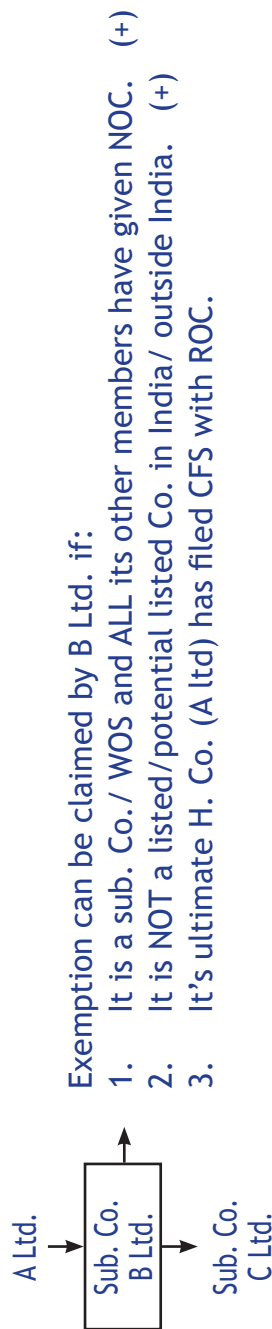
(2) At every annual general meeting of a company, the Board of Directors of the company shall lay before such meeting financial statements for the financial year.

(3) Where a company has one or more subsidiaries or associate companies, it shall, in addition to financial statements prepare a CFS of the company and of all the subsidiaries and associate companies in the same form and manner as that of its own and in accordance with applicable accounting standards.

Provided that the company shall also attach along with its financial statement, a separate statement containing the salient features of the financial statement of its subsidiary or associate company in form AOC -1

- (4) The provisions of this Act applicable to the preparation, adoption and audit of the financial statements of a holding company shall, mutatis mutandis, apply to the CFS.
- (5) Where the financial statements of a company do not comply with the accounting standards referred to in sub-section (1), the company shall disclose in its financial statements,
- the deviation from the accounting standards, B. the reasons for such deviation and
 - the financial effects, if any, arising out of such deviation.

4. Exemption from preparation of CFS:



#

5. Penalty for Non- compliance

- Imprisonment ≤ 1 year OR
- Penalty $\geq 50K \leq 5L$ OR
- Both.

133. Central Government to prescribe accounting standards

- The Central Government may prescribe the standards of accounting or any addendum thereto,
- As recommended by the ICAI.
- In consultation with and after examination of the recommendations made by the NFRA.

Section 129A

The Central Government may, require such class or classes of unlisted companies, as may be prescribed, –

- to prepare the financial results of the company on such periodical basis and in such form as may be prescribed;
- to obtain approval of the Board of Directors and complete audit or limited review of such periodical financial results in such manner as may be prescribed; and
- file a copy with the Registrar within a period of thirty days of completion of the relevant period with such fees as may be prescribed.

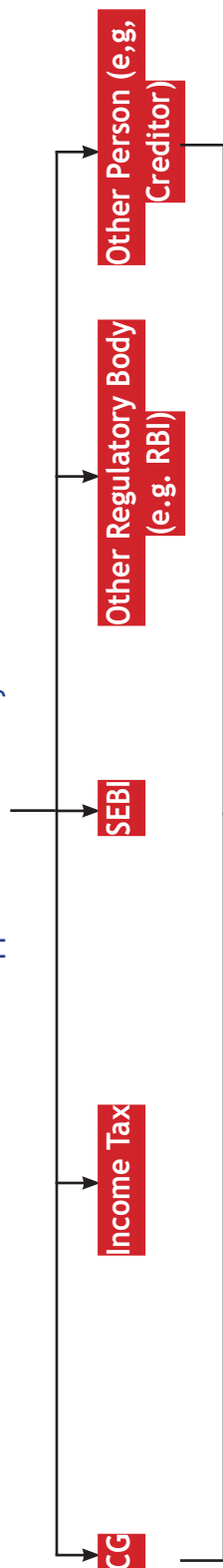
Companies Amendment Act, 2020





Re-opening of accounts on court/NCLT order - Section 130

Application is made by:



(1) A company shall not re-open its BOA and not recast its financial statements, unless an application in this regard is made by the CG, the Income-tax authorities, the SEBI, any other statutory regulatory body or authority or any person concerned and an order is made by a court of competent jurisdiction or the NCLT to the effect that-

(i) the relevant earlier accounts were prepared in a fraudulent manner; or

(ii) the affairs of the company were mismanaged during the relevant period, casting a doubt on the reliability of financial statements:

Provided that the court or NCLT, as the case may be, shall give notice to the CG, the Income-tax authorities, the SEBI or any other statutory regulatory body or any other person concerned and shall take into consideration the representations, if any, made by them Before passing any order under this section.

(2) Without prejudice to the provisions contained in this Act the accounts so revised or re-cast under sub-section (1) shall be final.

(3) No order shall be made under sub-section (1) in respect of re-opening of books of account relating to a period earlier than 8 financial years immediately preceding the current financial year:

Provided that where a direction has been issued by the CG section 128 for keeping of BOA for a period longer than 8 years, the BOA may be ordered to be re-opened within such longer period.



Voluntary revision of F.S. OR BOD report section 131

- (1) If it appears to the directors of a company that-
- (a) the financial statement of the company; or
 - (b) the report of the Board, do not comply with the provisions of section 129 or section 134
- They may prepare revised financial statement or a revised report in respect of any of the 3 preceding financial years after obtaining approval of NCLT on an application made by the company and a copy of the order passed by the NCLT shall be filed with the Registrar.
- Provided that the Tribunal shall give notice to the CG and the Income- tax authorities and shall take into consideration the representations, if any, made by them before passing any order under this section.
- Provided further that such revised financial statement or report shall not be prepared or filed more than once in a financial year.
- Provided also that the detailed reasons for revision of such financial statement or report shall also be disclosed in the Board's report in the relevant financial year in which such revision is being made.
- (2) Where copies of the previous financial statement or report have been sent out to members or delivered to the Registrar or laid before the company in general meeting, the revisions must be confined to-
- (a) the correction in respect of which the previous financial statement or report do not comply with the provisions of section 129 or section 134; and
 - (b) the making of any necessary consequential alternation.
- (3) The CG may make rules as to the application of the provisions of this Act in relation to revised financial statement or a revised director's report and such rules may, in particular-
- (a) make different provisions according to which the previous financial statement or report are replaced or are supplemented by a document indicating the corrections to be made;
 - (b) make provisions with respect to the functions of the company's auditor in relation to the revised financial statement or report;
 - (c) require the directors to take such steps as may be prescribed.



NFRA - Section 132

- (1) The Central Government may, by notification, constitute a National Financial Reporting Authority to provide for matters relating to accounting and auditing standards under this Act.
- (1A) The National Financial Reporting Authority shall perform its functions through such divisions as may be prescribed.
- (2) Notwithstanding anything contained in any other law for the time being in force, the National Financial Reporting Authority shall-
 - (a) make recommendations to the Central Government on the formulation and laying down of accounting and auditing policies and standards for adoption by companies or class of companies or their auditors, as the case may be
 - (b) monitor and enforce the compliance with accounting standards and auditing standards in such manner as may be prescribed
 - (c) oversee the quality of service of the professions associated with ensuring compliance with such standards, and suggest measures required for improvement in quality of service and such other related matters as may be prescribed; and
 - (d) perform such other functions relating to clauses (a), (b) and (c) as may be prescribed.
- (3) **The composition of Authority.** - (1) The Authority shall consist of the following persons to be appointed by the Central Government, namely:-
 - (a) a chairperson;
 - (b) three full-time members; and
 - (c) nine part-time members.
- (2) **The chairperson** shall be a person of eminence, ability, integrity and standing and having expertise and experience of not less than twenty-five years in the field of accountancy, auditing, finance or law
- (3) **A full-time member** shall be a person of ability, integrity, and standing and having expertise and experience of not less than twenty years in the field of accountancy, auditing, finance or law.
- (4) **The chairperson and all members**, before being appointed, shall submit a declaration to the Central Government confirming that they have no conflict of interest or lack of independence in respect of such appointment as chairperson or members in Form I annexed to these rules, failing which their appointment shall not be considered.
- (5) **The chairperson and full-time members**, shall not be associated with any audit firm including related consultancy firms during the course of their appointment and two years after ceasing to hold such appointment.
- (6) **A part-time member shall be a person**, who shall not have any such financial or other interest as is likely to affect prejudicially his functions as a part-time member.
- (3A) Each division of the National Financial Reporting Authority shall be presided over by the Chairperson or a full-time Member authorised by the Chairperson.
- (3B) There shall be an executive body of the National Financial Reporting Authority consisting of the Chairperson and full-time Members of such Authority for efficient discharge of its functions.
- (4) Notwithstanding anything contained in any other law for the time being in force, the National Financial Reporting Authority shall-
 - (a) have the power to investigate, either suo motu or on a reference made to it by the Central Government, for such class of bodies corporate or persons, in such manner as may be prescribed into the matters of professional or other misconduct committed by any member or firm of chartered accountants, registered under the Chartered Accountants Act, 1949;
 - (b) have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908, while trying a suit, in respect of the following matters, namely:-
 - (i) discovery and production of books of account and other documents, at such place and at such time as may be specified by the National Financial Reporting Authority;
 - (ii) summoning and enforcing the attendance of persons and examining them on oath;
 - (iii) inspection of any books, registers and other documents of any person referred to in clause (b) at any place;
 - (iv) issuing commissions for examination of witnesses or documents;
 - (c) where professional or other misconduct is proved, have the power to make order for-
 - (A) imposing penalty of-
 - (I) not less than 1 lakh rupees, but which may extend to 5 times of the fees received, in case of individuals; and
 - (II) not less than 5 lakh rupees, but which may extend to 10 times of the fees received, in case of firms;
 - (B) debarring the member or the firm from-
 - I. being appointed as an auditor or internal auditor or undertaking any audit in respect of financial statements or internal audit of the functions and activities of any company or body corporate; or
 - II. performing any valuation as provided under section 247, for a minimum period of 6 months or such higher period not exceeding 10 years as may be determined by the National Financial Reporting Authority.
- (5) Any person aggrieved by any order of the National Financial Reporting Authority may prefer an appeal before the NCLAT

As per NFRA rules, NFRA shall have power to monitor and enforce compliance with accounting standards and auditing standards, oversee the quality of service under sub-section (2) of section 132 or undertake investigation under sub-section (4) of such section of the auditors of the following class of companies and bodies corporate:

- a) companies whose securities are listed on **any stock exchange in India** or outside India;
- b) **unlisted public companies** having paid-up capital of not less than rupees five hundred crores or having annual turnover of not less than rupees one thousand crores or having, in aggregate, outstanding loans, debentures and deposits of not less than rupees five hundred crores as on the 31st March of immediately preceding financial year;
- c) **insurance** companies, **banking** companies, companies engaged in the generation or supply of **electricity**, companies governed by any special Act for the time being in force
- d) **any body corporate or company or person**, or any class of bodies corporate or companies or persons, on a **reference made to the NFRA** by **the Central Government** in public interest; and
- e) **a body corporate incorporated or registered outside India**, which is a subsidiary or associate company of any company or body corporate incorporated or registered in India as referred to in clauses (a) to (d) above, if the income or networth of such subsidiary or associate company exceeds 20% of the consolidated income or consolidated networth of such company or the body corporate, as the case may be, referred to in clauses (a) to (d) above.

BOA of NFRA: Same for IEPF u/s 125

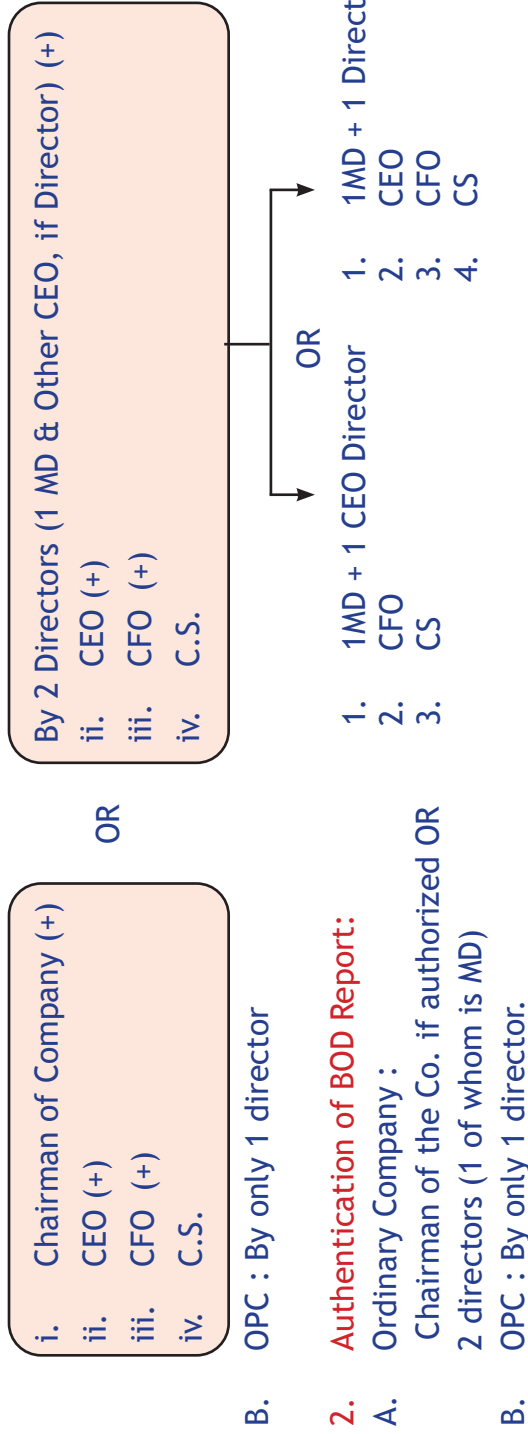
- a. Shall maintain BOA and other books and papers in such manner as per CG in consultation CAG.
- b. Account shall be audited by CAG.
- c. Such audited accounts with audit report forwarded annually to CG by NFRA
- d. NFRA to prepare annual report and forward to CG.
- e. CG to lay annual report + audit report in parliament (LS + RS)





1. Authentication of Financial Statements:

A. Ordinary Company:



2. Authentication of BOD Report:

A. Ordinary Company :

Chairman of the Co. if authorized OR

2 directors (1 of whom is MD)

B. OPC : By only 1 director.

3. Director Responsibility Statement :

Directors' Responsibility Statement [Section 134(5)]: The Directors' Responsibility Statement referred to in 134(3) (c) shall state that—

- (1) in the preparation of the annual accounts, the applicable accounting standards had been followed along with proper explanation relating to material departures;
- (2) the directors had selected such accounting policies and applied them consistently and made judgments and estimates that are reasonable and prudent so as to give a true and fair view of the state of affairs of the company at the end of the financial year and of the profit and loss of the company for that period;
- (3) the directors had taken proper and sufficient care for the maintenance of adequate accounting records in accordance with the provisions of this Act for safeguarding the assets of the company and for preventing and detecting fraud and other irregularities;



- (4) the directors had prepared the annual accounts on a going concern basis; and
- (5) the directors, in the case of a listed company, had laid down internal financial controls to be followed by the company and that such internal financial controls are adequate and were operating effectively.
- (6) the directors had devised proper systems to ensure compliance with the provisions of all applicable laws and that such systems were adequate and operating effectively.

4. **Contravention [Section 134(8)]:**

Persons liable	Punishment for contravention of any provision of this section
Company	₹ 3 Lacs
Every officer of the company who is in default	50,000

Companies Amendment Act, 2020



CORPORATE SOCIAL RESPONSIBILITY [SECTION 135]

According to section 135 of the Companies Act, 2013 read with the Companies (Corporate Social Responsibility) Rules, 2014:

(i) Which company is required to constitute CSR committee:

- (a) According to section 135(1), every company having
 - (1) net worth of rupees 500 crore or more, or
 - (2) turnover of rupees 1000 crore or more or
 - (3) a net profit of rupees 5 crore or more

during the immediately preceding financial year shall constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors, out of which at least one director shall be an independent director.

Provided that where a company is not required to appoint an independent director under sub-section (4) of section 149, it shall have in its Corporate Social Responsibility Committee two or more directors.

(ii) **Exclusion of Companies** [Rule 3(2) of the Companies (CSR) Rules, 2014]

Every company which ceases to be a company covered under subsection (1) of section 135 of the Act for three consecutive financial years shall not be required to-

- (a) constitute a CSR Committee; and
- (b) comply with the provisions contained in sub-section (2) to (5) of the said section, till such time it meets the criteria specified in sub-section (1) of section 135.

(iii) **Composition of CSR Committee:**

- (1) The CSR Committee shall be consisting of three or more directors, out of which at least one director shall be an independent director.

Provided that where a company is not required to appoint an independent director under sub-section (4) of section 149, it shall have in its Corporate Social Responsibility Committee two or more directors.

- (2) According to Rule 5(1) of the Companies (CSR) Rules, 2014,

The companies mentioned in the rule 3 shall constitute CSR Committee as under.-

- (i) an unlisted public company or a private company covered under subsection (1) of section 135 which is not required to appoint an independent director pursuant to sub-section (4) of section 149 of the Act, shall have its CSR Committee without such director ;
- (ii) a private company having only two directors on its Board shall constitute its CSR Committee with two such directors;
- (iii) with respect to a foreign company covered under these rules, the CSR Committee shall comprise of at least two persons

(iv) Duties of CSR Committee [Section 135(3)]:

The CSR Committee shall-

- (a) formulate and recommend to the Board, a CSR Policy which shall indicate the activities to be undertaken by the company in areas or subject, specified in Schedule VII;
- (b) recommend the amount of expenditure to be incurred on the activities referred to in clause (a); and
- (c) monitor the CSR Policy of the company from time to time.

**(vi) Duties of the Board in relation to CSR [Section 135(4)]:**

The Board of every company referred to in sub-section (1) shall—

- (1) after taking into account the recommendations made by the CSR Committee, approve the CSR Policy for the company and disclose contents of such Policy in its report and also place it on the company's website, if any, in such manner as may be prescribed; and

(vii) Amount of contribution towards CSR [Section 135(5)]:

- (a) The Board of every company shall ensure that the company spends, in every financial year, at least two per cent of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its CSR Policy.
- (b) Provided that the company shall give preference to the local area and areas around it where it operates, for spending the amount earmarked for CSR activities.
- (c) Provided further that if the company fails to spend such amount, the Board shall, in its report, specify the reasons for not spending the amount.
- (d) Provided also that if the company spends an amount in excess of the requirements provided under this sub-section, such company may set off such excess amount against the requirement to spend under this sub-section for such number of succeeding financial years and in such manner, as may be prescribed.

Companies Amendment Act, 2020

(viii) Exceptions to CSR Activities:

The Companies (CSR Policy) Rules, 2014 provides for some activities which are not considered as CSR activities:

- (1) The CSR projects or programs or activities undertaken outside India [Rule 4(4)].
- (2) The CSR projects or programs or activities that benefit only the employees of the company and their families [Rule 4(5)].
- (3) Contribution of any amount directly or indirectly to any political party under section 182 of the Act [Rule 4(7)].

(ix) Penalty

If a company is in default in complying with the provisions of sub-section (5) or sub-section (6), the company shall be liable to a penalty of twice the amount required to be transferred by the company to the Fund specified in Schedule VII or the Unspent Corporate Social Responsibility Account, as the case may be, or one crore rupees, whichever is less, and every officer of the company who is in default shall be liable to a penalty of one-tenth of the amount required to be transferred by the company to such Fund specified in Schedule VII, or the Unspent Corporate Social Responsibility Account, as the case may be, or two lakh rupees, whichever is less.

Companies Amendment Act, 2020

(x) Exemption

Where the amount to be spent by a company under sub-section (5) does not exceed fifty lakh rupees, the requirement under sub-section (1) for constitution of the Corporate Social Responsibility Committee shall not be applicable and the functions of such Committee provided under this section shall, in such cases, be discharged by the Board of Directors of such company.

Companies Amendment Act, 2020

(xi) Activities specified under Schedule VII:

Activities which may be included by companies in their CSR Policies (i.e. Activities as specified under Schedule VII) are as follows:



- (1) eradicating hunger, poverty and malnutrition, promoting health care including preventive health care and sanitation including contribution to the Swach Bharat Kosh set-up by the Central Government for the promotion of sanitation and making available safe drinking water;
- (2) promoting education, including special education and employment enhancing vocation skills especially among children, women, elderly, and the differently abled and livelihood enhancement projects;
- (3) promoting gender equality, empowering women, setting up homes and hostels for women and orphans; setting up old age homes, day care centres and such other facilities for senior citizens and measures for reducing inequalities faced by socially and economically backward groups;
- (4) ensuring environmental sustainability, ecological balance, protection of flora and fauna, animal welfare, agro forestry, conservation of natural resources and maintaining quality of soil, air and water including contribution to the Clean Ganga Fund set up by the Central Government for rejuvenation of river Ganga;
- (5) protection of national heritage, art and culture including restoration of buildings and sites of historical importance and works of art; setting up public libraries; promotion and development of traditional arts and handicrafts;
- (6) measures for the benefit of armed forces veterans, war widows and their dependents;
- (7) training to promote rural sports, nationally recognised sports, paralympic sports and Olympic sports;
- (8) contribution to the Prime Minister's National Relief Fund or any other - fund set up by the Central Government for socio-economic development and relief and welfare of the Scheduled Castes, the Scheduled Tribes, other backward classes, minorities and women;
- (9) contributions or funds provided to technology incubators located within academic institutions which are approved by the Central Government;
- (10) rural development projects;
- (11) slum area development. [For the purposes of this item, the term 'slum area' shall mean any area declared as such by the Central Government or any State Government or any other competent authority under any law for the time being in force.]

Latest Amendment

1. The Ministry of Corporate Affairs have made a clarification with respect to CSR:

Spending of CSR funds for COVID-19 is an eligible CSR activity,

it is further clarified that spending of CSR funds for 'creating health infrastructure for COVID care', 'establishment of medical oxygen generation and storage plants', 'manufacturing and supply of Oxygen concentrators, ventilators, cylinders and other medical equipment for countering COVID-19' or similar such activities are eligible CSR activities.



2. Every company covered under the provisions of sub-section (1) to section 135 shall furnish a report on Corporate Social Responsibility in Form CSR-2 to the Registrar for the preceding financial year (2020-2021) and onwards as an addendum to Form AOC-4 or AOC-4 XBRL or AOC-4 NBFC (Ind AS), as the case may be:

Provided that for the preceding financial year (2020-2021), Form CSR-2 shall be filed separately on or before 31st March 2022, after filing Form AOC-4 or AOC-4 XBRL or AOC-4 NBFC (Ind AS), as the case may be.

3. In the Companies (Corporate Social Responsibility Policy) Rules, 2014, in rule 4, for sub-rule (1), the following sub-rule shall be substituted, namely: -

‘(1) The Board shall ensure that the CSR activities are undertaken by the company itself or through, -

- (a) a company established under section 8 of the Act, or a registered public trust or a registered society, or registered under section 12A and approved under 80 G of the Income Tax Act, 1961, established by the company, either singly or along with any other company; or
- (b) a company established under section 8 of the Act or a registered trust or a registered society, established by the Central Government or State Government; or
- (c) any entity established under an Act of Parliament or a State legislature; or
- (d) a company established under section 8 of the Act, or a registered public trust or a registered society, or registered under section 12A and approved under 80 G of the Income Tax Act, 1961, and having an established track record of at least three years in undertaking similar activities.

Explanation.- For the purpose of clause (c), the term “entity” shall mean a statutory body constituted under an Act of Parliament or State legislature to undertake activities covered in Schedule VII of the Act.’.

RIGHT TO MEMBERS TO COPIES OF AUDITED FINANCIAL STATEMENT [SECTION 136]

- (1) a copy of the financial statements, including consolidated financial statements, if any, auditor’s report and every other document required by law to be annexed or attached to the financial statements, which are to be laid before a company in its general meeting, shall be sent to every member of the company, to every trustee for the debenture-holder of any debentures issued by the company, and to all persons other than such member or trustee, being the person so entitled, not less than twenty-one days before the date of the meeting.

Provided that if the copies of the documents are sent less than twenty-one days before the date of the meeting, they shall, notwithstanding that fact, be deemed to have been duly sent if it is so agreed by members—

- (a) holding, if the company has a share capital, majority in number entitled to vote and who represent not less than ninety-five per cent. of such part of the paid-up share capital of the company as gives a right to vote at the meeting; or
- (b) having, if the company has no share capital, not less than ninety five per cent. of the total voting power exercisable at the meeting



Provided further that in the case of a listed company, the provisions of this sub-section shall be deemed to be complied with, if the copies of the documents are made available for inspection at its registered office during working hours for a period of twenty-one days before the date of the meeting and a statement containing the salient features of such documents in the prescribed form or copies of the documents, as the company may deem fit, is sent to every member of the company and to every trustee for the holders of any debentures issued by the company not less than twenty-one days before the date of the meeting unless the shareholders ask for full financial statements:

Provided also that the Central Government may prescribe the manner of circulation of financial statements of companies having such net worth and turnover as may be prescribed:

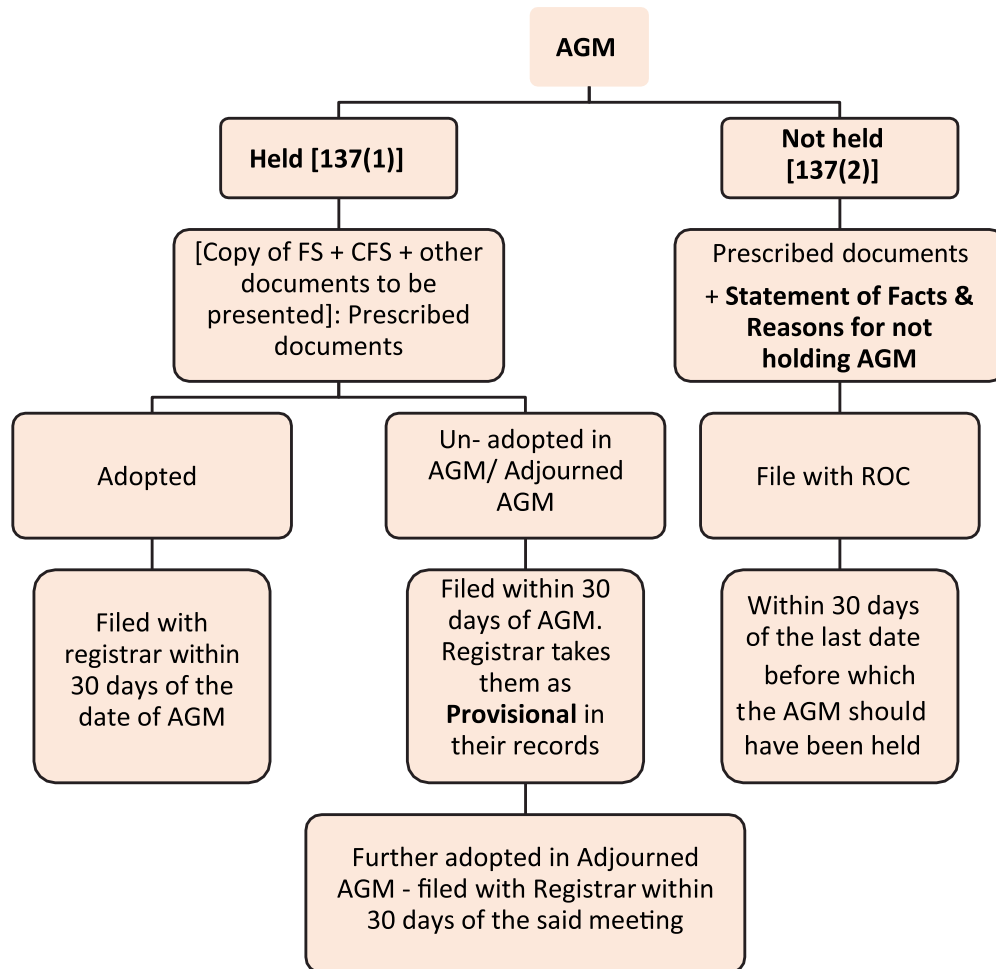
Provided also that a listed company shall also place its financial statements including consolidated financial statements, if any, and all other documents required to be attached thereto, on its website, which is maintained by or on behalf of the company.

- (2) A company shall allow every member or trustee of the holder of any debentures issued by the company to inspect the documents stated under sub-section (1) at its registered office during business hours.
- (3) If any default is made in complying with the provisions of this section, the company shall be liable to a penalty of twenty-five thousand rupees and every officer of the company who is in default shall be liable to a penalty of five thousand rupees.



COPY OF FINANCIAL STATEMENT TO BE FILED WITH REGISTRAR [SECTION 137] r.w. Sec. 92

This section provides that copies of financial statement including consolidated financial statement, if any, along with all the documents annexed to financial statement and adopted at AGM shall be filed with Registrar.



(i) Filing of financial statements [Section 137(1)]:

- (1) A copy of the financial statements, including consolidated financial statement, if any, along with all the documents which are required to be or attached to such financial statements under this Act, duly adopted at the AGM of the company, shall be filed with the Registrar within 30 days of the date of AGM in such manner, with such fees or additional fees as may be prescribed.

As per Rule 3 of the Companies (Filing of Documents and forms in Extensible Business Reporting Language) Rules, 2015-

The following class of companies shall file their financial statements and other documents under section 137 of the Act with the Registrar in e-form AOC- 4 XBRL as per Annexure-I:

- (i) companies listed with stock exchanges in India and their Indian subsidiaries;
- (ii) companies having paid up capital of five crore rupees or above;
- (iii) companies having turnover of one hundred crore rupees or above;
- (iv) all companies which are required to prepare their financial statements in accordance with Companies (Indian Accounting Standards) Rules, 2015.



Provided further that non-banking financial companies, housing finance companies and companies engaged in the business of banking and insurance sector are exempted from filing of financial statements under these rules.

(ii) If the financial statements are not adopted [Section 137(1)]:

- (a) Where the financial statements are not adopted at AGM or adjourned AGM, such unadopted financial statements along with the required documents shall be filed with the Registrar within 30 days of the date of AGM.
- (b) The Registrar shall take them in his records as provisional till the financial statements are filed with him after their adoption in the adjourned AGM for that purpose.
- (c) If the financial statements are adopted in the adjourned AGM, then they shall be filed with the Registrar within 30 days of the date of such adjourned AGM with such fees or such additional fees as may be prescribed.

(iii) Filing by One Person Company [Section 137(1)]:

A One Person Company shall file a copy of the financial statements duly adopted by its member, along with all the documents which are required to be attached to such financial statements, within 180 days from the closure of the financial year.

(iv) Annual General meeting not held [Section 137(2)]:

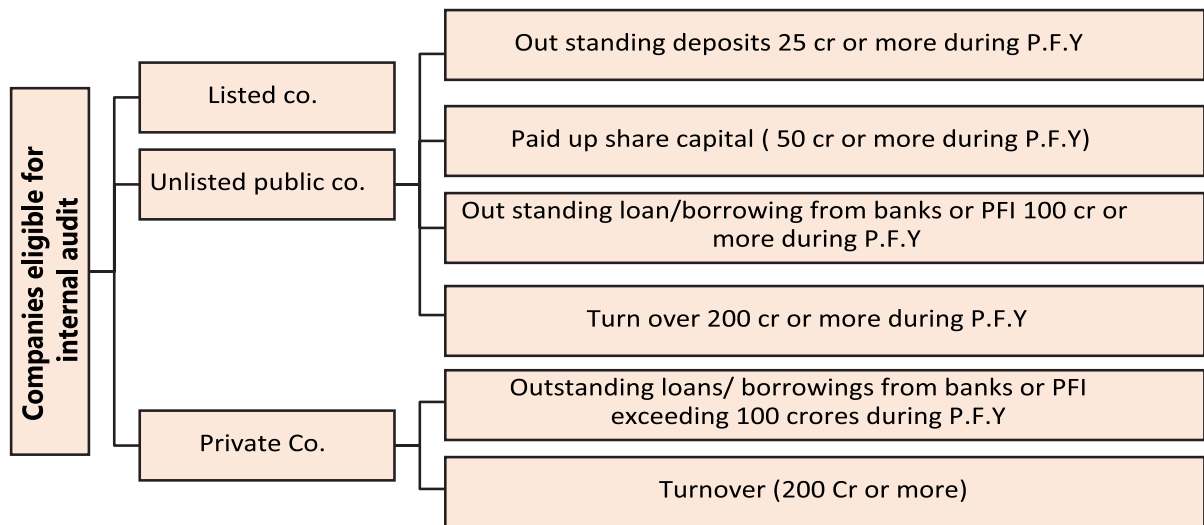
Where the AGM of a company for any year has not been held, the financial statements along with the documents required to be attached, duly signed along with the statement of facts and reasons for not holding the AGM shall be filed with the Registrar within thirty days of the last date before which the AGM should have been held and in such manner, with such fees or additional fees as may be prescribed.

(v) Penalty [Section 137(3)]:

Person liable	Punishment for contravention of section 137
Company	ten thousand rupees and in case of continuing failure, with a further penalty of one hundred rupees for each day during which such failure continues, subject to a maximum of two lakh rupees Companies Amendment Act, 2020
Officers— managing director and the Chief Financial Officer of the company, if any In their absence, any other director who is charged by the Board with the responsibility In its absence, all the directors of the company.	Penalty of 10,000 and in case of continuing failure with the further penalty of 100 Rupees for each day during which such failure continues subject to maximum 50,000 rupees. Companies Amendment Act, 2020



INTERNAL AUDIT [SECTION 138]

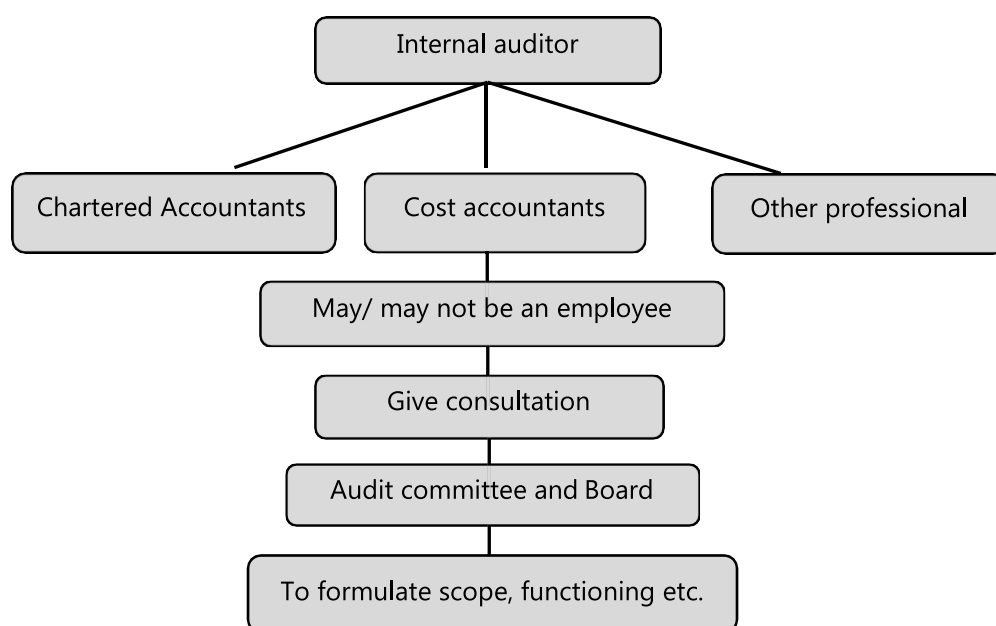


Who is Internal Auditor

- (a) Internal Auditor shall either be a Chartered Accountant or a Cost Accountant, or such other professional as may be decided by the Board to conduct internal audit of the functions and activities of the company.

The term “Chartered Accountant” or “Cost Accountant” shall mean a “Chartered Accountant” or a “Cost Accountant”, as the case may be, whether engaged in practice or not’.

- (b) The internal auditor may or may not be an employee of the company.





QUESTION & ANSWERS



Question 1

The Board of directors of Bharat Ltd. has a practical problem. The registered office of the company is situated in a classified backward area of Maharashtra. The Board wants to keep its books of account at its corporate office in Mumbai which is conveniently located. The Board seeks your advice about the feasibility of maintaining the accounting records at a place other than the registered office of the company. Advise.



Solution:

According to Section 128(1) of the Companies Act, 2013, every company is required to keep the books of accounts and other relevant books and papers and financial statement for every financial year which give a true and fair view of the state of the affairs of the company, including that of its branch office or offices, if any, and explain transactions effected both at the registered office and its branches and such books shall be kept on accrual basis and according to the double entry system of accounting.

The proviso to section 128(1) further provides that all or any of the books of account aforesaid and other relevant papers may be kept at such other place in India as the Board of Directors may decide and where such a decision is taken, the company shall, within seven days thereof, file with the Registrar a notice in writing giving the full address of that other place.

Therefore, the Board of Bharat Ltd. is empowered to keep its books of account at its corporate office in Mumbai by following the above procedure.



Question 2

Mr. White is working as Chief Accountant in White Metal Limited. The Board of Directors of the said company propose to charge him with the duty of ensuring compliance with the provisions of the Companies Act, 2013 so that books of account can be properly maintained and Balance Sheet and Profit and Loss Account can be prepared as per the provisions of law. Draft a “Board Resolution” for the said purpose. Also point out the consequences in case of default; when such a resolution is passed.



Solution:

Board Resolution for charging Mr. White, Chief Accountant, with the duty of Compliance with the requirements of Sections 129 & 134 of the Companies Act, 2013

“Resolved that Mr. White, Chief Accountant of the company be and is hereby charged with the duty of seeing that the requirements of Sections 129 and 134 of the Companies Act, 2013 are duly and fully complied with.

Resolved further that the said Mr. White is hereby entrusted with the authority to do such Acts or deeds as may be necessary or expedient for the purpose of discharging his above referred duties.”

Consequences of contravention: Section 128(6) provides that if the managing director, the whole-time director in charge of finance, the Chief Financial Officer or any other person



of a company charged by the Board with the duty of complying with the provisions of this section, contravenes such provisions, such managing director, whole-time director in charge of finance, Chief Financial officer or such other person of the company shall be punishable with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees. Hence, Mr. White is liable for punishment as referred above.



Question 3

Mr. Ramanujam, one of the Directors in Debari Food Processing Limited was not satisfied with the performance of the company in financial matters. He requested Mr. Anandaraja, a Chartered Accountant, to inspect the books of accounts of the company on his behalf. Decide, under the provisions of the Companies Act, 2013 whether the said company can refuse to allow Mr. Anandaraja to inspect the books of accounts?



Solution:

Under Section 128(3) of the Companies Act, 2013, the books of account and other books and papers maintained by the company within India shall be open for inspection at the registered office of the company or at such other place in India by any director during business hours, and in the case of financial information, if any, maintained outside the country, copies of such financial information shall be maintained and produced for inspection by any director subject to such conditions as may be prescribed.

The Companies Act, 2013 makes it quite clear that the inspection can be done by a director. However, in case the director wishes to get the inspection done by an agent or a representative he must seek the approval of the Board of Directors without which he will not be allowed to do so. In *Vakharia Vs Supreme General Film Exchange Co. Ltd* it was held that a director is entitled to take inspection of accounts personally or through an agent provided that there is no reasonable objection to the person chosen and the agent undertakes not to utilize the information obtained by him for any purpose other than the purpose of his principal.

As the right of inspection is a statutory right given under this section, a director who is prevented or refused from inspection may enforce his right through court.

As such, Mr. Ramanujam being the director in Debari Food Processing Limited may appoint Mr. Anandaraja to inspect the books of accounts of the company only with the approval of the Board of Directors.

Hence, the Debari Food Processing Limited cannot refuse to allow Mr. Anandaraja to inspect the books of accounts if such right of inspection has been approved by the Board of Directors.



Question 4

State giving reasons whether the following are true or false under the provisions of the Companies Act, 2013? The Board of Directors of ABC Ltd. wants to circulate unaudited accounts before the Annual General Meeting of the shareholders of the Company.



Solution:

False. Section 129(2) of the Companies Act, 2013 provides that at every annual general meeting of a company, the Board of Directors of the company shall lay before such meeting financial statements for the financial year. Further Section 134(7) provides that signed copy of every financial statement, including consolidated financial statement, if any, shall be issued,



circulated or published along with a copy each of:

- a) any notes annexed to or forming part of such financial statement;
- b) the auditor's report; and
- c) the Board's report.

It, therefore, follows that unaudited accounts cannot be sent to members or unaudited accounts cannot be filed with the Registrar of Companies.



Question 5

The Board of Directors of Vishwakarma Electronics Limited consists of Mr. Ghanshyam, Mr. Hyder (Directors) and Mr. Indersen (Managing Director). The company has also employed a full time Secretary. The Profit and Loss Account and Balance Sheet of the company were signed by Mr. Ghanshyam and Mr. Hyder. Examine whether the authentication of financial statements of the company was in accordance with the provisions of the Companies Act, 2013?



Solution:

Under Section 134(1) of the Companies Act, 2013 the financial statement, including consolidated financial statement, if any, shall be approved by the Board of Directors before they are signed on behalf of the Board by at least:

- a) The chairperson of the company where he is authorised by the Board; or
- b) Two directors out of which one shall be managing director and Chief Executive Officer, if he is a director in the company,
- c) the Chief Financial Officer and the Company Secretary of the company, wherever they are appointed.

In the instant case, the Balance Sheet and Profit and Loss Account have been signed by Mr. Ghanshyam and Mr. Hyder, the directors. In view of Section 134(1) of the Companies Act, 2013, Mr. Indersen, the Managing Director should be one of the two signing directors. Since the company has also employed a full time Secretary, he should also sign the Balance Sheet and Profit and Loss Account.



Question 6

The Companies Act, 2013 has prescribed an additional duty on the Board of Directors to include in the Board's Report a 'Directors' Responsibility Statement'. Explain briefly the details to be furnished in the said statement.



Solution:

Section 134(3)(c) of the Companies Act, 2013 provides that there shall be attached to statements laid before a company in general meeting, a report by its Board of Directors, which shall include a number of statements as prescribed in the sub section including Directors' Responsibility Statement.

Further Section 134(5) states that the Directors Responsibility Statement shall state that:

- (i) In the preparation of the annual accounts, the applicable accounting standards had been followed along with proper explanation relating to material departures;
- (ii) the directors had selected such accounting policies and applied them consistently and made judgments and estimates that are reasonable and prudent so as to give a true and fair view of the state of affairs of the company at the end of the financial year and of



- the profit or loss of the company for that period;
- (iii) the directors had taken proper and sufficient care for the maintenance of adequate accounting standards in accordance with the provisions of this Act for safeguarding the assets of the company and for preventing and detecting fraud and other irregularities; that the directors had prepared the annual accounts on a going concern basis; and
- (iv) the directors, in the case of a listed company, had laid down internal financial controls to be followed by the company and that such internal financial controls are adequate and were operating effectively.
- (v) the directors had devised proper systems to ensure compliance with the provisions of all applicable laws and that such systems were adequate and operating effectively.



Question 7

The Annual General Meeting of Robertson Ltd., for laying the Annual Accounts thereat for the year ended 31st March, 2014 was not held, as the accounts were not ready. In this context:

- (i) Advise the company regarding compliance of the provisions of section 137 of the Companies Act, 2013 for filing of copies of financial statements with the Registrar of Companies.
- (ii) Will it make any difference in case the Annual Accounts were duly laid before the Annual General Meeting held on 27th September, 2014 but the same were not adopted by the shareholders?



Solution:

Under Section 137(1) of the Companies Act, 2013, a copy of the financial statements, including consolidated financial statement, if any, along with all the documents which are required to be or attached to such financial statements under this Act, duly adopted at the annual general meeting of the company, shall be filed with the Registrar within thirty days of the date of annual general meeting in such manner, with such fees or additional fees as may be prescribed within the time specified. Every company shall file the financial statements with the Registrar together with Form AOC-4.

Provided that where the financial statements under sub-section (1) are not adopted at annual general meeting or adjourned annual general meeting, such unadopted financial statements along with the required documents under sub-section (1) shall be filed with the Registrar within thirty days of the date of annual general meeting and the Registrar shall take them in his records as provisional till the financial statements are filed with him after their adoption in the adjourned annual general meeting for that purpose.

Further under Section 137(2) of the Companies Act, 2013 where the annual general meeting of a company for any year has not been held, the financial statements along with the documents required to be attached under sub-section (1), duly signed along with the statement of facts and reasons for not holding the annual general meeting shall be filed with the Registrar within thirty days of the last date before which the annual general meeting should have been held and in such manner, with such fees or additional fees as may be prescribed within the time specified.

Accordingly,

- (i) In the present case though Annual General Meeting was not held, it ought to be held by



30th September, 2014 under Sections 96 of the Companies Act, 2013.

Therefore, under the provisions of Section 137(2) the financial statements along with the documents required to be attached under this Act, duly signed along with the statement of facts and reasons for not holding the annual general meeting shall be filed with the Registrar within thirty days of the last date before which the annual general meeting should have been held i.e. by 30th October 2014 along with such fees or additional fees as may be prescribed.

- (ii) Since the Annual General Meeting has been held in time on 27th September 2014, the unadopted financial statements along with the required documents under sub-section (1) of section 137 shall be filed with the Registrar within thirty days of the date of annual general meeting and the Registrar shall take them in his records as provisional till the financial statements are filed with him after their adoption in the adjourned annual general meeting for that purpose.



Question 8

Explaining the provisions of the Companies Act, 2013, answer the following:

- (i) Manner in which the companies are required to present the financial statements.
- (ii) What kinds of companies are exempted from the preparation of the above statements in terms of nature and the contents?
- (iii) State the consequences and the penalties in case the company does not comply with the accounting standards?



Solution:

- (i) In accordance with the provisions of the Companies Act, 2013 as contained in Section 129(1), the financial Statements of a company shall be prepared in such a manner so that these:
 - a) Give a true and fair view of the state of affairs of the company or companies.
 - b) Comply with the accounting standards notified under Section 133 of the Act.
 - c) Shall be in the form or forms as may be provided for different class or classes of companies in Schedule III to the Act.
 - d) However, the items contained in such financial statements shall be in accordance with the accounting standards.
- (ii) The above provisions relating to nature and content of financial statement shall not apply to following companies:
 - a) Insurance companies
 - b) Banking companies
 - c) Company engaged in the generation or supply of electricity
 - d) Any other class of company for which a form of financial statement has been specified in or under the Act governing such class of company.
- (iii) According to Section 129(5) of the Act, in case the financial statements of a company are not prepared in compliance with the Accounting Standards, the company shall disclose in its financial statements the following viz.
 - a) The extent to which the financial statements do not comply with Accounting Standards i.e. deviation from the Accounting Standards.



- b) The reasons for such deviation i.e. what has led the company to deviate from the Accounting Standards.
 - c) The financial effects, if any, arising out of such deviation.
- As per Section 129(7) of the Act, if a company contravenes the provisions relating to preparation of financial statements, the Managing Director, the Whole-time Director in charge of finance, the Chief Financial Officer or any other person charged by the Board with the duty of complying with the requirements of this section and in the absence of any of the officers mentioned above, all the directors shall be punishable with:
- a) Imprisonment for a term which may extend to 1 year; or
 - b) Fine which shall not be less than ₹ 50,000 which may extend to ₹ 5 lacs; or
 - c) Both with imprisonment as well as the fine.



Question 9

The Board of Directors of X company undertakes to make contribution under the discharge of its social responsibilities for promotion of sanitation facilities and to make available clean and safe drinking ganga water in nearby villages. State in the light of the Companies Act, 2013, whether the company can undertake such a responsibility and contribute towards the achievement of such social responsibility?



Solution:

Section 135 of the Companies Act, 2013 deals with the provisions related to the Corporate Social Responsibility. According to which it is mandatory for every company with specified criteria to spend a prescribed percentage of their profits on certain specified areas of social upliftment in discharge of their social responsibilities. The Companies (CSR Policy) Rules, 2014 provides that the CSR may include:-

- (i) Projects or programs relating to activities specified in Schedule VII to the Act; or
- (ii) Projects or programs relating to activities undertaken by the board of directors of a company (Board) in pursuance of recommendations of the CSR Committee of the Board as per declared CSR Policy of the company subject to the condition that such policy will cover subjects enumerated in Schedule VII of the Act.

The MCA vide Notification No. G.S.R. 741(E) dated 24th October, 2014, has amended Schedule VII to the Companies Act, 2013, whereby, contribution to the Swach Bharat Kosh set-up by the Central Government for the promotion of sanitation and contribution to the Clean Ganga Fund setup by the Central Government for rejuvenation of river Ganga have also been included in the activities which may be included by companies in their Corporate Social Responsibility policies.

Accordingly, in the given case, X company can take such responsibility and contribute for the promotion of sanitation facilities and rejuvenation of river ganga for supply of safe drinking water in nearby villages where it operates.



Question 10

Rajasthan Textiles Limited (RTL) is a company in India with a subsidiary company M and subsidiary company S in USA. Decide the liability of RTL with respect to the filing of the financial statements under the Companies Act, 2013



Solution:

Under Section 129(3) of the Companies Act, 2013, where a company has one or more subsidiaries, it shall, in addition to the financial statements provided under sub-section (2), prepare a consolidated financial statement (CFS) of the company and of all the subsidiaries in the same form and manner as that of its own which shall also be laid before the annual general meeting of the company along with the laying of its financial statement under sub-section (2).

Provided that the company shall also attach along with its financial statement, a separate statement containing the salient features of the financial statement of its subsidiary or subsidiaries in such form as may be prescribed.

Section 129(2) provides that at every annual general meeting of a company, the Board of Directors of the company shall lay before such meeting financial statements for the financial year.

Accordingly, as per the above provisions, CFS is prepared at the holding company level, so RTL (holding company of M & S) is required to prepare in addition to its own financial statements, a CFS of the company and of all the subsidiaries in the same form and manner as that of its own. So, the CFS prepared by RTL will include the financial statement of RTL and of its subsidiaries M and S in USA.



Question 11

Mr. D, one of a Director in PQR Limited was not satisfied with the performance of its subsidiary company in financial matters. He authorised Mr. F, a financial expert, to inspect the books of accounts of the company on his behalf. Decide, under the provisions of the Companies Act, 2013 whether the said company can refuse to allow Mr. F to inspect the books of accounts of its subsidiary company?



Solution:

Under Section 128(3) of the Companies Act, 2013, the books of account and other books and papers maintained by the company within India shall be open for inspection at the registered office of the company or at such other place in India by any director during business hours, and in the case of financial information, if any, maintained outside the country, copies of such financial information shall be maintained and produced for inspection by any director subject to such conditions as prescribed under Rule 4 of the Companies (Accounts) Rule, 2014.

Provided that the inspection in respect of any subsidiary of the company shall be done only by the person authorized in this behalf by a resolution of the Board of Directors.

In the given case, Mr. D being the director in PQR Limited authorised Mr. F to inspect the books of accounts of its subsidiary company. As per the above provision, the inspection in respect of any subsidiary of the company shall be done only by the person authorized in this behalf by a resolution of the Board of Directors.

Since in the given problem, Mr. F was authorized by the Mr. D at its own without seeking approval of the Board of Directors to inspect the books of accounts of its subsidiary company. So, company can refuse to allow Mr. F to inspect the books of accounts of its subsidiary company.



Question 12:

SKP Limited (Registered in India), a wholly owned subsidiary company of Herry Limited decided to follow different financial year for consolidation of its accounts outside India. State the procedure to be followed in this regard.



Solution:

Where a company or body corporate, which is a holding company or a subsidiary or associate company of a company incorporated outside India and is required to follow a different financial year for consolidation of its accounts outside India, the Central Government may, on an application made by that company or body corporate in such form and manner as may be prescribed, allow any period as its financial year, whether or not that period is a year.

Any application pending before the Tribunal as on the date of commencement of the Companies (Amendment) Act, 2019, shall be disposed of by the Tribunal in accordance with the provisions applicable to it before such commencement.

SKP Limited is advised to follow the above procedure accordingly.

[Note: This answer is based on the assumption that Herry limited is a foreign Company registered outside India as inferred from part (i) of the question]



Question 13:

- (i) Ravi Limited maintained its books of accounts under Single Entry System of Accounting. Is it permitted under the provisions of the Companies Act, 2013?
- (ii) State the person responsible for complying with the provisions regarding maintenance of Books of Accounts of a Company.
- (iii) Whether a Company can keep books of Accounts in electronic mode accessible only outside India.

(6 Marks)



Solution:

- (i) According to Section 128(1) of the Companies Act, 2013, every company shall prepare “books of account” and other relevant books and papers and financial statement for every financial year.

These books of accounts should give a true and fair view of the state of the affairs of the company, including that of its branch office(s).

These books of accounts must be kept on accrual basis and according to the double entry system of accounting.

Hence, maintenance of books of account under Singly Entry System of Accounting by Ravi Limited is not permitted.

- (ii) Persons responsible to maintain books

As per Section 128 (6) of the Companies Act, 2013, the person responsible to take all reasonable steps to secure compliance by the company with the requirement of maintenance of books of accounts etc. shall be:

- (a) Managing Director,
- (b) Whole-Time Director, in charge of finance
- (c) Chief Financial Officer
- (d) Any other person of a company charged by the Board with duty of complying with provisions of section 128.



- (iii) A Company have has the option of keeping such books of account or other relevant papers in electronic mode as per Rule 3 of the Companies (Accounts) Rules, 2014. According to such Rule,
- (a) such books of accounts or other relevant books or papers maintained in electronic mode shall remain accessible in India so as to be usable for subsequent reference.
 - (b) There shall be a proper system for storage, retrieval, display or printout of the electronic records as the Audit Committee, if any, or the Board may deem appropriate and such records shall not be disposed of or rendered unusable, unless permitted by law.
 - (c) The back-up of the books of account and other books and papers of the company maintained in electronic mode, including at a place outside India, if any, shall be kept in servers physically located in India on a periodic basis.
- Hence, a company cannot keep books of Account in electronic mode accessible only outside India.



Question 14:

The Board of Directors of Dilip Telelinks Ltd. consists of Mr. Choksey, Mr. Patel (Directors) and Mr. Shukla (Managing Director). The company has also employed a full time Secretary. The Profit and Loss Account and Balance Sheet were signed by Mr. Choksey and Mr. Patel. Examine whether the authentication of financial statements of the company is in accordance with the provisions of the Companies Act, 2013 ?

(3 Marks)



Solution:

According to Section 134(1) of the Companies Act, 2013, the financial statement, including consolidated financial statement, if any, shall be approved by the Board of Directors before they are signed on behalf of the Board by the chairperson of the company where he is authorised by the Board or by two directors out of which one shall be managing director, if any, and the Chief Executive Officer, the Chief Financial Officer and the company secretary of the company, wherever they are appointed, or in the case of One Person Company, only by one director, for submission to the auditor for his report thereon.

In the instant case, the Balance Sheet and Profit and Loss Account have been signed only by Mr. Choksey and Mr. Patel, the directors. In view of Section 134(1) of the Companies Act, 2013, Mr. Shukla, the Managing Director should have been one of the two signing directors.

Further, since the company has also employed a full- time Secretary, he should also sign the Balance Sheet and the Statement of Profit and Loss.



Question 15:

The balances extracted from the financial statement of ABC Limited are as below:

Sr. No.	Particulars	Balances as on 31-03-2020 as per Audited Financial Statement (₹ in crore)	Balances as on 30-09-2020 (Provisional ₹ in crore)
1.	Net Worth	100.00	100.00
2.	Turnover	500.00	1000.00
3.	Net Profit	1.00	5.00



Explaining the provisions of the Companies Act, 2013, you are requested to examine whether ABC Limited is required to constitute 'Corporate Social Responsibility Committee' (CSR Committee) during the second half of the financial year 2020-21. (3 Marks)



Solution:

According to section 135(1) of the Companies Act, 2013, every company having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during the immediately preceding financial year shall constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors, out of which at least one director shall be an independent director.

In the given question, the company does not fulfil any of the given criteria (net worth/ turnover/ net profit) for the immediately preceding financial year (i.e., 1.4.2019 to 31.3.2020). Hence, ABC Limited is not required to constitute Corporate Social Responsibility Committee for the financial year 2020-21.



Question 16:

X Ltd. is a listed company having a paid-up share capital of ₹ 25 crore as at 31st March, 2019 and turnover of ₹ 100 crore during the financial year 2018-19. The Company Secretary has advised the Board of Directors that X Ltd. is not required to appoint 'Internal Auditor' as the company's paid up share capital and turnover are less than the threshold limit prescribed under the Companies Act, 2013. Do you agree with the advice of the Company Secretary? Explain your view referring to the provisions of the Companies Act, 2013.

(3 Marks)



Solution:

According to the provisions of Section 138 of the Companies Act, 2013, read with Rule 13 of the Companies (Accounts) Rules, 2014, the following class of companies shall be required to appoint an internal auditor which may be either an individual or a partnership firm or a body corporate, namely:

- (1) every listed company;
- (2) every unlisted public company having-
 - (A) paid up share capital of 50 crore rupees or more during the preceding financial year; or
 - (B) turnover of 200 crore rupees or more during the preceding financial year;
 - (C) outstanding loans or borrowings from banks or financial institutions exceeding one hundred crore rupees or more at any point of time during the preceding financial year; or
 - (D) outstanding deposits of twenty five crore rupees or more at any point of time during the preceding financial year.

Besides, some private companies are also required to appoint an internal auditor which may be either an individual or a partnership firm or a body corporate.

Thus, X limited (which is a listed company) is required to appoint an internal auditor, irrespective of its paid-up share capital or turnover (as the limit of paid- up share capital or turnover is applicable for unlisted public company).

Hence, the advice of the Company Secretary is not correct.



Question 17:

Diya Limited, incorporated under the provisions of the Companies Act, 2013, has two subsidiaries - Jai Limited and Vijay Limited. All the three companies have prepared their financial statements for the year ended 31st March, 2021. Examining the provisions of the Companies Act, 2013, explain in what manner the subsidiaries- Jai Limited and Vijay Limited shall prepare their Balance Sheet and Statement of Profit & Loss? (3 Marks)



Solution:

According to section 129(3) of the Companies Act, 2013, where a company has one or more subsidiaries or associate companies, it shall, in addition to financial statements provided under sub-section (2), prepare a consolidated financial statement (CFS) of the company and of all the subsidiaries and associate companies in the same form and manner as that of its own and in accordance with applicable accounting standards, which shall also be laid before the annual general meeting of the company along with the laying of its financial statement under sub-section (2).

The company shall also attach along with its financial statement, a separate statement containing the salient features of the financial statement of its subsidiary or subsidiaries and associate company or companies in Form AOC-1 as per Rule 5 of the Companies (Accounts) Rules, 2014.

Provided further that the Central Government may provide for the consolidation of accounts of companies in such manner as may be prescribed under Rule 6 of the Companies (Accounts) Rules, 2014.

Since, consolidation of accounts is to be done by the holding company (i.e. Diya Limited), Jai Limited and Vijay Limited shall prepare their Balance Sheet and Statement of Profit and Loss Account normally following the relevant provisions of the Companies Act, 2013 compliant with the applicable Accounting Standards.



CHAPTER WISE - CLASS TEST



Question 1

ABC Limited has on its Board, four Directors viz. W, X, Y and Z. In addition, the company has Mr. D as the Managing Director. The company also has a full time Company Secretary, Mr. Wise, on its rolls. The financial statements of the company for the year ended 31st March, 2015 were authenticated by two of the directors, Mr. X and Y under their signatures.

Referring to the provisions of the Companies Act, 2013:

- (i) Examine the validity of the authentication of the Balance Sheet and Statement of Profit & Loss and the Board's Report.
- (ii) What would be your answer in case the company is a One Person Company (OPC) and has only one Director, who has authenticated the Balance Sheet and Statement of Profit & Loss and the Board's Report?



Solution:

In accordance with the provisions of the Companies Act, 2013, as contained under section 134 (1), the financial statements, including consolidated financial statement, if any, shall be approved by the Board of Directors before they are signed on behalf of the Board by at least:

- (a) The Chairperson of the company where he is authorized by the Board; or
- (b) Two directors out of which one shall be the managing director and Chief Executive Officer, if he is a director in the company
- (c) The Chief Financial Officer and the Company Secretary of the company, wherever they are appointed.

In case of a One Person Company, the financial statements shall be signed by only one director, for submission to the auditor for his report thereon.

The Board's report and annexures thereto shall be signed by its Chairperson of the company, if he is authorized by the Board and where he is not so authorized, shall be signed by at least two directors one of whom shall be a managing director or by the director where there is one director.

- (i) In the given case, the Balance Sheet and Profit & Loss Account have been signed by Mr. X and Mr. Y, the directors. In view of the provisions of Section 134 (1), the Managing Director Mr. D should be one of the two signatories. Since the company has also employed a full time Secretary, he should also sign the Balance Sheet and Profit & Loss Account. Therefore, authentication done by two directors is not valid.
- (ii) In case of OPC, the financial statements should be signed by one director and hence, the authentication is in order.



Question 2

DJA Company Limited, incorporated under the provisions of the Companies Act, 2013, has two subsidiaries - AJD Limited and AMR Limited. All the three companies have prepared their financial statements for the year ended 31st March, 2015. Examining the provisions of the Companies Act, 2013, answer the following:

- (i) In what manner the subsidiaries - AJD Limited and AMR Limited shall prepare their Balance Sheet and Profit & Loss Account?
- (ii) What would be your answer in case the DJA Limited - the holding company, is not required to prepare consolidated financial statements under the Indian Accounting Standards?



- (iii) What shall be your answer in case one of the subsidiary company's financial statements do not comply with the Accounting Standards?
- (iv) To what extent is the Central Government empowered to exempt a company from preparing the financial statements in compliance with the Indian Accounting Standards?



Solution:

- (i) In accordance with the provisions of the Companies Act, 2013, as contained under section 129(3) and (4): Where a company has one or more subsidiaries, it shall, in addition to its own financial statements prepare a consolidated financial statement of the company and of all the subsidiaries in the same form and manner as that of its own. The consolidated financial statements shall also be laid before the AGM of the company along with the laying of its own financial statement. The company shall also attach along with its financial statement, a separate statement containing the salient features of the financial statement of its subsidiaries in Form AOC-1. For the purpose of consolidated financial statements, 'subsidiaries' shall include associate company and joint venture.
- (ii) According to Companies (Accounts) Rules, 2014, the consolidation of financial statements of the company shall be made in accordance with the provisions of Schedule III to the Act and the applicable accounting standards. However, for a company which is not required to prepare consolidated financial statements under the Accounting Standards, it shall be sufficient if the company complies with provisions of consolidated financial statements provided in Schedule III to the Act. The provisions applicable to the preparation, adoption and audit of the financial statements of a holding company shall, mutatis mutandis, also apply to the consolidated financial statements.
- (iii) If the financial statements of a company do not comply with the accounting standards, the company shall disclose in its financial statements the following viz.
 - (a) The deviation from the accounting standards,
 - (b) The reasons for such deviation, and
 - (c) The financial effects, if any, arising out of such deviation.The Central Government may, on its own or on any application by a class or classes of companies, by notification, exempt any class or classes of companies from complying with any of the requirements of this Section or the rules made thereunder, if it is considered necessary to grant such exemption in the public interest. Any such exemption may be granted either unconditionally or subject to such conditions as may be specified in the notification.



Question 3

The Board of Directors of Star Ltd. consists of Mr. X, Mr. Y and Mr. Z. Mr. X and Mr. Y are Directors of the Company and Mr. Z is Managing Director in the Board. The company has also employed Mr. F as the Chief Financial Officer. The Financial Statement of the company were Signed by Mr. X and Mr. Y.

Examine the following concerns -

- (i) Whether the authentication of financial statements of the company was in conformity with the provisions of the Companies Act, 2013?
- (ii) If Financial Statement is not in conformity, how the above issue can be repaired in compliance with the Companies Act, 2013?



Solution:

- (i) Under section 134(1) of the Companies Act, 2013 the financial statement, including consolidated financial statement, if any, shall be approved by the Board of Directors before they are signed on behalf of the Board by at least:
 - (a) The chairperson of the company where he is authorised by the Board; or
 - (b) Two directors out of which one shall be managing director, and Chief Executive Officer, if he is a director in the company, and
 - (c) The Chief Financial Officer and the Company Secretary of the company, wherever they are appointed.

In given instance, the Financial Statement have been signed by Mr. X and Mr. Y, the directors. In view of Section 134(1) of the Companies Act, 2013, Mr. Z, the Managing Director should be one of the two signing directors. Since the company has also employed Mr. F as the Chief Financial Officer, he should also sign the Financial Statement. So, the authentication of the financial statements of the company was not in conformity with the provisions of the Companies Act, 2013.

- (ii) Section 131 of the Companies Act, 2013 provides of preparation of revised financial statement or revised report. According to this section if it appears to the directors of a company that the financial statement of the company; or the report of the Board, do not comply with the provisions of section 129 or section 134, they may prepare revised financial statement or a revised report in respect of any of the three preceding financial years after obtaining approval of the Tribunal on an application made by the company in such form and manner as may be prescribed and a copy of the order passed by the Tribunal shall be filed with the Registrar. It is also provided that the detailed reasons for revision of such financial statement or report shall also be disclosed in the Board's report in the relevant financial year in which such revision is being made.



Question 4

- (a) The registered office of the Jai Bharat Ltd. is situated in a remote area of Rajasthan. Due to various issues and practical problems due to lack of development, the Board decided to keep its books of account at its corporate office in Jaipur which is conveniently located. The Board seeks your advice about the viability of maintaining the accounting records at Jaipur rather than the registered office of the company. Advise the Jai Bharat Ltd. within the light of the Companies Act, 2013.
- (b) XYZ Ltd is a listed company having turnover of ₹1200 crores during the financial year 2015-16. The CSR committee of the Board formulated and recommended a CSR project which was approved by the Board. Company finalised the project under its CSR initiatives which require funds @ 5 % of average net profit of the company for last three financial years. Will such excess expense be counted in subsequent financial years as a part of CSR expenditure? Advise.



Solution:

- (a) According to section 128(1) of the Companies Act, 2013, every company is required to prepare and keep the books of accounts and other relevant books and papers and financial statement for every financial year which give a true and fair view of the state of the affairs of the company, including that of its branch office or offices, if any, and



explain the transactions effected both at the registered office and its branches and such books shall be kept on accrual basis and according to the double entry system of accounting.

The proviso to section 128(1) further provides that all or any of the books of account aforesaid and other relevant papers may be kept at such other place in India as the Board of Directors may decide and where such a decision is taken, the company shall, within seven days thereof, file with the Registrar a notice in writing giving the full address of that other place. Further company may keep such books of accounts or other relevant papers in electronic mode as per the Rule 3 of the Companies (Accounts) Rules, 2014.

Therefore, the Board of Jai Bharat Ltd. is empowered to keep its books of account at its corporate office in Jaipur by following the above procedure.

- (b) In terms of Section 135(5) of the Companies Act, 2013, the Board of every company to which section 135 is applicable, shall ensure that the company spends, in every Financial year at least 2 per cent of average net profits of the company made during the three immediately preceding financial years, in pursuance of its CSR policy.

Carry forward of CSR spend allowed as per Amendment.



Question 5

ABC Ltd is an unlisted public company engaged in pharma sector and has paid up capital of rupees 10 crores and achieved turnover of rupees 200 crores during financial year 2015-16. Is it necessary for ABC Ltd to file its financial statement in XBRL mode? Discuss stating clearly the classes of companies mandated to file their financial statement in extensible Business Reporting Language (XBRL) mode with its key benefits. State exceptions, if any.



Solution:

The following class of companies shall file their financial statement in XBRL (Extensible Business Reporting Language) mode and by using the XBRL taxonomy:

- (i) all companies listed with any stock exchange(s) in India and their Indian subsidiaries; or
- (ii) all companies having paid up capital of rupees 5 crores or above;
- (iii) all companies having turnover of rupees 100 crores or above; or
- (iv) all companies which were covered under the Companies (Filing of Documents and Forms in Extensible Business Reporting Language) Rules, 2011.

However, Banking Companies, Insurance Companies, Power Companies and Non- Banking Financial Companies (NBFCs) * and housing finance companies need not file financial statements under this rule.

Key benefits of XBRL filing are as under:

Relevant data has tags and selective information can be fetched for specific purposes by various government and regulatory agencies.

It is in conformity with Global Reporting Standards, which helps in improved data mining and relevant information search.

In view of the above it is necessary for ABC Ltd. To files its Financial Statement is XBRL mode.



Question 6

Bengaluru Limited is a listed company with a net worth of 95 lakhs and turnover of 11.6 crores as on 31st March, 2016. The company wants to circulate the financial statements in electronic mode. Referring to the provisions of the Companies Act, 2013, advise the company whether it can do so.



Solution:

Manner of circulation of financial statements in certain cases [Rule 11 of the Companies (Accounts) Rules, 2014]:

- (a) In case of all listed companies and such public companies which have a net worth of more than one crore rupees and turnover of more than ten crore rupees, the financial statements may be sent-
 - (i) by electronic mode to such members whose shareholding is in dematerialized format and whose email ids are registered with Depository for communication purposes;
 - (ii) where Shareholding is held otherwise than by dematerialized format, to such members who have positively consented in writing for receiving by electronic mode; and
 - (iii) by dispatch of physical copies through any recognised mode of delivery as specified under section 20 of the Act, in all other cases.
- (b) A listed company shall also place its financial statements including consolidated financial statements, if any, and all other documents required to be attached thereto, on its website, which is maintained by or on behalf of the company.



MCQs



Question 1:

ABC Limited has its shares listed on a recognized stock exchange in India. During the current financial year ending on 31st March 2023, the Securities and Exchange Board of India (SEBI) has found some irregularities in the filings made by the company. Accordingly, SEBI proposes to make an application to the Tribunal for reopening of the books of account of the Company. You, as an expert, are called upon by SEBI to advise the earliest financial year to be quoted in application for reopening of books of account may be granted by Tribunal?

- (a) 2018-2019 (b) 2016-2017
- (c) 2013-2014 (d) 2014-2015



Solution:

- (d) 2014-2015



Question 2.

During the half year ended September 2022, the board of directors (BOD) of New Era Limited has made an application to the Tribunal for revision in the accounts of the company for the financial year ended on March 2020. Further during the year ended March 2023, the BOD has again made an application to the Tribunal for revision in the board's report pertaining to the year ended March 2022. You are required to state the validity of the acts of the Board of directors.

- (a) The act of the BOD is valid only to the extent of application made for revisions in accounts as board's report are not eligible for revision.
- (b) The act of the BOD is valid as application made for revision in the accounts and board's report pertains to two different financial year.
- (c) The act of the BOD is invalid as the law provides for only one time application to be made in a financial year for revision of accounts and boards report.
- (d) The act of the BOD is invalid as to the application made for revision in accounts pertains to a period beyond 2 years immediately preceding the year 2023. The application made for revision in the Board report is however valid in law.



Solution:

- (b) The act of the BOD is valid as application made for revision in the accounts and board's report pertains to two different financial year.



Question 3.

As per the provisions of the Companies Act, 2013, which of the following statement is correct with respect to the surplus arising out of the CSR activities:

- (a) The surplus cannot exceed five percent of total CSR expenditure of the company for the financial year.
- (b) The surplus shall not form part of the business profit of a company
- (c) The surplus cannot exceed 10 percent of total CSR expenditure of the company for the financial year.
- (d) The surplus shall form part of the business profit of a company



Solution:

- (b) The surplus shall not form part of the business profit of a company



Question 4.

Shri Limited (a company having CSR Committee as per the provision of Section 135 of the Companies Act, 2013) decides to spend and utilize the amount of Corporate Social Responsibility on the activities for the benefit of all the employees of Shri Limited. As per the provision of Companies Act, 2013 this would mean that:

- (a) This is the total amount spent on Corporate Social Responsibility activities by Shri Limited for that financial year
- (b) No amount spent on Corporate Social Responsibility activities by Shri Limited for that financial year
- (c) Only half of the total amount spent, shall be considered to be spent on Corporate Social Responsibility activities by Shri Limited for that financial year
- (d) Only the amount that has been spent on the employees having salary of ₹ 20,000 per month or less, shall be considered to be spent on Corporate Social Responsibility activities by Shri Limited for that financial year.



Solution:

- (b) No amount spent on Corporate Social Responsibility activities by Shri Limited for that financial year



**"RAASTE KI PARWAH
KAROONGA TOH...
MANZIL BURA MAAN JAYEGI"**

- ONCE UPON A TIMEIN MUMBAI



10

AUDIT AND AUDITOR



11

COMPANIES INCORPORATED OUTSIDE INDIA



INTRODUCTION

Chapter XXII	Consists of sections 379 to 393A as well as the Companies (Registration of Foreign Companies) Rules, 2014.

Foreign Company [Section 2(42)]: “Foreign company” means any company or body corporate incorporated outside India which-

- (a) has a place of business in India whether by itself or through an agent, physically or through electronic mode; and
- (b) conducts any business activity in India in any other manner.

Example 1: ABC Entertainment Limited (Indian Company) having foreign subsidiary UVW Limited rendering satellite services to the group will be covered under the definition of Foreign Company under the Companies Act, 2013.

Example 2: Airline companies who operate through their booking agents in India will be covered under the definition of Foreign Company under the Companies Act, 2013.

According to the Companies (Registration of Foreign Companies) Rules, 2014, “electronic mode” means carrying out electronically based, whether main server is installed in India or not, including, but not limited to -

- (a) business to business and business to consumer transactions, data interchange and other digital supply transactions;
- (b) offering to accept deposits or inviting deposits or accepting deposits or subscriptions in securities, in India or from citizens of India;
- (c) financial settlements, web based marketing, advisory and transactional services, database services and products, supply chain management;
- (d) online services such as telemarketing, telecommuting, telemedicine, education and information research; and
- (e) all related data communication services, whether conducted by e-mail, mobile devices, social media, cloud computing, document management, voice or data transmission or otherwise.

Explanation- For the purposes of this clause, electronic based offering of securities, subscription thereof or listing of securities in the International Financial Services Centres set up under section 18 of the Special Economic Zones Act, 2005 shall not be construed as ‘electronic mode’ for the purpose of clause (42) of section 2 of the Act.

Example 3: Zakpak Ltd. is a shipping company incorporated in Japan. The Company has set up a branch office in India after obtaining necessary approvals from RBI. Branch Offices are generally considered as a reflection of the Parent Company’s office. Thus, branch offices of a company incorporated outside India are considered as a place of business for conducting business activity in India and will be required to follow provisions of this chapter and such other provisions as may be specified elsewhere under Companies Act, 2013.



Facts: Union Minister of State for Corporate Affairs Shri Rao Inderjit Singh in a written reply to a question in Rajya Sabha stated that 320 foreign companies were registered in India between 2018 and 2021.

APPLICATION OF ACT TO FOREIGN COMPANIES [SECTION 379]

According to this section:

- (i) **Applicability of Act to foreign companies:** Sections 380 to 386 (both inclusive) and sections 392 and 393 shall apply to all foreign companies. It implies that all companies which falls within the definition of foreign company as per section 2(42), shall comply with the provisions of this Chapter.
- (ii) **Requirement of holding of paid up share capital:** Where not less than 50% of the paid-up share capital, whether equity or preference or partly equity and partly preference, of a foreign company incorporated outside India is held by:
 - (i) one or more citizens of India; or
 - (ii) by one or more companies or bodies corporate incorporated in India; or
 - (iii) by one or more citizens of India and one or more companies or bodies corporate incorporated in India,whether singly or in the aggregate, such foreign company shall also comply with the provisions of Chapter XXII and such other provisions of this Act as may be prescribed with regard to the business carried on by it in India as if it were a company incorporated in India. [Section 379(2)]

Note: Chapter XXII referred to above deals with the legal provisions for companies incorporated outside India.

Example 4: The shareholding of Emaar Company LLC, incorporated in Dubai and having a place of business in India, is as follows:

1. Hinduja Company Limited (Indian Company): 26%
2. Vaishali Company Limited (Indian Company): 25%
3. Citizens of Dubai: Remaining holding

As per section 379(2), Emaar Company LLC will also be required to comply with the provisions of Chapter XXII as not less than 50% of the shareholders of Emaar Company LLC consists of body corporates incorporated in India. Emaar Company LLC will also be required to comply with other provisions of this Act as may be prescribed with regard to the business carried on by its place of business in India as if it were a company incorporated in India.

DOCUMENTS, ETC., TO BE DELIVERED TO REGISTRAR BY FOREIGN COMPANIES [SECTION 380]

According to section 380 (1) of the Companies Act, 2013,

- (i) Every foreign company shall, within 30 days of the establishment of its place of business in India, deliver to the Registrar for registration:
 - (a) a certified copy of the charter, statutes or memorandum and articles, of the company or other instrument constituting or defining the constitution of the company. If the instrument is not in the English language, a certified translation thereof in the English language;



- (b) the full address of the registered or principal office of the company;
- (c) a list of the directors and secretary of the company containing such particulars as may be prescribed;

In relation to the nature of particulars to be provided as above, the Companies (Registration of Foreign Companies) Rules, 2014, provide that the list of directors and secretary or equivalent (by whatever name called) of the foreign company shall contain the following particulars, for each of the persons included in such list, namely:

- (1) personal name and surname in full;
 - (2) any former name or names and surname or surnames in full;
 - (3) father's name or mother's name or spouse's name;
 - (4) date of birth;
 - (5) residential address;
 - (6) nationality;
 - (7) if the present nationality is not the nationality of origin, his nationality of origin;
 - (8) passport Number, date of issue and country of issue; (if a person holds more than one passport then details of all passports to be given)
 - (9) income-tax permanent account number (PAN), if applicable;
 - (10) occupation, if any;
 - (11) whether directorship in any other Indian company, (Director Identification Number (DIN), Name and Corporate Identity Number (CIN) of the company in case of holding directorship);
 - (12) other directorship or directorships held by him;
 - (13) Membership Number (for Secretary only); and
 - (14) e-mail ID.
- (d) the **name and address or the names and addresses of one or more persons resident in India** authorised to accept on behalf of the company service of process and any notices or other documents required to be served on the company;
 - (e) the **full address of the office of the company** in India which is deemed to be its principal place of business in India;
 - (f) **particulars of opening and closing of a place of business** in India on earlier occasion or occasions;
 - (g) **declaration** that none of the directors of the company or the authorised representative in India has ever been convicted or debarred from formation of companies and management in India or abroad; and
 - (h) **any other information** as may be prescribed.

- (ii) **Form, procedure and time for making application and submission of prescribed documents:** According to the Companies (Registration of Foreign Companies) Rules, 2014, the above information shall be filed with the Registrar within 30 days of the establishment of its place of business in India, in Form FC-1 along with prescribed fees and documents required to be furnished as provided in section 380(1). The application shall also be supported with an attested copy of approval from the Reserve Bank of India under the Foreign Exchange Management Act or Regulations, and also from other regulators, if any, approval is required by such foreign company to establish a place of business in India or a declaration from the authorised representative of such foreign company that no such approval is required.



- (iii) **Office where documents to be delivered and fee** for registration of documents:
1. According to the Companies (Registration of Foreign Companies) Rules, 2014, any document which any foreign company is required to deliver to the Registrar shall be delivered to the Registrar having jurisdiction over New Delhi.
 2. It shall be accompanied with the prescribed fees⁶.
 3. If any foreign company ceases to have a place of business in India, it shall forthwith give notice of the fact to the Registrar, and from the date on which such notice is so given, the obligation of the company to deliver any document to the Registrar shall cease, provided it has no other place of business in India.
- (iv) Under section 380(2) every foreign company existing at the commencement of the Companies Act 2013, which has not delivered to the Registrar the documents and particulars specified in section 592(1) of the Companies Act, 1956, it shall continue to be subject to the obligation to deliver those documents and particulars in accordance with the Companies Act, 1956.
- (v) **Form, procedure and time within which alteration in documents shall be intimated to Registrar:** Section 380(3) provides that where any alteration is made or occurs in the documents delivered to the Registrar under section 380, the foreign company shall, within 30 days of such alteration, deliver to the Registrar for registration, a return containing the particulars of the alteration in the prescribed form. The Companies (Registration of Foreign Companies) Rules, 2014, has prescribed that the return containing the particulars of the alteration shall be filed in form FC-2 along with prescribed fees.

Illustration 1: Search & Find Pte. Ltd., incorporated in Singapore. The Company sells its goods through electronic mode on the e-commerce platforms in India, however, it does not have any branch or office in India. Is the Company required to submit the documents as required under Section 380 of the Companies Act, 2013.

Answer: Yes, as per 2(42) of Companies Act, 2013, any company or body corporate incorporated outside India which (a) has a place of business in India whether by itself or through an agent, physically or through electronic mode; and Rule 12 of the Companies (Registration Offices and Fees) Rules, 2014

- (b) conducts any business activity in India in any other manner shall be considered as a foreign company. Accordingly, as Search & Find Pte. Ltd., is conducting its business through electronic mode, it is considered a foreign company as per Companies Act, 2013 and is required to submit the documents mentioned under Section 380 of the Companies Act, 2013.



ACCOUNTS OF FOREIGN COMPANY [SECTION 381]

According to this section:

- (i) Every foreign company shall, in every calendar year,—
 - (a) make out a balance sheet and profit and loss account in such form, containing such particulars and including or having attached or annexed thereto such documents as may be prescribed, and
 - (b) deliver a copy of those documents to the Registrar.

According to the 7Companies (Registration of Foreign Companies) Rules, 2014, every foreign company shall prepare financial statement of its Indian business operations in accordance with Schedule III or as near thereto as possible for each financial year including:

- (1) documents that are required to be annexed should be in accordance with Chapter IX i.e. Accounts of Companies.
- (2) The documents relating to copies of latest consolidated financial statements of the parent foreign company, as submitted by it to the prescribed authority in the country of its incorporation under the applicable laws there.

Note: “financial year” in relation to any company or body corporate, means the period ending on the 31st day of March every year, and where it has been incorporated on or after the 1st day of January of a year, the period ending on the 31st day of March of the following year, in respect whereof financial statement of the company or body corporate is made up:

Provided that where a company or body corporate, which is a holding company or a subsidiary or associate company of company incorporated outside India and is required to follow a different financial year for consolidation of its accounts outside India, the Central Government may, on an application made by that company or body corporate in such form and manner as may be prescribed, allow any period as its financial year, whether or not that period is a year.

Provided further that any application pending before the Tribunal as on the date of commencement of the Companies (Amendment) Ordinance, 2018, shall be disposed of by the Tribunal in accordance with the provisions applicable to it before such commencement.

It is important to note that a foreign company having its place of business in India may not necessarily follow a financial year ending on the 31st day of March every year provided it has obtained the requisite approvals from the Central Government for the same.

Example 5:

ROK Limited, is a company incorporated outside India having a place of business in India. ROK Limited is a subsidiary of HOK Limited (Holding company), registered in Australia and is required to consolidate its accounts with HOK Limited. Accordingly, if HOK Limited is required to follow financial year other than 31st day of March every year, ROK can make an application to Central Government to follow the financial year as per HOK Limited.



- (ii) The Central Government is empowered to direct that, in the case of any foreign company or class of foreign companies, the requirements of clause (a) given above shall not apply, or shall apply subject to such exceptions and modifications as may be specified in notification in that behalf [Section 381(1)].
- (iii) If any of the specified documents are not in the English language, a certified translation thereof in the English language shall be annexed. [Section 381 (2)]
- (iv) Every foreign company shall send to the Registrar along with the documents required to be delivered to him, a copy of a list in the prescribed form, of all places of business established by the company in India as at the date with reference to which the balance sheet referred to in section 381(1) is made.

According to the Companies (Registration of Foreign Companies) Rules, 2014, every foreign company shall file with the Registrar, along with the financial statement, in Form FC-3 with such fee as provided under Companies (Registration Offices and Fees) Rules, 2014 a list of all the places of business established by the foreign company in India as on the date of balance sheet.

According to the 9Companies (Registration of Foreign Companies) Rules, 2014, if any foreign company ceases to have a place of business in India, it shall forthwith give notice of the fact to the Registrar, and as from the date on which notice is so given, the obligation of the company to deliver any document to the Registrar shall cease, if it does not have other place of business in India.

- (v) According to the 10Companies (Registration of Foreign Companies) Rules, 2014,
 - (a) Further, every foreign company shall, along with the financial statement required to be filed with the Registrar, attach thereto the following documents; namely:-
 - (1) Statement of related party transaction
 - (2) Statement of repatriation of profits
 - (3) Statement of transfer of funds (including dividends, if any)

The above statements shall include such other particulars as are prescribed in the Companies (Registration of Foreign Companies) Rules, 2014.

- (b) All these documents shall be delivered to the Registrar within a period of 6 months of the close of the financial year of the foreign company to which the documents relate.

Provided that the Registrar may, for any special reason, and on application made in writing by the foreign company concerned, extend the said period by a period not exceeding three months.

Example 6: Mukesh & Jordan LLC is a foreign company and is required to file its financial statements within six months of the close of the financial year with Registrar on an annual basis alongwith following additional documents:

- (1) Statement of related party transaction
 - (2) Statement of repatriation of profits
 - (3) Statement of transfer of funds (including dividends, if any)

However, where the Central Government has exempted or specified different documents for any foreign company or a class of foreign companies, then documents as specified shall be submitted.



- (vi) **Audit of accounts of foreign company:** According to the 11 Companies (Registration of Foreign Companies) Rules, 2014,
- (a) **Every foreign company shall get its accounts, pertaining to the Indian business operations** prepared in accordance with section 381(1) and Rules thereunder, shall be audited by a practicing Chartered Accountant in India or a firm or limited liability partnership of practicing chartered accountants.
 - (b) **The provisions of Chapter X** i.e. Audit and Auditors and rules made there under, as far as applicable, shall apply, mutatis mutandis, to the foreign company.

DISPLAY OF NAME, ETC., OF FOREIGN COMPANY [SECTION 382]

Every foreign company shall—

- (a) conspicuously exhibit on the outside of every office or place where it carries on business in India, the name of the company and the country in which it is incorporated, in letters easily legible in English characters, and also in the characters of the language or one of the languages in general use in the locality in which the office or place is situated;
- (b) cause the name of the company and of the country in which the company is incorporated, to be stated in legible English characters in all business letters, bill-heads and letter paper, and in all notices, and other official publications of the company; and
- (c) if the liability of the members of the company is limited, cause notice of that fact—
 - (i) to be stated in every such prospectus issued and in all business letters, bill-heads, letter paper, notices, advertisements and other official publications of the company, in legible English characters; and
 - (ii) to be conspicuously exhibited on the outside of every office or place where it carries on business in India, in legible English characters and also in legible characters of the language or one of the languages in general use in the locality in which the office or place is situated.

SERVICE ON FOREIGN COMPANY [SECTION 383]

Any process, notice, or other document required to be served on a foreign company shall be deemed to be sufficiently served, if addressed to any person whose name and address have been delivered to the Registrar under section 380 and left at, or sent by post to, the address which has been so delivered to the Registrar or by electronic mode.

DEBENTURES, ANNUAL RETURN, REGISTRATION OF CHARGES, BOOKS OF ACCOUNT AND THEIR INSPECTION [SECTION 384]

- (i) The provisions of section 71 (Issue of Debentures) shall apply mutatis mutandis to a foreign company.
- (ii) The provisions of section 92 (Preparation and filing of Annual return) shall, subject to such exceptions, modifications and adaptations as may be made therein by rules made under this Act, apply to a foreign company as they apply to a company incorporated in India. Further, as per Rule 3 of the Companies (Corporate Social Responsibility Policy) Rules 2014, a foreign company which fulfils the criteria specified under Section 135(1) of the Companies Act 2013 is required to comply with Section 135 of the Companies Act, 2013, subject to such exceptions, modifications and adaptations as may be made therein by rules made under this Act, apply to a foreign company as they apply to a company



incorporated in India.

According to the Companies (Registration of Foreign Companies) Rules, 2014, every foreign company shall prepare and file an annual return in Form FC-4 along with prescribed fees, within a period of 60 days from the last day of its financial year, to the Registrar containing the particulars as they stood on the close of the financial year.

- (iii) The provisions of section 128 (Books of account, etc., to be kept by company) shall apply to a foreign company to the extent of requiring it to keep at its principal place of business in India, the books of account referred to in that section, with respect to monies received and spent, sales and purchases made, and assets and liabilities, in the course of or in relation to its business in India.
- (iv) The provisions of Chapter VI (Registration of Charges) shall apply mutatis mutandis to charges on properties which are created or acquired by any foreign company.
- (v) The provisions of Chapter XIV (Inspection, inquiry and investigation) shall apply mutatis mutandis to the Indian business of a foreign company as they apply to a company incorporated in India.

FEE FOR REGISTRATION OF DOCUMENTS [SECTION 385]

There shall be paid to the Registrar for registering any document required by the provisions of this Chapter to be registered by him, such fee, as may be prescribed.

According to the Companies (Registration of Foreign Companies) Rules, 2014, the fees to be paid to the Registrar for registering any document relating to a foreign company shall be such as provided in the Companies (Registration Offices and Fees) Rules, 2014.

INTERPRETATION [SECTION 386]

For the purposes of the foregoing provisions of this Chapter, the expression:

- (a) “Certified” means certified in the prescribed manner to be a true copy or a correct translation;
- (b) “Director”, in relation to a foreign company, includes any person in accordance with whose directions or instructions the Board of Directors of the company is accustomed to act; and
- (c) “Place of business” includes a share transfer or registration office.

Illustration 2: Examine with reference to the provisions of the Companies Act, 2013 whether the following companies can be treated as foreign companies:

- (i) A company incorporated outside India having a share registration office at Mumbai.
- (ii) Indian citizens incorporated a company in Singapore for the purpose of carrying on business there.

Answer: Section 2(42) of the Companies Act, 2013 defines a “foreign company” as any company or body corporate incorporated outside India which:

- (a) Has a place of business in India whether by itself or through an agent, physically or through electronic mode; and
- (b) Conducts any business activity in India in any other manner.

According to section 386 of the Companies Act, 2013, for the purposes of Chapter XXII of the Companies Act, 2013 (Companies incorporated outside India), expression “Place of business”



includes a share transfer or registration office.

Further, to qualify as a 'foreign company' a company must have the following features:

- (a) it must be incorporated outside India; and
- (b) it should have a place of business in India.
- (c) That place of business may be either in its own name or through an agent or may even be through the electronic mode; and
- (d) It must conduct a business activity of any nature in India.
 - (i) Therefore, a company incorporated outside India having a share registration office at Mumbai will be treated as a foreign company provided it conducts any business activity in India.
 - (ii) In the case of a company incorporated in Singapore for the purpose of carrying on business in Singapore, it will not fall within the definition of a foreign company. Its incorporation outside India by Indian citizen is immaterial. In order to be a foreign company it has to have a place of business in India and must also conduct a business activity in India.

DATING OF PROSPECTUS AND PARTICULARS TO BE CONTAINED THEREIN [SECTION 387]

According to this section:

- (i) **Prospectus to be dated and signed [Section 387(1)]:** No person shall issue, circulate or distribute in India any prospectus offering to subscribe for securities of a company incorporated or to be incorporated outside India, whether the company has or has not established, or when formed will or will not establish, a place of business in India, unless the prospectus is dated and signed, and—
 - (a) contains particulars with respect to the following matters, namely:—
 - (1) the instrument constituting or defining the constitution of the company;
 - (2) the enactments or provisions by or under which the incorporation of the company was effected;
 - (3) address in India where the said instrument, enactments or provisions, or copies thereof, and if the same are not in the English language, a certified translation thereof in the English language can be inspected;
 - (4) the date on which and the country in which the company would be or was incorporated; and
 - (5) whether the company has established a place of business in India and, if so, the address of its principal office in India; and
 - (b) states the matters specified under section 26 (Matters to be stated in prospectus). Provided that points (1), (2) and (3) of point (a) above shall not apply in the case of a prospectus issued more than 2 years after the date at which the company is entitled to commence business.



Example 7: Mir Company LLC, a company incorporated in Dubai, on 28th April 2017. Mir Company LLC has established a place of Business in Mumbai in the year 2020. Now the place of business in India proposes to offer subscription to securities of Mir Company LLC. Now the place of business in India before going with the subscription will have to file a prospectus dated and signed and the prospectus shall not be required to contain the particulars mentioned in points (1), (2) and (3) of point (a) above as the prospectus will be getting issued after a period of more than 2 years since the Mir Company LLC has commenced its business.

- (ii) **No waiver of compliance in prospectus [Section 387(2)]:** Any condition requiring or binding an applicant for securities to waive compliance with any requirement imposed by virtue of section 387(1) or purporting to impute him with notice of any contract, documents or matter not specifically referred to in the prospectus, shall be void. It is to be understood that section 387 (2) does not provides any exception with respect to the non-compliance of the requirements stated under section 387 (1) by any person responsible for issuing or circulating prospectus.
- (iii) **Form of application for securities to be issued along with prospectus [Section 387(3)]:** No person shall issue to any person in India a form of application for securities of such a company or intended company as is mentioned in section 387(1), unless the form is issued with a prospectus which complies with the provisions of this Chapter (Chapter XXII) and such issue does not contravene the provisions of section 388:
Exception: If it is shown that the form of application was issued in connection with a bona fide invitation to a person to enter into an underwriting agreement with respect to securities.
- (iv) Section 387(4) further provides that the provisions of section 387—
 - (a) shall not apply to the issue to existing members or debenture holders of a company of a prospectus or form of application relating to securities of the company, whether an applicant for securities will or will not have the right to renounce in favour of other persons; and
 - (b) except in so far as it requires a prospectus to be dated, to the issue of a prospectus relating to securities which are or are to be in all respects uniform with securities previously issued and for the time being dealt in or quoted on a recognised stock exchange, but, subject as aforesaid, section 387 shall apply to a prospectus or form of application whether issued on or with reference to the formation of a company or subsequently. According to section 387(4), the provisions of section 387 shall not apply to the issue of prospectus or form of application relating to securities of the company to existing member or debenture holders of a company; and The provisions of section 387 shall not apply in respect of issue of prospectus dealing with offer for securities which are uniform in all respects with securities previously issued and such previously issued securities are listed on a recognised stock exchange. However, provisions relating to dating of prospectus shall continue to apply.
- (v) Nothing in Section 387 shall limit or diminish any liability which any person may incur under any law for the time being in force in India or under the Companies Act, 2013 apart from Section 387.



PROVISIONS AS TO EXPERT'S CONSENT AND ALLOTMENT [SECTION 388]

According to this section:

- (i) No person shall issue, circulate or distribute in India any prospectus offering for subscription in securities of a company incorporated or to be incorporated outside India, whether the company has or has not been established, or when formed will or will not establish, a place of business in India,—
 - (a) if, where the prospectus includes a statement purporting to be made by an expert, he has not given, or has before delivery of the prospectus for registration withdrawn, his written consent to the issue of the prospectus with the statement included in the form and context in which it is included, or there does not appear in the prospectus a statement that he has given and has not withdrawn his consent as aforesaid; or
 - (b) if the prospectus does not have the effect, where an application is made in pursuance thereof, of rendering all persons concerned bound by all the provisions of section 33 (Issue of application forms for securities) and section 40 (Securities to be dealt with in stock exchanges), so far as applicable.
- (ii) For the purposes of this section, a statement shall be deemed to be included in a prospectus, if it is contained in any report or memorandum appearing on the face thereof or by reference incorporated therein or issued therewith.

REGISTRATION OF PROSPECTUS [SECTION 389]

According to this section:

No person shall issue, circulate or distribute in India any prospectus offering for subscription in securities of a company incorporated or to be incorporated outside India, whether the company has or has not established, or when formed will or will not establish, a place of business in India, unless before the issue, circulation or distribution of the prospectus in India;

- a copy thereof certified by the chairperson of the company and two other directors of the company as having been approved by resolution of the managing body has been delivered for registration to the Registrar; and
- the prospectus states on the face of it that a copy has been so delivered, and
- there is endorsed on or attached to the copy, any consent to the issue of the prospectus required by section 388 and such documents as may be prescribed.

According to the Companies (Registration of Foreign Companies) Rules, 2014, the following documents shall be annexed to the prospectus, namely:

- (a) any consent to the issue of the prospectus required from any person as an expert;
- (b) a copy of contracts for appointment of managing director or manager and in case of a contract not reduced into writing, a memorandum giving full particulars thereof;
- (c) a copy of any other material contracts, not entered in the ordinary course of business, but entered within preceding 2 years;
- (d) a copy of underwriting agreement; and
- (e) a copy of power of attorney, if prospectus is signed through duly authorized agent of directors.



OFFER OF INDIAN DEPOSITORY RECEIPTS [SECTION 390]

For the purposes of this section, and according to the 15 Companies (Registration of Foreign Companies) Rules, 2014, Indian Depository Receipts (IDR) means any instrument in the form of a depository receipt created by a Domestic Depository in India and authorized by a company incorporated outside India making an issue of such depository receipts.

According to section 390, notwithstanding anything contained in any other law for the time being in force, the Central Government may make rules applicable for—

- (i) the offer of Indian Depository Receipts (IDR);
- (ii) the requirement of disclosures in prospectus or letter of offer issued in connection with IDR;
- (iii) the manner in which the IDR shall be dealt with in a depository mode and by custodian and underwriters; and
- (iv) the manner of sale, transfer or transmission of IDR,

by a company incorporated or to be incorporated outside India, whether the company has or has not established, or will or will not establish, any place of business in India.

According to Rule 13 of the Companies (Registration of Foreign Companies) Rules, 2014, no company incorporated or to be incorporated outside India, whether the company has or has not established, or may or may not establish, any place of business in India shall make an issue of Indian Depository Receipts (IDRs) unless it complies with the conditions mentioned under this rule, in addition to the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 and any directions issued by the Reserve Bank of India.

The Rules relating to offer, disclosure requirements and manner of transfer, sale etc., related to IDR are contained in Companies (Registration of Foreign Companies) Rules, 2014.

Standard Chartered PLC was the first global company to file for an issue of IDR in India in 2010.

Application of Chapter XV (Compromises, Arrangements and Amalgamations): Section 234 of the Companies Act, 2013 deals with merger or amalgamation of company with foreign company.

Section 234(1) states that the provisions of Chapter XV unless otherwise provided under any other law for the time being in force, shall apply mutatis mutandis to schemes or mergers and amalgamations between companies registered under this Act and companies incorporated in the jurisdictions of such countries as may be notified from time to time by the Central Government. Provided that the Central Government may make rules, in consultation with the Reserve Bank of India, in connection with mergers and amalgamations provided under this section.

Section 234(2) states that subject to the provisions of any other law for the time being in force, a foreign company, may with the prior approval of the Reserve Bank of India, merge into a company registered under this Act or vice versa and the terms and conditions of the scheme of merger may provide, among other things, for the payment of consideration to the shareholders of the merging company in cash, or in Depository Receipts, or partly in cash and partly in Depository Receipts, as the case may be, as per the scheme to be drawn up for the purpose.



Explanation: For the purposes of sub-section (2) above, the expression “foreign company” means any company or body corporate incorporated outside India whether having a place of business in India or not.

APPLICATION OF SECTIONS 34 TO 36 AND CHAPTER XX [SECTION 391]

Section 391 of the Companies Act, 2013 provides for Application of sections 34 to 36 and Chapter XX. According to this section:

According to sub-section (1), the provisions of sections 34 to 36 (both inclusive) shall apply to—

- (i) the issue of a prospectus by a company incorporated outside India under section 389 as they apply to prospectus issued by an Indian company;
- (ii) the issue of IDR by a foreign company.

Section 34 deals with criminal liability for mis-statements in prospectus. Section 35 deals with Civil Liability for mis-statement in prospectus.

Section 36 deals with punishment for fraudulently inducing persons to invest money.

Sub-section (2) provides that, subject to the provisions of section 376 (Power to wind up Foreign companies although dissolved), the provisions of Chapter XX (i.e. Chapter on Winding up) shall apply mutatis mutandis for closure of the place of business of a foreign company in India as if it were a company incorporated in India in case such foreign company has raised monies through offer or issue of securities under this Chapter which have not been repaid or redeemed.

PUNISHMENT FOR CONTRAVENTION [SECTION 392]

Without prejudice to the provisions of section 391, if a foreign company contravenes the provisions of Chapter XXII of the Companies Act, 2013 (i.e. Chapter on Companies incorporated outside India), the foreign company shall be punishable with fine which shall not be less than 1,00,000 rupees but which may extend to 3,00,000 rupees and in the case of a continuing offence, with an additional fine which may extend to 50,000 rupees for every day after the first during which the contravention continues and every officer of the foreign company who is in default shall be punishable with fine which shall not be less than 25,000 rupees but which may extend to 5,00,000 rupees.

Thus, the punishment for contravention may be summed up as under:

1. Fine on defaulting foreign company in the range of 1 lac rupees to 3 lac rupees.
2. In case of continuing default an additional fine on the foreign company to the tune of 50,000 rupees per day after the first during which the contravention continues.
3. Punishment for every officer of the foreign company who is in default shall be imposition of a fine of a minimum amount of 25,000 rupees, but which may extend to 5,00,000 rupees.

COMPANY'S FAILURE TO COMPLY WITH PROVISIONS OF THIS CHAPTER NOT TO AFFECT VALIDITY OF CONTRACTS, ETC [SECTION 393]

Any failure by a company to comply with the provisions of Chapter XXII of the Companies Act, 2013, shall not affect the validity of any contract, dealing or transaction entered into by the company or its liability to be sued in respect thereof. However, the company shall not be entitled to bring any suit, claim any set-off, make any counter-claim or institute any legal proceeding in respect of any such contract, dealing or transaction, until the company has complied with the provisions of the Companies Act, 2013, applicable to it.



RULE 12 OF COMPANIES (REGISTRATION OF FOREIGN COMPANIES) RULES, 2014

Action for Improper Use or Description as Foreign Company: It states that if any person or persons trade or carry on business in any manner under any name or title or description as a foreign company registered under the Act or the rules made thereunder, that person or each of those persons shall, unless duly registered as foreign company under the Act and rules made thereunder, shall be liable for investigation under section 210 of the Act and action consequent upon that investigation shall be taken against that person.

EXEMPTIONS UNDER THIS CHAPTER

The Central Government may, by notification, exempt any class of-

- (a) foreign companies;
- (b) companies incorporated or to be incorporated outside India, whether the company has or has not established, or when formed may or may not establish, a place of business in India,

in so far as they relate to the offering for subscription in the securities, requirements related to the prospectus, and all matters incidental thereto in the International Financial Services Centres set up under section 18 of the Special Economic Zones Act, 2005.

SUMMARY

Foreign company” means any company or body corporate incorporated outside India which-

- (a) has a place of business in India whether by itself or through an agent, physically or through electronic mode; and
- (b) conducts any business activity in India in any other manner.

Every foreign company shall, in every calendar year,—

- (a) make out a balance sheet and profit and loss account in prescribed format, and
- (b) deliver a copy of those documents to the Registrar.

The punishment for contravention is as under:

1. Fine on defaulting foreign company in the range of 1 lac rupees to 3 lac rupees.
2. In case of continuing default an additional fine on the foreign company to the tune of 50,000 rupees per day after the first during which the contravention continues.
3. Punishment for every officer of the foreign company who is in default shall be imposition of a fine of a minimum amount of 25,000 rupees, but which may extend to 5,00,000 rupees.



QUESTION & ANSWERS



Descriptive Questions



Question 1

- (i) ABC Ltd., a foreign company having its Indian principal place of business at Kolkata, West Bengal is required to deliver various documents to Registrar of Companies under the provisions of the Companies Act, 2013. You are required to state, where the said company should deliver such documents.
- (ii) In case, a foreign company does not deliver its documents to the Registrar of Companies as required under section 380 of the Companies Act, 2013, state the penalty prescribed under the said Act, which can be levied



Solution:

- (i) The Companies Act, 2013 vide section 380 state that every foreign company is required to deliver to the Registrar for registration, within 30 days of the establishment of office in India, documents which have been specified therein. According to the Companies (Registration of Foreign Companies) Rules, 2014, any document which any foreign company is required to deliver to the Registrar shall be delivered to the Registrar having jurisdiction over New Delhi.
- (ii) The Companies Act, 2013 lays down the governing provisions for foreign companies in Chapter XXII which is comprised of sections 379 to 393. The penalties for non-filing or for contravention of any provision for this chapter including for non-filing of documents with the Registrar as required by section 380 and other sections in this chapter are laid down in section 392 of the Act which provides that if a foreign company contravenes the provisions of this Chapter, the foreign company shall be punishable with a fine which shall not be less than 1,00,000 but which may extend to 3,00,000 and in the case of a continuing offence, with an additional fine which may extend to 50,000 for every day after the first during which the contravention continues and every officer of the foreign company who is in default shall be punishable with fine which shall not be less than 25,000 but which may extend to 5,00,000.



Question 2

DEJY is a Company Limited incorporated in Singapore desires to establish a branch office at Mumbai. You being a practicing Chartered Accountant have been appointed by the company as a liaison officer for compliance of legal formalities on behalf of the company. Examining the provisions of the Companies Act, 2013, answer the following:

- (i) Whether branch office will be considered as a company incorporated outside India.
- (ii) If yes, state the documents you are required to furnish on behalf of the company, on the establishment of a branch office at Mumbai.



Solution:

- (i) According to section 2(42) of the Companies Act, 2013, “Foreign company” means any company or body corporate incorporated outside India which-
- (a) has a place of business in India whether by itself or through an agent, physically or through electronic mode; and
 - (b) conducts any business activity in India in any other manner. Further, branch offices are generally considered as reflection of the Parent Company’ office. Thus, branch offices of a company incorporated outside India are considered as a place of business for conducting business activity in India and will be required to follow provisions of this chapter and such other provisions as may be specified elsewhere under Companies Act, 2013.
- (ii) Under section 380(1) of the Companies Act, 2013 every foreign company shall, within 30 days of the establishment of place of business in India, deliver to the Registrar for registration the following documents:
- (a) a certified copy of the charter, statutes or memorandum and articles, of the company or other instrument constituting or defining the constitution of the company. If the instruments are not in the English language, a certified translation thereof in the English language;
 - (b) the full address of the registered or principal office of the company;
 - (c) a list of the directors and secretary of the company containing such particulars as may be prescribed;
- In relation to the nature of particulars to be provided as above, the Companies (Registration of Foreign Companies) Rules, 2014, provide that the list of directors and secretary or equivalent (by whatever name called) of the foreign company shall contain the following particulars, for each of the persons included in such list, namely:
- (1) personal name and surname in full;
 - (2) any former name or names and surname or surnames in full;
 - (3) father’s name or mother’s name or spouse’s name;
 - (4) date of birth;
 - (5) residential address;
 - (6) nationality;
 - (7) if the present nationality is not the nationality of origin, his nationality of origin;
 - (8) passport Number, date of issue and country of issue; (if a person holds more than one passport then details of all passports to be given)
 - (9) income-tax permanent account number (PAN), if applicable;
 - (10) occupation, if any;
 - (11) whether directorship in any other Indian company, (Director Identification Number (DIN), Name and Corporate Identity Number (CIN) of the company in case of holding directorship);
 - (12) other directorship or directorships held by him;
 - (13) Membership Number (for Secretary only); and
 - (14) e-mail ID.
- (d) the name and address or the names and addresses of one or more persons resident in India authorised to accept on behalf of the company service of process and any notices or other documents required to be served on the company;



- (e) the full address of the office of the company in India which is deemed to be its principal place of business in India;
- (f) particulars of opening and closing of a place of business in India on earlier occasion or occasions;
- (g) declaration that none of the directors of the company or the authorised representative in India has ever been convicted or debarred from formation of companies and management in India or abroad; and
- (h) any other information as may be prescribed.

According to the Companies (Registration of Foreign Companies) Rules, 2014, any document which any foreign company is required to deliver to the Registrar shall be delivered to the Registrar having jurisdiction over New Delhi.



Question 3

Galilio Ltd. is a foreign company in Germany, and it has established a place of business in Mumbai. Explain the relevant provisions of the Companies Act, 2013 and rules made thereunder relating to preparation and filing of financial statements, as also the documents to be attached alongwith the financial statements by the foreign company.



Solution:

According to section 381 of the Companies Act, 2013:

- (i) Every foreign company shall, in every calendar year,—
 - (a) make out a balance sheet and profit and loss account in such form, containing such particulars and including or having attached or annexed thereto such documents as may be prescribed, and
 - (b) deliver a copy of those documents to the Registrar.
- According to the Companies (Registration of Foreign Companies) Rules, 2014, every foreign company shall prepare financial statement of its Indian business operations in accordance with Schedule III or as near thereto as possible for each financial year including:
- (1) documents that are required to be annexed should be in accordance with Chapter IX i.e. Accounts of Companies.
 - (2) The documents relating to copies of latest consolidated financial statements of the parent foreign company, as submitted by it to the prescribed authority in the country of its incorporation under the applicable laws there.
- (ii) The Central Government is empowered to direct that, in the case of any foreign company or class of foreign companies, the requirements of clause (a) of section 381(1) shall not apply, or shall apply subject to such exceptions and modifications as may be specified in notification in that behalf.
 - (iii) If any of the specified documents are not in the English language, a certified translation thereof in the English language shall be annexed. [Section 381 (2)]
 - (iv) Every foreign company shall send to the Registrar along with the documents required to be delivered to him, a copy of a list in the prescribed form, of all places of business established by the company in India as at the date with reference to which the balance sheet referred to in section 381(1) is made.

According to the Companies (Registration of Foreign Companies) Rules, 2014, every



foreign company shall file with the Registrar, along with the financial statement, in Form FC-3 with such fee as provided under Companies (Registration Offices and Fees) Rules, 2014 a list of all the places of business established by the foreign company in India as on the date of balance sheet.

According to the Companies (Registration of Foreign Companies) Rules, 2014, if any foreign company ceases to have a place of business in India, it shall forthwith give notice of the fact to the Registrar, and as from the date on which notice is so given, the obligation of the company to deliver any document to the Registrar shall cease, if it does not have other place of business in India.

- (v) According to the Companies (Registration of Foreign Companies) Rules, 2014,
- (a) Further, every foreign company shall, along with the financial statement required to be filed with the Registrar, attach thereto the following documents; namely:-
 - (1) Statement of related party transaction
 - (2) Statement of repatriation of profits
 - (3) Statement of transfer of funds (including dividends, if any)
 The above statements shall include such other particulars as are prescribed in the Companies (Registration of Foreign Companies) Rules, 2014.
 - (b) All these documents shall be delivered to the Registrar within a period of 6 months of the close of the financial year of the foreign company to which the documents relate.



Question 4

In the light of the provisions of the Companies Act, 2013, examine whether the following Companies can be considered as a 'Foreign Company':

- (i) Red Stone Limited is a Company registered in Singapore. The Board of Directors meets and executes business decisions at their Board Meeting held in India.
- (ii) Xen Limited Liability Company registered in Dubai has installed its main server in Dubai for maintaining office automation software by Cloud Computing for its client in India.



Solution:

According to section 2(42) of the Companies Act, 2013, "Foreign company" means any company or body corporate incorporated outside India which-

- (a) has a place of business in India whether by itself or through an agent, physically or through electronic mode; and
- (b) conducts any business activity in India in any other manner.

According to the Companies (Registration of Foreign Companies) Rules, 2014, "electronic mode" means carrying out electronically based, whether main server is installed in India or not, including, but not limited to-

- (a) business to business and business to consumer transactions, data interchange and other digital supply transactions;
- (b) offering to accept deposits or inviting deposits or accepting deposits or subscriptions in securities, in India or from citizens of India;
- (c) financial settlements, web-based marketing, advisory and transactional services, database services and products, supply chain management;
- (d) online services such as telemarketing, telecommuting, telemedicine, education and



information research; and

(e) all related data communication services,

Whether conducted by e-mail, mobile devices, social media, cloud computing, document management, voice or data transmission or otherwise.

- (i) In the given situation, Red Stone Limited is registered in Singapore. However, it does not have a place of business in India whether by itself or through an agent, physically or through electronic mode; and does not conduct any business activity in India in any other manner. Mere holding of board meetings and executing business decisions in India cannot be termed as conducting business activity in India. Hence, M/s Red Stone Limited is not a foreign company as per the Companies Act, 2013.
- (ii) In the given situation, Xen Limited Liability Company is registered in Dubai and has installed its main server in Dubai for maintaining office automation software by Cloud Computing for its client in India. Thus, it can be said that M/s Xen Limited Liability Company has a place of business in India through electronic mode and is conducting business activity in India. Hence, Xen Limited Liability Company is a foreign company as per the Companies Act, 2013.



Question 5

Abroad Ltd., a foreign company without establishing a place of business in India, proposes to issue prospectus for subscription of securities in India. Being a consultant of the company, advise on the procedure of such an issue of prospectus by Abroad Ltd.



Solution:

As per section 389 of the Companies Act, 2013, no person shall issue, circulate or distribute in India any prospectus offering for subscription in securities of a company incorporated or to be incorporated outside India, whether the company has or has not established, or when formed will or will not establish, a place of business in India, unless before the issue, circulation or distribution of the prospectus in India, a copy thereof certified by the chairperson of the company and two other directors of the company as having been approved by resolution of the managing body has been delivered for registration to the Registrar and the prospectus states on the face of it that a copy has been so delivered, and there is endorsed on or attached to the copy, any consent to the issue of the prospectus required by section 388 and such documents as may be prescribed under Rule 11 of the Companies (Incorporated outside India) Rules, 2014.

Accordingly, the Abroad Ltd. a foreign company shall proceed with the issue of prospectus in compliance with the above stated provisions of section 379 of the Act.



Question 6

Jackson & Jackson LLC, incorporated in Germany, is proposing to establish a business in Mumbai, India. Its official documents are in German language. Whether Jackson & Jackson LLC can file the required documents with Registrar in the same language.

**Solution:**

Every foreign company shall, within 30 days of the establishment of its place of business in India, deliver the documents to the Registrar as per Section 380 of the Companies Act, 2013. Further, if the original instruments/documents are not in the English language, a certified translation in the English language is required for the same and submitted to Registrar.

**Question 7**

Swift Pharmaceuticals, a Company registered in Singapore, has started its business in India during the financial year 2016. The Company has submitted all the required documents with registrar within the due date. On March 1, 2023, Swift Pharmaceuticals has shifted its principal office in Singapore. Does the Company required to undertake any steps due to change in address of principal office.

**Solution:**

Section 380 (3) provides that where any alteration is made or occurs in the documents delivered to the Registrar under section 380, the foreign company shall, within 30 days of such alteration, deliver to the Registrar for registration, a return containing the particulars of the alteration in the prescribed form. The Companies (Registration of Foreign Companies) Rules, 2014, has prescribed that the return containing the particulars of the alteration shall be filed in form FC-2 along with prescribed fees. Accordingly, Swift Pharmaceuticals is required to submit the full address of the new registered or principal office of the company by March 30, 2023.

Multiple Choice Questions**Question 1**

Jackson Communications LLC, incorporated in Arizona, USA, has established a principal place of business at Kolkata, West Bengal. It is required to deliver requisite documents to the specified authority. You are required to select an appropriate option from the four given below which indicates the number of days within which such documents shall be delivered:

- (a) Jackson Communications LLC shall, within 10 days of the establishment of a principal place of business in India, deliver the requisite documents to the specified authority.
- (b) Jackson Communications LLC shall, within 15 days of the establishment of a principal place of business in India, deliver the requisite documents to the specified authority.
- (c) Jackson Communications LLC shall, within 30 days of the establishment of a principal place of business in India, deliver the requisite documents to the specified authority.
- (d) Jackson Communications LLC shall, within 45 days of the establishment of a principal place of business in India, deliver the requisite documents to the specified authority.

**Solution:**

- (c) Jackson Communications LLC shall, within 30 days of the establishment of a principal place of business in India, deliver the requisite documents to the specified authority.



Question 2

Morgen Stern Digi Cables GmbH incorporated in Berlin, Germany, established a place of business at Mumbai to conduct its business of data interchange and other digital supply transactions online. However, Morgen Stern Digi Cables GmbH failed to deliver certain documents to the jurisdictional Registrar of Companies within the prescribed time period in compliance with the respective statutory provisions. Which option, out of the four given below, shall correctly indicate the amount of fine with which Morgen Stern Digi Cables GmbH shall be punishable for its failure to deliver certain documents:

- (a) Morgen Stern Digi Cables GmbH is punishable with fine which shall not be less than 50,000 rupees but which may extend to 5,00,000 rupees and in the case of a continuing offence, with an additional fine upto 25,000 rupees for every day after the first during which the contravention continues.
- (b) Morgen Stern Digi Cables GmbH is punishable with fine which shall not be less than 1,00,000 rupees but which may extend to 5,00,000 rupees and in the case of a continuing offence, with an additional fine upto 20,000 rupees for every day after the first during which the contravention continues.
- (c) Morgen Stern Digi Cables GmbH is punishable with fine which shall not be less than 2,00,000 rupees but which may extend to 5,00,000 rupees and in the case of a continuing offence, with an additional fine upto 50,000 rupees for every day after the first during which the contravention continues.
- (d) Morgen Stern Digi Cables GmbH is punishable with fine which shall not be less than 1,00,000 rupees but which may extend to 3,00,000 rupees and in the case of a continuing offence, with an additional fine upto 50,000 rupees for every day after the first during which the contravention continues.



Solution:

- (d) Morgen Stern Digi Cables GmbH is punishable with fine which shall not be less than 1,00,000 rupees but which may extend to 3,00,000 rupees and in the case of a continuing offence, with an additional fine upto 50,000 rupees for every day after the first during which the contravention continues.



Question 3

Radix Healthcare Ltd., a company registered in Thailand, although has no place of business established in India, yet it is engaged in online business through remote delivery of healthcare services in India. Select the incorrect statement from those given below as to the nature of the Radix Healthcare Ltd. in the light of the applicable provisions of the Companies Act, 2013:

- (a) Radix Healthcare Ltd. is not a foreign company as it has no place of business established in India.
- (b) Radix Healthcare Ltd. is a foreign company being involved in business activity through telemedicine.
- (c) Radix Healthcare Ltd. is a foreign company for conducting business through electronic mode.
- (d) Radix Healthcare Ltd. is a foreign company as it conducts business activity in India.

**Solution:**

- (a) Radix Healthcare Ltd. is not a foreign company as it has no place of business established in India.

**Question 4**

Fam Software Company Inc., a company incorporated in Australia, proposes to establish a place of business at Mumbai. The list of the Directors includes (i) Mr. Arjun - Managing Director, (ii) Mr. Ranveer - Director, (iii) Mr. Ramesh Malik - Director and (iv) Mr. Arbaaz - Director. Ms. Lavina has been appointed as the Secretary of Fam Software Company Inc. It is to be noted that Mr. Ramesh Malik and Mr. Arbaaz, resident in India, are the persons who have been authorised by Fam Software Company Inc. to accept on behalf of the company service of process, notices or other documents required to be served on Fam Software Company Inc. In relation to the company's establishment, you are required to enlighten the Fam Company Inc. with respect to whose, a declaration will be required to be submitted to the Registrar of Companies by Fam Software Company Inc. for not being convicted or debarred from formation of companies in or outside India.

- (a) Mr. Arjun, Mr. Ranveer, Mr. Ramesh Malik, Mr. Arbaaz and Ms. Lavina.
- (b) Mr. Arjun, Mr. Ramesh Malik, Mr. Arbaaz and Ms. Lavina.
- (c) Mr. Ramesh Malik and Mr. Arbaaz.
- (d) Mr. Arjun, Mr. Ranveer, Mr. Ramesh Malik and Mr. Arbaaz.

**Solution:**

- (d) Mr. Arjun, Mr. Ranveer, Mr. Ramesh Malik and Mr. Arbaaz.

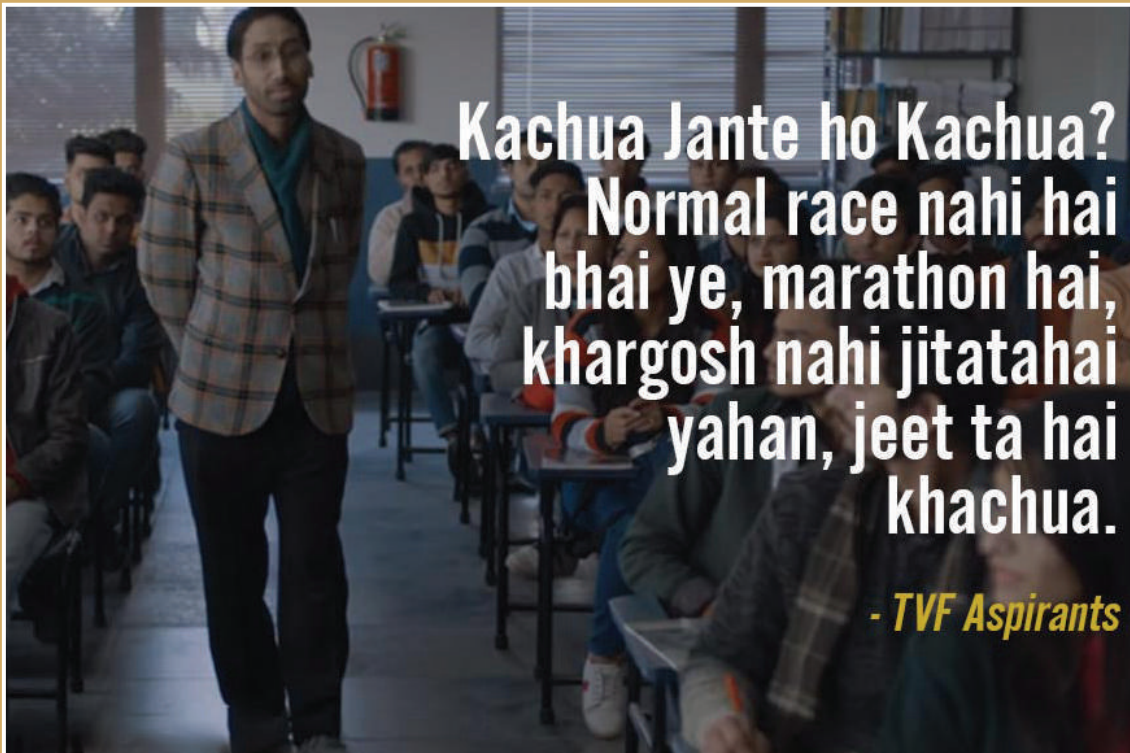
**Question 5**

5K Cosmetic Shop plc., a company incorporated in Switzerland, is involved in digital supply services through electronic mode, the server of which is located outside India. The company follows calendar year as its financial year. Every year the company is required to prepare a balance sheet and profit and loss account. You are required to choose the correct timeline within which such documents shall be filed with the Registrar of Companies considering the provisions of Chapter XXII of the Companies Act, 2013:

- (a) Within a period of 30 days from the close of the financial year of 5K Cosmetic Shop plc.
- (b) Within a period of 3 months from the close of the financial year of 5K Cosmetic Shop plc.
- (c) Within a period of 60 days from the close of the financial year of 5K Cosmetic Shop plc.
- (d) Within a period of 6 months from the close of the financial year of 5K Cosmetic Shop plc.

**Solution:**

- (d) Within a period of 6 months from the close of the financial year of 5K Cosmetic Shop plc.



**Kachua Jante ho Kachua?
Normal race nahi hai
bhai ye, marathon hai,
khargosh nahi jitata hai
yahan, jeet ta hai
khachua.**

- TVF Aspirants

Part B

OTHERS LAW





01

THE FOREIGN EXCHANGE MANAGEMENT ACT, 1999



INTRODUCTION

Need for the Act

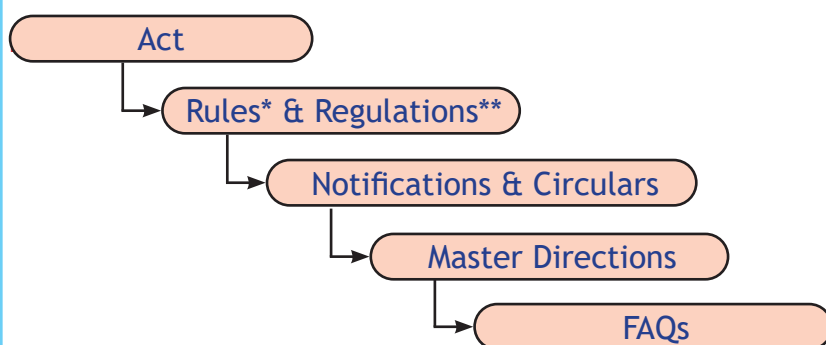
The change in the economic scenario, globalization of capital, free trade across the globe, necessitated the need for managing foreign exchange in the country in an orderly manner. To facilitate cross border trade and cross border capital flows, exchange control law was required. Foreign exchange control led to introduction of exchange control law through Defense of India rules by the Britishers in 1939. Subsequently, Foreign Exchange Regulation Act (FERA) was enacted in 1947 which was later replaced with 'the Foreign Exchange Regulation Act, 1973' (FERA).

Government as part of its agenda of liberalization of the Indian economy in 1991, permitted free movement of foreign exchange in connection to trade related receipts and payments as well as Foreign Investment in various sectors. This increased the flow of foreign exchange to India and consequently foreign exchange reserves increased substantially. The Foreign Exchange Management Act, 1999 was enacted and made effective from 1st June, 2000. This Act enables management of foreign exchange reserves for the country.

Salient Features of the Act: It provides for-

- Regulation of transactions between residents and non-residents
- Investments in India by non-residents and overseas investments by Indian residents
- Freely permissible transactions on current account subject to reasonable restrictions that may be imposed
- Reserve Bank of India (RBI) and Central Government control over capital account transactions
- Requirement for realisation of export proceeds and repatriation to India
- Dealing in foreign exchange through 'Authorised Persons' like Authorised Dealer/ Money Changer/ Off-shore banking unit
- Adjudication and Compounding of Offences
- Investigation of offences by Directorate of Enforcement
- Appeal provisions including Special Director (Appeals) and Appellate Tribunal.

Enforcement of FEMA: Though RBI exercises overall control over foreign exchange transactions, enforcement of FEMA has been entrusted to a separate 'Directorate of Enforcement' formed for this purpose. [Section 36].



*Rules are notified by the Ministry of Finance, Government of India

** Regulations are notified by the Reserve Bank of India



Broad Structure of FEMA

Now let us have a glance at the broad structure the Act. The Act consists of 7 Chapters dealing with following areas:

Chapters	Matters	Sections
I	Preliminary	1 - 2
II	Regulation and Management of Foreign Exchange	3 - 9
III	Authorised Person	10 - 12
IV	Contravention and Penalties	13 - 15
V	Adjudication and Appeal	16 - 35
VI	Directorate of Enforcement	36 - 38
VII	Miscellaneous	39 - 49

PREAMBLE, EXTENT, APPLICATION AND COMMENCEMENT OF FEMA, 1999

- (A) **Preamble:** This Act aims to consolidate and amend the law relating to foreign exchange with the objective of –
- facilitating external trade and payments and
 - for promoting the orderly development and maintenance of foreign exchange market in India.
- (B) **Extent and Application [Section 1]:** FEMA, 1999 extends to the whole of India. In addition, it shall also apply to all branches, offices and agencies outside India owned or controlled by a person resident in India and also to any contravention thereunder committed outside India by any person to whom this Act applies.
The scope of the Act has been extended to include branches, offices and agencies outside India. The scope is thus wide enough because the emphasis is on the words “Owned or Controlled”. Contravention of the FEMA committed outside India by a person to whom this Act applies will also be covered by FEMA.
- (C) **Commencement:** The Act, 1999 came into force with effect from 1st June, 2000 vide Notification G.S.R. 371(E), dated 1.5.2000.

DEFINITIONS [SECTION 2]

In this Act, unless the context otherwise requires:

- (1) “Authorised person” means an authorised dealer, money changer, off-shore banking unit or any other person for the time being authorised under section 10(1) to deal in foreign exchange or foreign securities; **[Section 2(c)]**
- (2) “Capital Account Transaction” means a transaction, which alters the assets or liabilities, including contingent liabilities, outside India of persons resident in India or assets or liability in India of persons resident outside India, and includes transactions referred to in Section 6(3); **[Section 2(e)]**
- (3) “Currency” includes all currency notes, postal notes, postal orders, money orders, cheques, drafts, travelers’ cheques, letters of credit, bills of exchange and promissory notes, credit cards or such other similar instruments, as may be notified by the Reserve Bank. **[Section 2(h)]**



- (4) “Currency Notes” means and includes cash in the form of coins and bank notes; **[Section 2(i)]**
- (5) “Current Account Transaction” means a transaction other than a capital account transaction and without prejudice to the generality of the foregoing such transaction includes,
- (i) payments due in connection with foreign trade, other current business, services, and short-term banking and credit facilities in the ordinary course of business.
 - (ii) payments due as interest on loans and as net income from investments.
 - (iii) remittances for living expenses of parents, spouse and children residing abroad, and
 - (iv) expenses in connection with foreign travel, education and medical care of parents, spouse and children; **[Section 2(j)]**
- (6) “Export”, with its grammatical variations and cognate expressions means;
- (i) the taking out of India to a place outside India any goods.
 - (ii) provision of services from India to any person outside India; **[Section 2(l)]**
- (7) “Foreign Currency” means any currency other than Indian currency; **[Section 2(m)]**
- (8) “Foreign Exchange” means foreign currency and includes:
- (i) deposits, credits and balances payable in any foreign currency,
 - (ii) drafts, travelers’ cheques, letters of credit or bills of exchange, expressed or drawn in Indian currency but payable in any foreign currency,
 - (iii) drafts, travelers’ cheques, letters of credit or bills of exchange drawn by banks, institutions or persons outside India, but payable in Indian currency; **[Section 2(n)]**
- (9) “Foreign Security” means any security, in the form of shares, stocks, bonds, debentures or any other instrument denominated or expressed in foreign currency and includes securities expressed in foreign currency, but where redemption or any form of return such as interest or dividends is payable in Indian currency; **[Section 2(o)]**
- (10) “Import”, with its grammatical variations and cognate expressions, means bringing into India any goods or services; **[Section 2(p)]**
- (11) “Person” includes:
- (i) an individual,
 - (ii) a Hindu undivided family,
 - (iii) a company,
 - (iv) a firm,
 - (v) an association of persons or a body of individuals, whether incorporated or not,
 - (vi) every artificial juridical person, not falling within any of the preceding sub-clauses, and;
 - (vii) any agency, office or branch owned or controlled by such person; **[Section 2(u)]**
- (12) “Person resident in India” means:
- (i) a person residing in India for more than 182 days during the course of the preceding financial year but does not include—
 - (A) a person who has gone out of India or who stays outside India, in either case—
 - (a) for or on taking up employment outside India, or
 - (b) for carrying on outside India a business or vocation outside India, or
 - (c) for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period;



- (B) a person who has come to or stays in India, in either case, otherwise than:
 - (a) for or on taking up employment in India, or
 - (b) for carrying on in India a business or vocation in India, or
 - (c) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period;
 - (ii) any person or body corporate registered or incorporated in India,
 - (iii) an office, branch or agency in India owned or controlled by a person resident outside India,
 - (iv) an office, branch or agency outside India owned or controlled by a person resident in India; **[Section 2(v)]**
- (13) “Person Resident Outside India” means a person who is not resident in India; **[Section 2(w)]**
- (14) “Transfer” includes sale, purchase, exchange, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien. **[Section 2(ze)]**

RESIDENTIAL STATUS UNDER FEMA, 1999

The definition of “person” is similar to the definition contained in the Income-tax Act, 1961. The term ‘person’ includes entities such as companies, firms, individuals, HUF, Association of Persons (AOP), artificial juridical persons agencies, as well as offices and branches. Agencies, offices and branches do not have independent status separate from their owners. Yet these have been considered as persons. Under FEMA such offices and branches are included in definition of **Person Resident in India**. Therefore, they have been included in the definition of “Person”.

The term ‘person resident in India’ means the following entities:

1. A person who resides in India for more than 182 days during the preceding financial year;

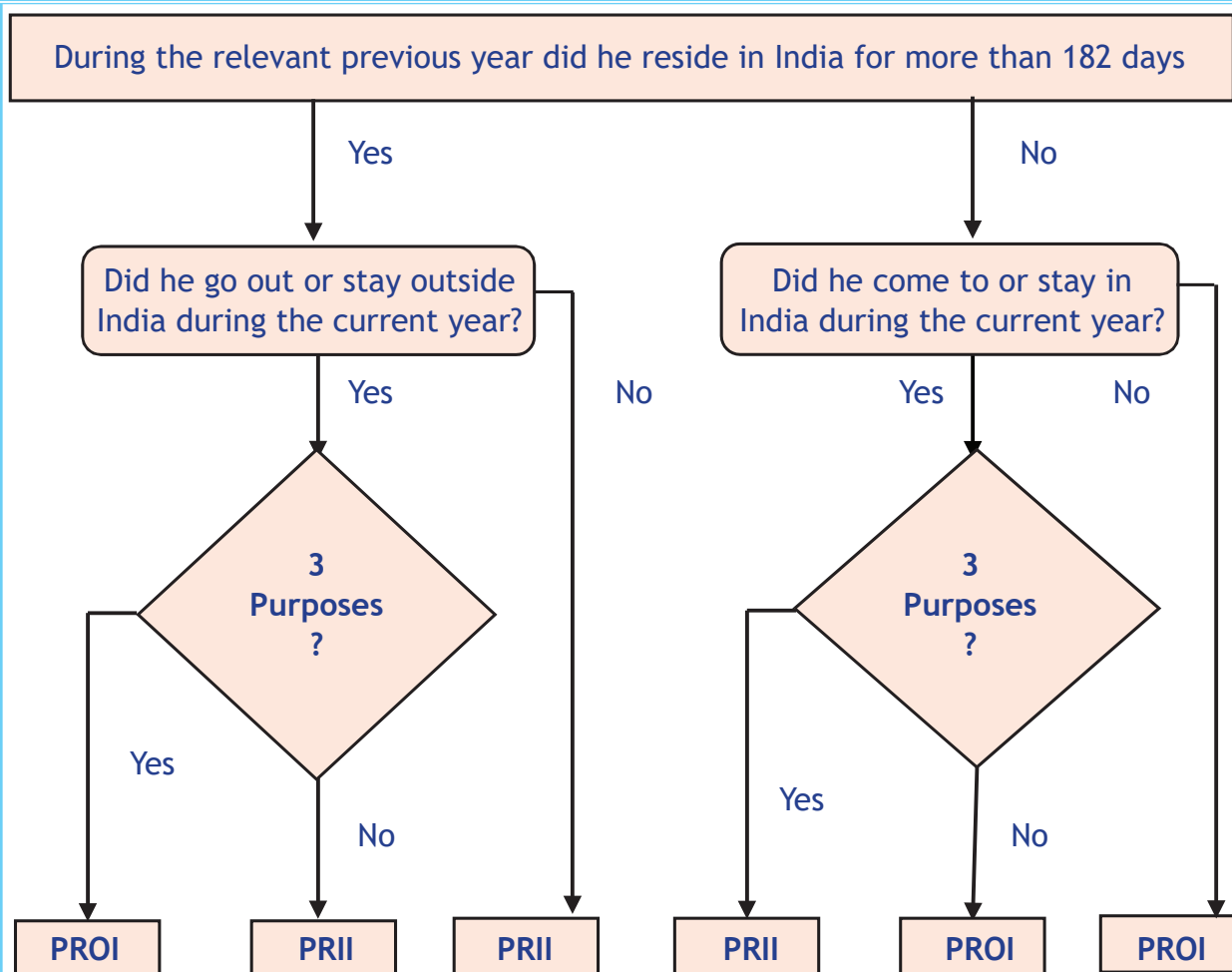
The following persons are NOT persons resident, in India even though they may have resided in India for more than 182 days.

- A. A person who has gone out of India or stays outside India for any of the three purposes given below,
- B. A person who has come to or stays in India OTHERWISE THAN for any of the three purposes given below;

Three Purposes

- (i) For or on taking up Employment
 - (ii) For carrying on a business or Vacation
 - (iii) For any other purpose in such circumstances as would indicate stay for an uncertain period.
- 2. Any person or body corporate registered or incorporated in India;
 - 3. An office, branch or agency in India owned or controlled by a person resident outside India;
 - 4. An office, branch or agency outside India owned or controlled by a person resident in India.

Person resident outside India means a person who is **not** resident in India.



As the definitions of Person Resident in India (PRII) and Person Resident outside India (PROI) are quite relevant for determining the applicability of the Act on an entity, let us analyse and understand it better.

In the case of individuals, to be considered as “resident”, the person should have resided in India in the preceding financial year for more than 182 days. **Citizenship is not the criteria for determining whether or not a person is resident in India.**

There are three limbs in the definition. The first limb prescribes the number of days stay. Then there are two limbs which are exceptions to the first limb.

First limb - It states that a person who is in India for more than 182 days in the “preceding year” will be a Person Resident in India. Thus, at the threshold or basic level, one has to consider the period of stay during the preceding year.

Example 1: If a person resides in India for more than 182 days during FY 2020-21, then for the FY 2021-22, the person will be an Indian resident. For FY 2020-21, one will have to consider residence during FY 2019-20, and so on.



There are two exceptions provided in clauses (A) and (B). Clause (A) is for persons going out of India. Clause (B) is for persons coming into India. Exceptions carve out situations that do not fall under the main body of a section, even though they satisfy the criteria. This means that even if a person is an Indian resident based on the test provided in the first limb, the person will be a “Person Resident Outside India (PROI) if he falls within limb (A) or limb (B).

Clause (A) - second limb - It states that if a person leaves India in any of the THREE PURPOSES we saw above, he will not be a PRII. He will be a PROI.

Thus, in the **example** given for the first limb above, if a person leaves India on 1st November 2021, he will be a non-resident from 2nd November 2021 - even though his number of days in India was more than 182 days in FY 2020-2021. Similarly, if a person goes and stays out of India for carrying on any business, he will be a PROI from that date. For FY 2021-2022 the person will be a PRII till 1st November 2021. He will then be a PROI. From 1st April 2022, the person will continue to be a PROI as long as he stays out of India for employment.

An **example** for clause (iii) can be a person who has a green card in the USA. The green card entitles a person to stay in the USA and eventually become a US citizen. If a person goes abroad and starts staying in the USA, he will be a non-resident from that date as his stay abroad indicates that he is going to stay there for an uncertain period.

Clause (B) - third limb - This is a complex clause as first limb read with third limb has two exceptions. Limb one uses the phrase “but does not include”. Third limb uses the phrase “otherwise than”. Use of two exceptions make it complex reading.

It states that if a person has come to India **for any reason otherwise than** for - employment, business or circumstances which indicate his intention to stay for uncertain period - he will be a non-resident. This will be so even if the person has stayed in India for more than 182 days in the preceding year.

For **example**, if a person comes to India on 1st June 2021 for visiting his parents. However, his parents fall sick and he stays till 31st March 2022. Thereafter he continues to stay in India. It is however certain that he will leave India in next 6 months when his parents recover. His stay in India is neither for employment, nor for business, nor for circumstances which show that he will stay in India for an uncertain period. In such a case, even if he has resided in India for more than 182 days in FY 2021-2022, he will continue to be a non-resident from 1st April 2022 also. In FY 2021-2022, he is of course a PROI as he did not reside in India for more than 182 in FY 2020-2021.

If a person comes to India on 1st June 2021 for employment, business or circumstances which indicate his intention to stay in India for an uncertain period, he will be a PRII from 1st June 2021.

Residential status is not for a year. It is from a particular date. This is different from income-tax law. Under income-tax law, a person has to pay tax in respect of the income of the previous year. Therefore, it is possible to look at a complete year for determining residential status under the Income Tax Act, 1961. FEMA is a regulatory law. One has to know the person’s status at the time of undertaking a transaction. If for **example**, a person comes to India for employment, and if his status can be known only when the year is completed, how will he and other people enter into commercial transactions with each other? If he is considered as a PROI till the year is over, then people will not be able to enter into transactions with him. This is the reason why the residential status is not for a year but from particular date.



It is understood that this condition applies only to individuals. It will not apply to HUF, AOP or artificial juridical person as they cannot get employed, cannot go out of India or come to India. Hence, they do not come within the ambit of the second and third limbs. These entities like HUF and AOP are not required to be registered or incorporated like corporate entities nor the definition can be far stretched to cover by applying the criteria of 'owned or controlled'. Hence legally the definition for HUF, AOP, BOI fail. Practically if the HUF, AOP etc. are in India, they will be considered as Indian residents.

Person or Body corporate: Any person or body corporate registered or incorporated in India, will be considered a PRII. This definition too, does not apply to AOP, BOI etc.

Office, branch or agency: Any agency, branch or agency outside India but **owned or controlled by PRII** will be considered as person resident in India (PRII). Thus, one cannot set up a branch outside India and attempt to avoid FEMA provisions.

Any agency, branch or agency in India but **owned or controlled by a person resident outside India (PROI)** will be considered as a person resident in India. This is relevant as Indian residents can deal with such branch in India without considering FEMA. If such branch is considered as a PROI then it will be difficult to undertake several transactions.

Illustration 1

Mr. X had resided in India during the financial year 2019-2020 for less than 182 days. He had come to India on April 1, 2020 for carrying on business. He intends to leave the business on April 30, 2021 and leave India on June 30, 2021. Determine his residential status for the financial years 2020-2021 and 2021-2022 up to the date of his departure?

Answer

As explained in the above illustration, Mr. X will be considered as a 'person resident in India' from 1st April 2020. As regards, financial year 2021-2022, Mr. X would continue to be an Indian resident from 1st April 2021.

If he leaves India for the purpose of taking up employment or for business/vocation outside India, or for any other purpose as would indicate his intention to stay outside India for an uncertain period, he would cease to be person resident in India from the date of his departure. It may be noted that even if Mr. X is a foreign citizen, has not left India for any of these purposes, he would be considered, 'person resident in India' during the financial year 2021-2022. Thus, it is the purpose of leaving India which will decide his status from 1st July 2021.

Illustration 2

Mr. Z had resided in India during the financial year 2019-2020. He left India on 1st August, 2020 for United States for pursuing higher studies for three years. What would be his residential status during financial year 2020-2021 and during 2021- 2022?

Answer

Mr. Z had resided in India during financial year 2019-2020 for more than 182 days. After that he has gone to USA for higher studies. He has not gone out of or stayed outside India for or on taking up employment, or for carrying a business or for any other purpose, in circumstances as would indicate his intention to stay outside India for an uncertain period. Accordingly, he would be 'person resident in India' during the financial year 2020-2021. RBI has however



clarified in its AP circular no. 45 dated 8th December 2003, that students will be considered as non-residents. This is because usually students start working there to take care of their stay and cost of studies.

For the financial year 2021-2022, he would not have been in India in the preceding financial year (2020-2021) for a period exceeding 182 days. Accordingly, he would not be 'person resident in India' during the financial year 2021-2022.

Illustration 3

Toy Ltd. is a Japanese company having several business units all over the world. It has a robotic unit with its head quarters in Mumbai and has a branch in Singapore. The Headquarters at Mumbai controls the Singapore branch of the robotic unit. What would be the residential status of the robotic unit in Mumbai and that of the Singapore branch?

Answer

Toy Ltd. being a Japanese company would be a person resident outside India. [Section 2(w)]. Section 2(u) defines 'person'. Under clause (viii) thereof person would include any agency, office or branch owned or controlled by such 'person'. The term such 'person' appears to refer to a person who is included in clauses (i) to (vi). Accordingly, robotic unit in Mumbai, being a branch of a company, would be a 'person'.

Section 2(v) defines 'person resident in India'. Under clause (iii) thereof 'person resident in India' would include an office, branch or agency in India owned or controlled by a person resident outside India. Robotic unit in Mumbai is owned or controlled by a person 'resident outside India'. Hence, it would be 'person resident in India'.

The robotic unit headquartered in Mumbai, which is a person resident in India as discussed above, controls the Singapore branch, Hence, the Singapore branch is a 'person resident in India'.

Illustration 4

Miss Alia is an airhostess with the British Airways. She flies for 12 days in a month and thereafter takes a break for 18 days. During the break, she is accommodated in 'base', which is normally the city where the Airline is headquartered. However, for security considerations, she was based at Mumbai. During the financial year, she was accommodated at Mumbai for more than 182 days. What would be her residential status under FEMA?

Answer

Miss Alia stayed in India at Mumbai 'base' for more than 182 days in the preceding financial year. She is however employed in UK. She has not come to India for employment, business or circumstances which indicate her intention to stay for uncertain period. Under section 2(v) (B), such persons are not considered as Indian residents even if their stay exceeds 182 days in the preceding year. Thus, while Miss Alia may have stayed in India for more than 182 days, she cannot be considered to be a Person Resident in India.

If however she has been employed in Mumbai branch of British Airways, then she will be considered a Person Resident in India.



REGULATION AND MANAGEMENT OF FOREIGN EXCHANGE

Dealing in foreign exchange, etc. [Section 3]

No person shall-

- (a) deal in or transfer any foreign exchange or foreign security to any person not being an authorised person (AP);
- (b) make any payment to or for the credit of any person resident outside India in any manner;
- (c) receive otherwise than through an authorised person, any payment by order or on behalf of any person resident outside India in any manner.

Explanation—For the purpose of this clause, where any person in, or resident in, India receives any payment by order or on behalf of any person resident outside India through any other person (including an authorised person) without a corresponding inward remittance from any place outside India, then, such person shall be deemed to have received such payment otherwise than through an authorised person;

- (d) enter into any financial transaction in India as consideration for or in association with acquisition or creation or transfer of a right to acquire, any asset outside India by any person.

The above transactions may be carried on:

- (a) as otherwise provided in this Act; or
- (b) with the general or special permission of the Reserve Bank.

Explanation – For the purpose of this clause, “**financial transaction**” means making any payment to, or for the credit of any person, or receiving any payment for, by order or on behalf of any person, or drawing, issuing or negotiating any bill of exchange or promissory note, or transferring any security or acknowledging any debt.

This section imposes blanket restrictions on the specified transactions. This section applies to PRIs and PROs. The purpose of this section is to regulate inflow and outflow of Foreign Exchange through Authorised dealers and in a permitted manner.

Consider following examples:

- (i) **Example pertaining to clause (a)- Dealing in foreign exchange** - A PRO comes to India and would like to sell US\$ 1,000 to his friend who is resident in India. The friend offers him a rate better than the banks. This cannot be done as it would amount to dealing in foreign exchange.
- (ii) **Example pertaining to clause (b)** - A PRO has an insurance policy in India. He requests his brother in India to pay the insurance premium. This will amount to payment for the credit of non-resident. This is not permitted.
- (iii) **Example pertaining to clause (c)-** A foreign tourist comes to India and he takes food at a restaurant. He would like to pay US\$ 20 in cash to the restaurant. The restaurant cannot accept cash as it will be a receipt otherwise than through Authorised Person. The restaurant will have to take a money changers license to accept foreign currency.
- (iv) **Example pertaining to clause (d)**-Transactions covered by this sub-section are known as Hawala transactions. An Indian resident gives ₹ 70,000 in cash to an Indian dealer. For this transaction, the brother in Dubai will get US\$ 1,000 from a Dubai dealer. The two dealers may settle the transactions later. However, transaction is not permitted.



Holding of foreign exchange [Section 4]

Except as provided in this Act, no person resident in India shall acquire, hold, own, possess or transfer any foreign exchange, foreign security or any immovable property situated outside India.

This section prevents Indian residents to acquire, hold, own, possess or transfer any foreign exchange, foreign security or immovable property abroad. Then through separate notifications, acquisition of these assets has been permitted subject to certain conditions and compliance rules.

Example 2: If an Indian resident receives bank balance of US\$ 10,000 from his uncle in London, the Indian resident cannot hold on to the foreign funds. He is supposed to bring back the funds as provided in section 8.

Current account transactions [Section 5]

The term ‘Current Account Transaction’ is defined negatively by Section 2(j) of the Act. It means a transaction **other than a capital account transaction** and includes the following types of transactions:

- (i) Payments in the course of ordinary course of foreign trade, other services such as short-term banking and credit facilities in the ordinary course of business etc.
- (ii) Payments in the form of interest on loans or income from investments.
- (iii) Remittances for living expenses of parents, spouse, or children living abroad
- (iv) Expenses in connection with foreign travel, education etc.

Example 3: An Indian resident imports machinery from a vendor in UK for installing in his factory. As per accounts and income-tax law, machinery is a “capital expenditure”. However, under FEMA, it does not alter (create) an asset in India for the UK vendor. It does not create any liability to a UK vendor for the Indian importer. Once the payment is made, the Indian resident or the UK vendor neither owns nor is owed anything in the other country. Hence it is a Current Account Transaction.

Example 4: An Indian resident imports machinery from a vendor in UK for installing in his factory on a credit period of 3 months. As per accounts and income-tax law, for the credit period of 3 months, there is a liability of the Indian importer to the UK vendor. Technically under FEMA also, it is a liability outside India. However, under definition of Current Account Transaction [Section 2(j)(i)], “short-term banking and credit facilities in the ordinary course of business” are considered as a Current Account Transaction. Hence, import of machinery on credit terms is Current Account Transaction.

Example 5: A Person Resident in India transfers US\$ 1,000 to his NRI brother in New York as “gift”. The funds are sent from the PRII’s Indian bank account to the NRI brother’s bank account in New York. Under accounts and income-tax law, gift is a “capital receipt”. However, under FEMA, once the gift is accepted by the NRI, no one owns or owes anything to anyone in India or USA. The transaction is over. Hence, it is a Current Account Transaction.



If gift is a current account transaction, why is there a restriction under Current Account regulations? It is because while there is no restriction on Current Account transactions, some reasonable restrictions can be imposed. Otherwise, people may transfer funds abroad under the garb of current account transactions.

If however the PRII gives a PROI a gift in India in Indian currency, for the PROI it will result in funds lying in India (alteration of Indian asset). For PRII, there is no creation of asset or a liability. As this transaction creates an asset in India for the PROI, it is a Capital Account transaction.

In a similar manner, if a PROI gives a gift to a PRII by remitting funds in India, there is no restriction. However, if the PROI gives the funds abroad, the resident cannot keep it abroad. He has to bring it to India.

Any person may sell or draw foreign exchange to or from an authorised person if such sale or drawal is a current account transaction.

The general rule to be understood is that Current Account transactions are freely permitted unless specifically prohibited and Capital Account transactions are prohibited unless specifically or generally permitted.

Section 5 of the Act permits any person to sell or draw Foreign Exchange to or from an Authorised person to undertake any current account transaction. The Central Government has the power to impose reasonable restrictions, in consultation with the RBI and in public interest on current account transactions. The Central Government has in exercise of this power issued the Foreign Exchange Management (Current Account Transactions) Rules, 2000. Let us now see the various schedules to the Rules that lay down the restrictions:

I. SCHEDULE I - Transactions for which drawal of foreign exchange is prohibited:

- (i) Remittance out of lottery winnings.
- (ii) Remittance of income from racing/riding, etc., or any other hobby.
- (iii) Remittance for purchase of lottery tickets, banned/prescribed magazines, football pools, sweepstakes etc.
- (iv) Payment of commission on exports made towards equity investment in Joint Ventures/ Wholly Owned Subsidiaries abroad of Indian companies.
- (v) Remittance of dividend by any company to which the requirement of dividend balancing is applicable.
- (vi) Payment of commission on exports under Rupee State Credit Route, except commission up to 10% of invoice value of exports of tea and tobacco.
- (vii) Payment related to “Call Back Services” of telephones.
- (viii) Remittance of interest income on funds held in Non-resident Special Rupee Scheme a/c.



II. SCHEDULE II - Transactions, which require prior approval of the Government of India for drawal of foreign exchange:

Purpose of Remittance	Ministry/Department of Govt. of India whose approval is required
Cultural Tours	Ministry of Human Resources Development (Department of Education and Culture)
Advertisement in foreign print media for the purposes other than promotion of tourism, foreign investments and international bidding (exceeding US\$ 10,000) by a State Government and its Public Sector Undertakings.	Ministry of Finance, Department of Economic Affairs
Remittance of freight of vessel chartered by a PSU	Ministry of Surface Transport (Chartering Wing)
Payment of import through ocean transport by a Govt. Department or a PSU on c.i.f. basis (i.e., other than f.o.b. and f.a.s. basis)	Ministry of Surface Transport (Chartering Wing)
Multi-modal transport operators making remittance to their agents abroad	Registration Certificate from the Director General of Shipping
Remittance of hiring charges of transponders by (a) TV Channels (b) Internet service providers	Ministry of Information and Broadcasting Ministry of Communication and Information Technology.
Remittance of container detention charges exceeding the rate prescribed by Director General of Shipping	Ministry of Surface Transport (Director General of Shipping)
Remittance of prize money/ sponsorship of sports activity abroad by a person other than International/ National/ State Level sports bodies, if the amount involved exceeds US \$ 100,000	Ministry of Human Resource Development (Department of Youth Affairs and Sports)
Remittance for membership of P & I Club	Ministry of Finance (Insurance Division)



SCHEDULE III - Transactions which require RBI's prior approval for drawal of foreign exchange:

1. Facilities for individuals—Individuals can avail of foreign exchange facility for the following purposes within the limit of USD 250,000 only.:

- (i) Private visits to any country (except Nepal and Bhutan)
- (ii) Gift or donation.
- (iii) Going abroad for employment
- (iv) Emigration
- (v) Maintenance of close relatives abroad
- (vi) Travel for business or attending a conference or specialised training or for meeting expenses for meeting medical expenses, or check-up abroad, or for accompanying as attendant to a patient going abroad for medical treatment/ check-up.
- (vii) Expenses in connection with medical treatment abroad
- (viii) Studies abroad
- (ix) Any other current account transaction

Any additional remittance in excess of the said limit for the said purposes shall require prior approval of the Reserve Bank of India.

However, for the purposes mentioned at item numbers (iv), (vii) and (viii) above, the individual may avail of exchange facility for an amount in excess of the limit prescribed under the Liberalised Remittance Scheme if it is so required by a country of emigration, medical institute offering treatment or the university, respectively:

Further, if an individual remits any amount under the said Liberalised Remittance Scheme in a financial year, then the applicable limit for such individual would be reduced from USD 250,000 (US Dollars Two Hundred and Fifty Thousand Only) by the amount so remitted:

Further, that for a person who is resident but not permanently resident in India and-

- (a) is a citizen of a foreign State **other than** Pakistan; or
- (b) is a citizen of India, who is on deputation to the office or branch of a foreign company or subsidiary or joint venture in India of such foreign company, may make remittance up to his net salary (after deduction of taxes, contribution to provident fund and other deductions).

Explanation: For the purpose of this item, a person resident in India on account of his employment or deputation of a specified duration (irrespective of length thereof) or for a specific job or assignments, the duration of which does not exceed three years, is a resident but not permanently resident:

2. Facilities for persons other than individual—The following remittances by persons other than individuals shall require prior approval of the Reserve Bank of India:

- (i) Donations exceeding one per cent. of their foreign exchange earnings during the previous three financial years or USD 5,000,000, whichever is less, for-
 - a. creation of Chairs in reputed educational institutes,
 - b. contribution to funds (not being an investment fund) promoted by educational



institutes; and

- c. contribution to a technical institution or body or association in the field of activity of the donor Company.
- (ii) Commission, per transaction, to agents abroad for sale of residential flats or commercial plots in India exceeding USD 25,000 or five percent of the inward remittance whichever is more.
- (iii) Remittances exceeding USD 10,000,000 per project for any consultancy services in respect of infrastructure projects and USD 1,000,000 per project, for other consultancy services procured from outside India.
- (iv) Remittances exceeding five per cent of investment brought into India or USD 100,000 whichever is higher, by an entity in India by way of reimbursement of pre-incorporation expenses.

3. If the transaction is not listed in any of the above three schedules, it can be freely undertaken.

Exemption for remittance from RFC Account - No approval is required where any remittance has to be made for the transactions listed in Schedule II and Schedule III above from an Resident Foreign Currency (RFC) account.

Exemption for remittance from EEFC Account - If any remittance has to be made for the transactions listed in Schedule II and Schedule III above from Exchange Earners' Foreign Currency (EEFC) account, then also no approval is required. However, if payment has to be made for the following transactions, approval is required even if payment is from EEFC account:

- Remittance for membership of P & I Club.
- Commission, per transaction, to agents abroad for sale of residential flats or commercial plots in India exceeding USD 25,000 or five per cent of the inward remittance whichever is more. Remittances exceeding five per cent of investment brought into India or USD 100,000 whichever is higher, by an entity in India by way of reimbursement of pre- incorporation expenses.

Exemption for payment by International Credit Card while on a visit abroad - If a person is on a visit abroad, he can incur expenditure stated in Schedule III if he incurs it through International credit card.

Note: Liberalised Remittance Scheme (LRS): Under the Liberalised Remittance Scheme (LRS), all resident individuals, including minors, are allowed to freely remit up to USD 250,000 per financial year (April - March) for any permissible current or capital account transaction or a combination of both. This is inclusive of foreign exchange facility for the purposes mentioned in Para 1 of Schedule III of Foreign Exchange Management (CAT) Amendment Rules 2015, dated May 26, 2015.



In case of remitter being a minor, the LRS declaration form must be countersigned by the minor's natural guardian. The Scheme is not available to corporates, partnership firms, HUF, Trusts etc.

Consolidation of remittance of family members - Remittances under the Scheme can be consolidated in respect of family members subject to individual family members complying with its terms and conditions.

Exception: Clubbing is **not permitted** by other family members for **capital account transactions** such as opening a bank account/investment/purchase of property, if they are not the co-owners/co-partners of the overseas bank account/investment/property.

Capital account transactions [Section 6]

The definitions of "Capital Account Transactions" and its opposite "current account transactions" are contained in clauses (e) and (j) of Section 2. The regulations under FEMA apply to a transaction based on whether the transaction is "Capital Account Transaction" or a "Current Account Transaction". These transactions broadly outline the basics and whole approach of the Act. Basically these two transactions have to be understood as being similar to the concepts of items relating to the profit and loss account or revenue items (with respect to current account transactions) and of Balance Sheet or capital items (with respect to capital account transactions).

Capital Accounts Transaction in India can be carried out only to the extent permitted because Indian Rupee is not yet fully convertible. Capital and current account transactions are intended to be mutually exclusive. **A transaction which alters the asset or liabilities in India of non-residents falls under the category of capital account.** However, as far as residents are concerned transactions which alter the contingent liabilities outside India are also capital account transactions. The Reserve Bank of India may by regulations place restrictions on various specified capital account transactions. **In simple terms, cross border transactions pertaining to investments, loans, immovable property, transfer of assets are Capital Account Transactions.**

- (1) Subject to the provisions of sub-section (2), any person may **sell or draw foreign exchange to or from an authorised person** for a capital account transaction.
- (2) Reserve Bank had the **power to specify the Capital Account transactions which are permitted and the relevant limits, terms and conditions.** By Finance Act 2015, powers for regulation of Capital Account Transactions for Non-debt instruments were transferred to Central Government. RBI continued to have powers to regulate debt instruments. The amendments have however been made effective from 15th October 2019. Now the regulations are as under:

The Reserve Bank may, in consultation with the Central Government, specify:

- (a) any class or classes of capital account transactions, involving debt instruments, which are permissible;
- (b) the limit up to which foreign exchange shall be admissible for such transactions;
- (c) any conditions which may be placed on such transactions;

Provided that the Reserve Bank or the Central Government shall not impose any restrictions on the drawal of foreign exchange for payment due on account of amortisation of loans or for depreciation of direct investments in the ordinary course of business.



RBI has issued notification for Debt instruments specifying the terms and conditions. These regulations for foreign investment in debt instruments. For investment by Indian residents outside India, RBI continues to have power to regulate the transactions for equity and debt.

(2A) The Central Government may, in consultation with the Reserve Bank, prescribe— (a) any class or classes of capital account transactions, not involving debt instruments, which are permissible; (b) the limit up to which foreign exchange shall be admissible for such transactions; and (c) any conditions which may be placed on such transactions.

Central Government has issued notification for Non-debt instruments specifying the terms and conditions. RBI has issued notification for mode of payment and reporting of Non-debt instruments.

(3) Before 15th October 2019, Section 6(3) specified a list of capital account transactions which could be regulated by RBI [apart from the general powers which it had under Section 6(2)]. **This list has now been deleted from 15th October 2019.**

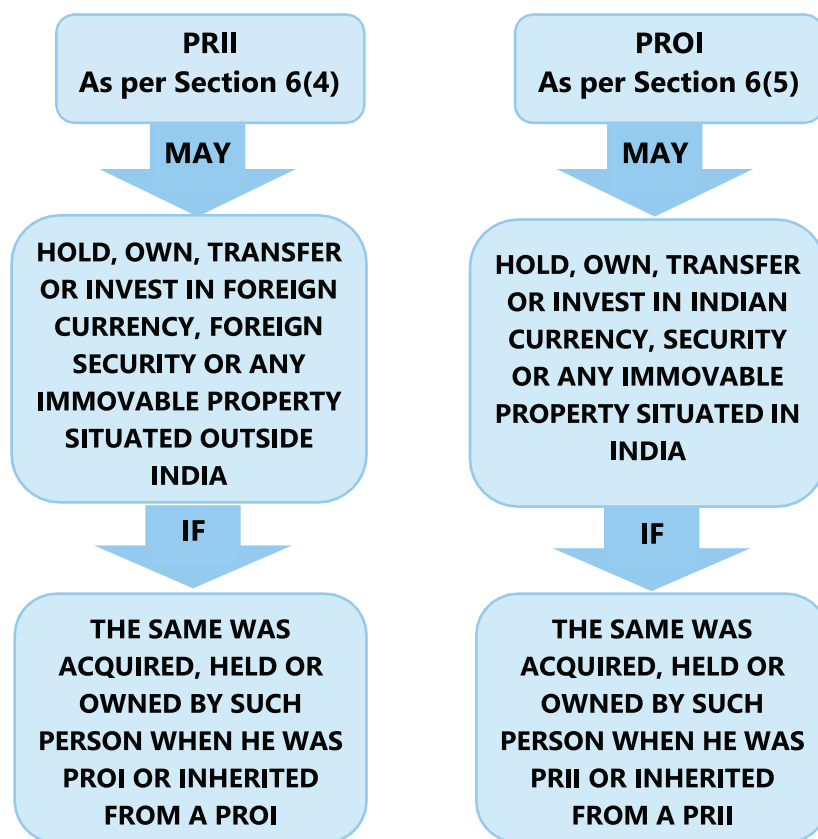
(4) **A person resident in India may hold, own, transfer or invest** in foreign currency, foreign security or any immovable property situated outside India if such currency, security or property was **acquired, held or owned** by such person **when he was resident outside India or inherited from a person who was resident outside India.**

The RBI vide A.P. (DIR Series) Circular No. 90 dated 9th January, 2014 has issued a clarification on section 6(4) of the Act. This circular clarifies that section 6(4) of the Act covers the following transactions:

- (i) Foreign currency accounts opened and maintained by such a person when he was resident outside India;
 - (ii) Income earned through employment or business or vocation outside India taken up or commenced while such person was resident outside India, or from investments made while such person was resident outside India, or from gift or inheritance received while such a person was resident outside India;
 - (iii) Foreign exchange including any income arising therefrom, and conversion or replacement or accrual to the same, held outside India by a person resident in India acquired by way of inheritance from a person resident outside India.
 - (iv) A person resident in India may freely utilize all their eligible assets abroad as well as income on such assets or sale proceeds thereof received after their return to India for making any payments or to make any fresh investments abroad without approval of Reserve Bank, provided the cost of such investments and/or any subsequent payments received therefor are met exclusively out of funds forming part of eligible assets held by them and the transactions is not in contravention to extant FEMA provisions.
- (5) **A person resident outside India may hold, own, transfer or invest** in Indian currency, security or any immovable property situated in India if such currency, security or property was acquired, held or owned by a such person when **he was resident in India or inherited from a person who was resident in India.**
- (6) Without prejudice to the provisions of this section, the Reserve Bank may, by regulation, prohibit, restrict, or regulate establishment in India of a branch, office or other place of business by a person resident outside India, for carrying on any activity relating to such branch, office or other place of business.



Capital Account Transactions [Sec. 6(4) & 6(5)]



- (7) For the purposes of this section, the term “debt instruments” shall mean, such instruments as may be determined by the Central Government in consultation with the Reserve Bank.

Capital account transaction is basically split into the following categories under **Foreign Exchange Management (Permissible capital account transactions) Regulations, 2000** :-

- (I) transaction, which are permissible in respect of persons resident in India and outside India.
- (II) transaction on which restrictions cannot be imposed; and
- (III) transactions, which are prohibited.

I. Permissible Transactions

Under sub-section (2) of Section 6, the RBI has issued the Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000. The Regulations specify the list of transaction, which are permissible in respect of persons resident in India in Schedule-I and the classes of capital account transactions of persons resident outside India in Schedule-II. Further, subject to the provisions of the Act or the rules or regulations or direction or orders made or issued thereunder, any person may sell or draw foreign exchange to or from an authorised person for a capital account transaction specified in the Schedules; provided that the transaction is within the limit, if any, specified in the regulations relevant to the transaction.



SCHEDULE I

The list of permissible classes of transactions made by **persons resident in India** is:

- (a) Investment by a person resident in India in foreign securities.
- (b) Foreign currency loans raised in India and abroad by a person resident in India.
- (c) Transfer of immovable property outside India by a person resident in India.
- (d) Guarantees issued by a person resident in India in favour of a person resident outside India.
- (e) Export, import and holding of currency/currency notes.
- (f) Loans and overdrafts (borrowings) by a person resident in India from a person resident outside India.
- (g) Maintenance of foreign currency accounts in India and outside India by a person resident in India.
- (h) Taking out of insurance policy by a person resident in India from an insurance company outside India.
- (i) Loans and overdrafts by a person resident in India to a person resident outside India.
- (j) Remittance outside India of capital assets of a person resident in India.
- (k) Undertake derivative contracts

SCHEDULE II

The list of permissible classes of transactions made by **persons resident outside India** is:

- (a) Investment in India by a person resident outside India, that is to say,
 - (i) issue of security by a body corporate or an entity in India and investment therein by a person resident outside India; and
 - (ii) investment by way of contribution by a person resident outside India to the capital of a firm or a proprietorship concern or an association of a person in India.
- (b) Acquisition and transfer of immovable property in India by a person resident outside India.
- (c) Guarantee by a person resident outside India in favour of, or on behalf of, a person resident in India.
- (d) Import and export of currency/currency notes into/from India by a person resident outside India.
- (e) Deposits between a person resident in India and a person resident outside India.
- (f) Foreign currency accounts in India of a person resident outside India.
- (g) Remittance outside India of capital assets in India of a person resident outside India.
- (h) Undertake derivative contracts

Transactions with no restriction

They are:

- (1) For amortisation of loan and
- (2) For depreciation of direct investments in ordinary course of business.

Also, restrictions cannot be imposed when drawal is of the purpose of repayments of loan installments.

Prohibited Transactions



On certain transactions, the Reserve Bank of India imposes prohibition.

- (a) no person shall **undertake or sell or draw foreign exchange to or from an authorised person** for any capital account transaction, provided that-
- (i) subject to the provisions of the Act or the rules or regulations or directions or orders made or issued thereunder, **a resident individual may, draw from an authorized person foreign exchange not exceeding USD 250,000 per financial year or such amount as decided by Reserve Bank** from time to time for a capital account transaction specified in Schedule I.
 - (ii) Where the **drawal of foreign exchange** by a resident individual for any capital account transaction specified in Schedule I **exceeds USD 250,000 per financial year, or as decided by Reserve Bank** from time to time as the case may be, the limit specified in the regulations relevant to the transaction shall apply with respect to such drawal.

Provided further that no part of the foreign exchange of USD 250,000, drawn under proviso (a) shall be used for remittance directly or indirectly to countries notified as non-co-operative countries and territories by Financial Action Task Force (FATF) from time to time and communicated by the Reserve Bank of India to all concerned.

- (b) The **person resident outside India is prohibited from making investments in India** in any form, in any company, or partnership firm or proprietary concern or any entity whether incorporated or not which is engaged or proposes to engage:
- (i) In **the business of chit fund**; Registrar of Chits or an officer authorised by the state government in this behalf, may, in consultation with the State Government concerned, permit any chit fund to accept subscription from Non-resident Indians. Non-resident Indians shall be eligible to subscribe, through banking channel and on non-repatriation basis, to such chit funds, without limit subject to the conditions stipulated by the Reserve Bank of India from time to time
 - (ii) **As Nidhi company;**
 - (iii) In **agricultural or plantation activities;**
 - (iv) In **real estate business, or construction of farm houses or**
Explanation: In “real estate business” the term shall not include development of townships, construction of residential/commercial premises, roads or bridges and Real Estate Investment Trusts (REITs) registered and regulated under the SEBI (REITs) Regulations 2014 .; or
 - (v) In **trading in Transferable Development Rights (TDRs).**
‘Transferable Development Rights’ means certificates issued in respect of category of land acquired for public purpose either by Central or State Government in consideration of surrender of land by the owner without monetary compensation, which are transferable in part or whole;
- (c) **No person resident in India shall undertake** any capital account transaction which is not permissible in terms of Order S.O. 1549(E) dated April 21, 2017, as amended from time to time, of the Government of India, Ministry of External Affairs, **with any person who is, a citizen of or a resident of Democratic People’s Republic of Korea, or an entity incorporated or otherwise, in Democratic People’s Republic of Korea, until**



further orders, unless there is specific approval from the Central Government to carry on any transaction.

- (d) The **existing investment transactions, with any person** who is, a citizen of or resident of Democratic People's Republic of Korea, or an entity incorporated or otherwise in Democratic People's Republic of Korea, or any existing representative office or other assets possessed in Democratic People's Republic of Korea, **by a person resident in India**, which is not permissible in terms of Order S.O. 1549(E) dated April 21, 2017, as amended from time to time, of the Government of India, Ministry of External Affairs **shall be closed/ liquidated/disposed/settled within a period of 180 days from the date of issue of this Notification**, unless there is specific approval from the Central Government to continue beyond that period.”

Thus, a capital account transaction is permitted only if it is specifically permitted under the regulations. If the transaction is not stated as generally permitted, a prior specific approval is required.

SUMMARY

- FEMA makes provisions in respect of dealings in foreign exchange.
- FEMA regulates transactions between residents and non-residents.
- Broadly, all current account transactions are free. However, Central Government can impose reasonable instructions by issuing rules.
- Capital account transactions are regulated by Reserve Bank of India (RBI) and Central Government.
- FEMA envisages that RBI will have a controlling role in management of foreign exchange.



QUESTION & ANSWERS



Descriptive Questions



Question 1

‘Printex Computer’ is a Singapore based company having several business units all over the world. It has a unit for manufacturing computer printers with its Headquarters in Pune. It has a Branch in Dubai which is controlled by the Headquarters in Pune. What would be the residential status under the FEMA, 1999 of printer units in Pune and that of Dubai branch?



Solution:

Printex Computer being a Singapore based company would be person resident outside India [(Section 2(w))]. Section 2 (u) defines ‘person’ under clause (viii) thereof, as person would include any agency, office or branch owned or controlled by such person. The term such person appears to refer to a person who is included in clause (i) to (vi). Accordingly, Printex unit in Pune, being a branch of a company would be a ‘person’.

Section 2(v) defines a person resident in India. Under clause (iii) thereof person resident in India would include an office, branch or agency in India owned or controlled by a person resident outside India. Printex unit in Pune is owned or controlled by a person resident outside India, and hence it, would be a ‘person resident in India.’

However, Dubai Branch though not owned is controlled by the Printer unit in Pune which is a person resident in India. Hence, the Dubai Branch is a person resident in India.



Question 2

Mr. Sane, an Indian National desires to obtain Foreign Exchange for the following purposes:

- (i) Remittance of US Dollar 50,000 out of winnings on a lottery ticket.
- (ii) US Dollar 100,000 for sending a cultural troupe on a tour of U.S.A.

Advise him whether he can get Foreign Exchange and if so, under what conditions?



Solution:

Under provisions of section 5 of the Foreign Exchange Management Act, 1999 certain Rules have been made for drawal of Foreign Exchange for Current Account transactions. As per these Rules, Foreign Exchange for some of the Current Account transactions is prohibited. As regards some other Current Account transactions, Foreign Exchange can be drawn with prior permission of the Central Government while in case of some Current Account transactions, prior permission of Reserve Bank of India is required.

- (i) In respect of item No.(i), i.e., remittance out of lottery winnings, such remittance is prohibited and the same is included in First Schedule to the Foreign Exchange Management (Current Account Transactions) Rules, 2000. Hence, Mr. Sane cannot withdraw Foreign Exchange for this purpose.
- (ii) Foreign Exchange for meeting expenses of cultural tour can be withdrawn by any person after obtaining permission from Government of India, Ministry of Human Resources



Development, (Department of Education and Culture) as prescribed in Second Schedule to the Foreign Exchange Management (Current Account Transactions) Rules, 2000. Hence, in respect of item (ii), Mr. Sane can withdraw the Foreign Exchange after obtaining such permission.

In all the cases, where remittance of Foreign Exchange is allowed, either by general or specific permission, the remitter has to obtain the Foreign Exchange from an Authorised Person as defined in Section 2(c).



Question 3

State which kind of approval is required for the following transactions under the Foreign Exchange Management Act, 1999:

- (i) X, a Film Star, wants to perform along with associates in New York on the occasion of Diwali for Indians residing at New York. Foreign Exchange drawal to the extent of US dollars 20,000 is required for this purpose.
- (ii) R wants to get his heart surgery done at United Kingdom. Up to what limit Foreign Exchange can be drawn by him and what are the approvals required?



Solution:

Approval to the following transactions under FEMA, 1999:

- (i) Foreign Exchange drawals for cultural tours require prior permission/approval of the Ministry of Human Resources Development (Department of Education and Culture) irrespective of the amount of foreign exchange required. Therefore, in the given case X, the Film Star is required to seek permission of the said Ministry of the Government of India.
- (ii) Individuals can avail of foreign exchange facility within the limit of USD 2,50,000 only. Any additional remittance in excess of the said limit for the expenses requires an approval from RBI. However, in connection with medical treatment abroad, no approval of the Reserve Bank of India is required. Therefore, R can draw foreign exchange up to amount estimated by a medical institute offering treatment.



Question 4

Referring to the provisions of the Foreign Exchange Management Act, 1999, state the kind of approval required for the following transactions:

- (i) M requires U.S. \$ 5,000 for remittance towards hiring charges of transponders.
- (ii) P requires U.S. \$ 2,000 for payment related to call back services of telephones.



Solution:

Under section 5 of the Foreign Exchange Management Act, 1999, and Rules relating thereto, some current account transactions require prior approval of the Central Government, some others require the prior approval of the Reserve Bank of India, some are freely permitted transactions and some others are prohibited transactions. Accordingly,

- (i) It is a current account transaction, where M is required to take approval of the Central Government for drawal of foreign exchange for remittance of hire charges of transponders.
- (ii) Withdrawal of foreign exchange for payment related to call back services of telephone is a prohibited transaction. Hence, Mr. P cannot obtain US \$ 2,000 for the said purpose.



Question 5

Suresh resided in India during the Financial Year 2020-2021. He left India on 15th July 2021 for Switzerland for pursuing higher studies in Biotechnology for 2 years. What would be his residential status under the Foreign Exchange Management Act, 1999 during the Financial Years 2021-2022 and 2022-2023?

Mr. Suresh requires every year USD 25,000 towards tuition fees and USD 30,000 for incidental and stay expenses for studying abroad. Is it possible for Mr. Suresh to get the required Foreign Exchange and, if so, under what conditions?



Solution:

Residential Status: According to section 2(v) of the Foreign Exchange Management Act, 1999, 'Person resident in India' means a person residing in India for more than 182 days during the course of preceding financial year [Section 2(v)(i)]. However, it does not include a person who has gone out of India or who stays outside India for employment outside India or for any other purpose in such circumstances as would indicate his intention to stay outside India for an uncertain period.

Generally, a student goes out of India for a certain period. In this case, Mr. Suresh who resided in India during the financial year 2020-2021 left on 15.7.2021 for Switzerland for pursuing higher studies in Biotechnology for 2 years, he will be resident as he has gone to stay outside India for a 'certain period'. RBI has however clarified in its AP circular no. 45 dated 8th December 2003, that students will be considered as non-residents. This is because usually students start working there to take care of their stay and cost of studies.

Mr. Suresh will be treated as person resident in India for Financial Year 2021- 2022 till 16th July 2021 and from 17th July 2021, he will be considered as person resident outside India.

However, during the Financial Year 2022-2023, Mr. Suresh will be considered as person resident outside India as he left India on 15th July 2021.

Foreign Exchange for studies abroad: According to Para I of Schedule III to Foreign Exchange Management (Current Account Transactions), Amendment Rule, 2015 dated 26th May, 2015, individuals can avail of foreign exchange facility for the studies abroad within the limit of USD 2,50,000 only. Any additional remittance in excess of the said limit shall require prior approval of the RBI. Further proviso to Para I of Schedule III states that individual may be allowed remittances (without seeking prior approval of the RBI) exceeding USD 2,50,000 based on the estimate received from the institution abroad. In this case the foreign exchange required is only USD 55,000 per academic year and hence approval of RBI is not required.



Question 6

- (i) Mr. P has won a big lottery and wants to remit US Dollar 20,000 out of his winnings to his son who is in USA. Advise whether such remittance is possible under the Foreign Exchange Management Act, 1999.
- (ii) Mr. Z is unwell and would like to have a kidney transplant done in USA. He would like to know the formalities required and the amount that can be drawn as foreign exchange for the medical treatment abroad.



Solution:

Remittance of Foreign Exchange (Section 5 of the Foreign Exchange Management Act, 1999):

According to section 5 of the FEMA, 1999, any person may sell or draw foreign exchange to or from an authorized person if such a sale or drawal is a current account transaction. Provided that Central Government may, in public interest and in consultation with the reserve bank, impose such reasonable restrictions for current account transactions as may be prescribed.

As per the rules, drawal of foreign exchange for current account transactions are categorized under three headings-

1. Transactions for which drawal of foreign exchange is prohibited,
2. Transactions which need prior approval of appropriate government of India for drawal of foreign exchange, and
3. Transactions which require RBI's prior approval for drawl of foreign exchange.
 - (i) Mr. P wanted to remit US Dollar 20,000 out of his lottery winnings to his son residing in USA. Such remittance is prohibited and the same is included in the Foreign Exchange Management (Current Account Transactions) Rules, 2000. Hence Mr. P cannot withdraw foreign exchange for this purpose.
 - (ii) "Remittance of foreign exchange for medical treatment abroad" requires prior permission or approval of RBI where the individual requires withdrawal of foreign exchange exceeding USD 250,000. The Schedule also prescribes that for the purpose of expenses in connection with medical treatment, the individual may avail of exchange facility for an amount in excess of the limit prescribed under the Liberalized Remittance Scheme, if so required by a medical institute offering treatment.

Therefore, Mr. Z can draw foreign exchange up to the USD 250,000 and no prior permission/ approval of RBI will be required. For amount exceeding the above limit, authorised dealers may release foreign exchange based on the estimate from the doctor in India or hospital or doctor abroad.



Question 7

Mr. Rohan, an Indian Resident individual desires to obtain Foreign Exchange for the following purposes:

- (A) US\$ 120,000 for studies abroad on the basis of estimates given by the foreign university.
- (B) Gift Remittance amounting US\$ 10,000.

Advise him whether he can get Foreign Exchange and if so, under what condition(s)?



Solution:

- (A) **Remittance of Foreign Exchange for studies abroad:** Foreign exchange may be released for studies abroad up to a limit of US \$ 250,000 for the studies abroad without any permission from the RBI. Above this limit, RBI's prior approval is required. Further proviso to Para I of Schedule III states that individual may be allowed remittances exceeding USD 250,000 based on the estimate received from the institution abroad. In this case since US \$ 120,000 is the drawal of foreign exchange, so permission of the RBI is not required.
- (B) **Gift remittance exceeding US \$ 10,000:** Under the provisions of section 5 of FEMA 1999, certain Rules have been made for drawal of foreign exchange for current account transactions. Gift remittance is a current account transaction. Gift remittance exceeding



US \$ 250,000 can be made after obtaining prior approval of the RBI. In the present case, since the amount to be gifted by an individual, Mr. Rohan is USD 10,000, there is no need for any permission from the RBI.

MCQ Based Questions



Question 1

In September, 2021, Mr. Purshottam Saha visited Atlanta as well as Athens and thereafter, London and Berlin on a month-long business trip, for which he withdrew foreign exchange to the extent of US\$ 50,000 from his banker State Bank of India, New Delhi branch. In December, 2021 he further, withdrew US\$ 50,000 from SBI and remitted the same to his son Raviyansh Saha who was studying in Toronto, Canada. In the first week of January, 2022, he sent his ailing mother Mrs. Savita Saha for a specialised treatment along with his wife Mrs. Rashmi Saha to Seattle where his younger brother Pranav Saha, holder of Green Card, is residing. For the purpose of his mother's treatment and to help Pranav Saha to meet increased expenses, he requested his banker SBI to remit US\$ 75,000 to Pranav Saha's account maintained with Citibank, Seattle. In February, 2022, Mr. Purshottam Saha's daughter Devanshi Saha got engaged and she opted for a 'destination marriage' to be held in August, 2022 in Zurich, Switzerland. While on a trip to Dubai in the last week of March, 2022, he again withdrew US\$ 35,000 to be used by him and Devanshi Saha for meeting various trip expenses including shopping in Dubai. Later, the event manager gave an estimate of US\$ 2,50,000 for the wedding of Devanshi Saha at Zurich, Switzerland. Which option do you think is the correct one in the light of applicable provisions of Foreign Exchange Management Act, 1999 including obtaining of prior approval, if any, from Reserve Bank of India since Mr. Purshottam Saha withdrew foreign exchange on various occasions from his banker State Bank of India.

- (a) In respect of withdrawal of foreign exchange on various occasions from his banker State Bank of India and remitting the same outside India during the financial year 2021-22, Mr. Purshottam Saha is not required to obtain any prior approval.
- (b) In respect of withdrawal of US\$ 35,000 in the last week of March, 2022, for a trip to Dubai, Mr. Purshottam Saha must have obtained prior approval of Reserve Bank of India since the maximum amount of foreign exchange that can be withdrawn in a financial year is US\$ 1,75,000.
- (c) After withdrawing US\$ 1,00,000, Mr. Purshottam Saha must have obtained prior approval of Reserve Bank of India for the remaining remittances made during the financial year 2021-22, otherwise SBI would not have permitted further withdrawals.
- (d) After withdrawing US\$ 50,000, Mr. Purshottam Saha must have obtained prior approval of Reserve Bank of India for the remaining remittances made during the financial year 2021-22, otherwise SBI would not have permitted further withdrawals.



Solution:

- (a) In respect of withdrawal of foreign exchange on various occasions from his banker State Bank of India and remitting the same outside India during the financial year 2021-22, Mr. Purshottam Saha is not required to obtain any prior approval.



Question 2

M/s. Kedhar Sports Academy, a private coaching club, provides coaching for cricket, football and other similar sports. It coaches sports aspirants pan India. It also conducts various sports events and campaigns, across the country. In 2022, to mark the 25th year of its operation, a cricket tournament (akin to the format of T-20) is being organized by M/s. Kedhar Sports Academy in Lancashire, England, in the first half of April. The prize money for the 'winning team' is fixed at USD 40,000 whereas in case of 'runner-up', it is pegged at USD 11,000. You are required to choose the correct option from the four given below which signifies the steps to be taken by M/s. Kedhar Sports Academy for remittance of the prize money of USD 51,000 (i.e. USD 40,000+USD 11,000) to England keeping in view the relevant provisions of Foreign Exchange Management Act, 1999:

- (a) For remittance of the prize money of USD 51,000, M/s Kedhar Sports Academy is required to obtain prior permission from the Ministry of Human Resource Development (Department of Youth Affairs and Sports).
- (b) For remittance of the prize money of USD 51,000, M/s Kedhar Sports Academy is required to obtain prior permission from the Reserve Bank of India.
- (c) For remittance of the prize money of USD 51,000, M/s Kedhar Sports Academy is not required to obtain any prior permission from any authority, whatsoever, and it can proceed to make the remittance.
- (d) For remittance of the prize money of USD 51,000, M/s Kedhar Sports Academy is required to obtain prior permission from the Ministry of Finance (Department of Economic Affairs).



Solution:

- (c) For remittance of the prize money of USD 51,000, M/s Kedhar Sports Academy is not required to obtain any prior permission from any authority, whatsoever, and it can proceed to make the remittance.



Question 3

Akash Ceramics Limited, an Indian company, holds a commercial plot in Chennai which it intends to sell. M/s. Super Seller, a real estate broker with its Head Office in the USA, has been appointed by Akash Ceramics Limited to find some suitable buyers for the said commercial plot in Chennai which is situated at a prime location. M/s. Super Seller identifies Glory Estate Inc., based out of USA, as the potential buyer. It is to be noted that Glory Estate Inc. is controlled from India and hence, is a 'Person Resident in India' under the applicable provisions of Foreign Exchange Management Act, 1999. A deal is finalised and Glory Estate Inc. agrees to purchase the commercial plot for USD 600,000 (assuming 1 USD = ₹ 70). According to the agreement, Akash Ceramics Limited is required to pay commission @ 7% of the sale proceeds to M/s. Super Seller for arranging the sale of commercial plot to Glory Estate Inc. and commission is to be remitted in USD to the Head Office of M/s. Super Seller located in USA. Considering the relevant provisions of Foreign Exchange Management Act, 1999, which statement out of the four given below is correct (ignoring TDS implications arising under the Income-tax Act, 1961):

- (a) There is no requirement of obtaining prior permission of Reserve Bank of India (RBI) for remittance of commission upto USD 25,000 by Akash Ceramics Limited to M/s. Super Seller but for the balance commission of USD 17,000, prior permission of RBI is required to be obtained.



- (b) There is no requirement of obtaining prior permission of Reserve Bank of India (RBI) for remittance of commission upto USD 30,000 by Akash Ceramics Limited to M/s. Super Seller but for the balance commission of USD 12,000, prior permission of RBI is required to be obtained.
- (c) There is no requirement of obtaining prior permission of Reserve Bank of India (RBI) for remittance of entire commission of USD 42,000 by Akash Ceramics Limited to M/s. Super Seller.
- (d) It is mandatory to obtain prior permission of Reserve Bank of India (RBI) for remittance of entire commission of USD 42,000 by Akash Ceramics Limited to M/s. Super Seller.



Solution:

- (d) It is mandatory to obtain prior permission of Reserve Bank of India (RBI) for remittance of entire commission of USD 42,000 by Akash Ceramics Limited to M/s. Super Seller.



Question 4

Mohita Periodicals and Mags Publications Limited, having registered office in Chennai, has obtained consultancy services from an entity based in France for setting up a software programme to strengthen various aspects relating to publications. The consideration for such consultancy services is required to be paid in foreign currency. The compliance officer of Mohita Periodicals and Mags Publications Limited, Mrs. Ritika requires your advice regarding the foreign exchange that can be remitted for the purpose of obtaining consultancy services from abroad without prior approval of Reserve Bank of India. Out of the following four options, choose the one which correctly portrays the amount of foreign exchange remittable for the given purpose after considering the provisions of the Foreign Exchange Management Act, 1999 and regulations made thereunder:

- (a) Permissible amount of foreign exchange that can be remitted by Mohita Periodicals and Mags Publications Limited for obtaining consultancy services from an entity based in France without prior approval of RBI is US\$ 50,000,000.
- (b) Permissible amount of foreign exchange that can be remitted by Mohita Periodicals and Mags Publications Limited for obtaining consultancy services from an entity based in France without prior approval of RBI is US\$ 10,000,000.
- (c) Permissible amount of foreign exchange that can be remitted by Mohita Periodicals and Mags Publications Limited for obtaining consultancy services from an entity based in France without prior approval of RBI is US\$ 5,000,000.
- (d) Permissible amount of foreign exchange that can be remitted by Mohita Periodicals and Mags Publications Limited for obtaining consultancy services from an entity based in France without prior approval of RBI is US\$ 1,000,000.



Solution:

- (d) Permissible amount of foreign exchange that can be remitted by Mohita Periodicals and Mags Publications Limited for obtaining consultancy services from an entity based in France without prior approval of RBI is US\$ 1,000,000.



Question 5

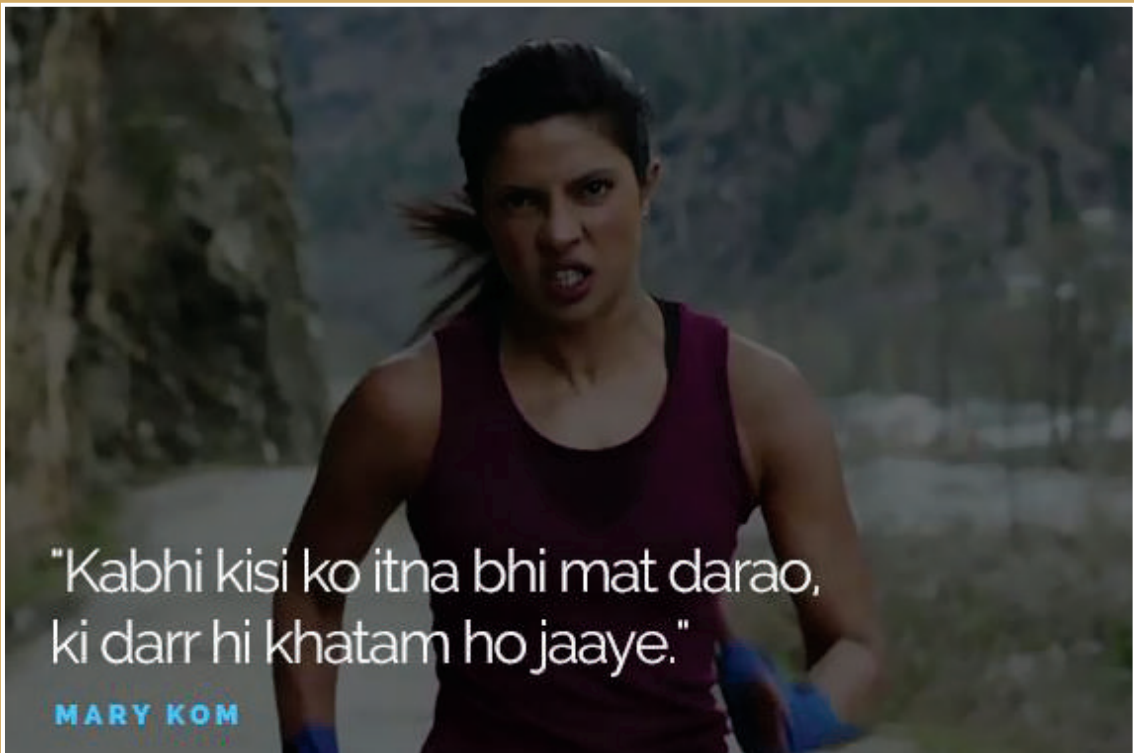
After five years of stay in USA, Mr. Umesh came to India at his paternal place in New Delhi on October 25, 2021, for the purpose of conducting business with his two younger brothers Rajesh and Somesh and contributed a sum of ₹ 10,00,000 as his capital. Simultaneously, Mr. Umesh also started a proprietary business of selling artistic brass ware, jewellery, etc. procured directly from the manufacturers based at Moradabad. Within a period of two months after his arrival from USA, Mr. Umesh established a branch of his proprietary business at Minnesota, USA. You are required choose the appropriate option with respect to residential status of Mr. Umesh and his branch for the financial year 2022-23 after considering the applicable provisions of the Foreign Exchange Management Act, 1999:

- (a) For the financial year 2022-23, Mr. Umesh and his branch established at Minnesota, USA, are both persons resident outside India.
- (b) For the financial year 2022-23, Mr. Umesh is a resident in India but his branch established at Minnesota, USA, is a person resident outside India.
- (c) For the financial year 2022-23, Mr. Umesh and his branch established at Minnesota, USA, are both persons resident in India.
- (d) For the financial year 2022-23, Mr. Umesh is a person resident outside India but his branch established at Minnesota, USA, is a person resident in India.



Solution:

- (c) For the financial year 2022-23, Mr. Umesh and his branch established at Minnesota, USA, are both persons resident in India.

A photograph of Mary Kom, an Indian boxer, running outdoors. She is wearing a maroon tank top and blue boxing gloves. Her hair is tied back, and she has a determined expression. The background is a blurred natural setting with trees and a path.

"Kabhi kisi ko itna bhi mat darao,
ki darr hi khatam ho jaaye."

MARY KOM



01

THE LIMITED LIABILITY PARTNERSHIP ACT, 2008



INTRODUCTION

The Ministry of Law and Justice on 9th January 2009 notified the Limited Liability Partnership Act, 2008.

The Parliament passed the Limited Liability Partnership Bill on 12th December, 2008 and the President of India has assented the Bill on 7th January, 2009 and called as the Limited Liability Partnership Act, 2008 (the “LLP Act, 2008”).

This Act has been enacted to make provisions for the formation and regulation of Limited Liability Partnerships and for matters connected there with or incidental thereto.

The LLP Act, 2008 has 81 sections (of which section 81 is now omitted with effect from 1st April 2022) and 4 schedules.

The First Schedule deals with mutual rights and duties of partners and limited liability partnership and its partners where there is absence of a formal agreement amongst them.

The Second Schedule deals with conversion of a firm into LLP.

The Third Schedule deals with conversion of a private company into LLP.

The Fourth Schedule deals with conversion of unlisted public company into LLP.

The Ministry of Corporate Affairs and the Registrar of Companies (ROC) are entrusted with the task of administering the LLP Act, 2008. The Central Government has the authority to frame the Rules with regard to the LLP Act, 2008, and can amend them by notifications in the Official Gazette, from time to time.

It is also to be noted that the Indian Partnership Act, 1932 is not applicable to LLPs.

Note

The Limited Liability Partnership Act, 2008 has been recently amended through the Limited Liability Partnership (Amendment) Act, 2021 dated 13 th August, 2021.

Need of new form of Limited Liability Partnership

The lawmakers envisaged the need for bringing out a new legislation for creation of the Limited Liability Partnership to meet with the contemporary growth of the Indian economy. A need has been felt for a new corporate form that would provide an alternative to the traditional partnership with

unlimited personal liability on the one hand and the statute-based governance structure of the limited liability company on the other hand. In order to enable professional expertise and entrepreneurial initiative and to combine and operate in flexible, innovative and efficient manner, the LLP Act, 2008 was enacted.

Thus, LLP as a form of business organization is an alternative corporate business vehicle. It provides the benefits of limited liability but allows its members the flexibility of organizing their internal structure as a partnership based on a mutually arrived agreement. The LLP form enables entrepreneurs, professionals and enterprises providing services of any kind or engaged in scientific and technical disciplines, to form commercially efficient vehicles suited to their requirements. Owing to flexibility in its structure and operation, the LLP is a suitable vehicle for small enterprises and for investment by venture capital.



LIMITED LIABILITY PARTNERSHIP - MEANING AND CONCEPT

Meaning: LLP is a new form of legal business entity with limited liability. It is an alternative corporate business vehicle that not only gives the benefits of limited liability at low compliance cost but allows its partners the flexibility of organising their internal structure as a traditional partnership. The LLP is a separate legal entity and, while the LLP itself will be liable to the full extent of its assets, the liability of the partners will be limited to the extent of their capital contribution.

LLP as a separate legal entity and business organisation is an alternative corporate business form that gives the benefits of limited liability of a company and the flexibility of a partnership. Since LLP contains elements of both 'a corporate structure' as well as 'a partnership firm structure' LLP is called a hybrid between a company and a partnership.

FIGURE 13.1



DEFINITIONS

1. **Address [(Section 2(1)(a))]:** "Address" in relation to a partner of a limited liability partnership, means—
 - (i) if an individual, his usual residential address; and
 - (ii) if a body corporate, the address of its registered office.
2. **Body Corporate [(Section 2(1)(d))]:** It means a company as defined in clause (20) of section 2 of the Companies Act, 2013 and includes—
 - (i) a LLP registered under this Act;
 - (ii) a LLP incorporated outside India; and
 - (iii) a company incorporated outside India, but does not include—
 - (i) a corporation sole;
 - (ii) a co-operative society registered under any law for the time being in force; and
 - (iii) any other body corporate (not being a company as defined in clause (20) of section 2 of the Companies Act, 2013 or a limited liability partnership as defined in this Act), which the Central Government may, by notification in the Official Gazette, specify in this behalf.



Means

A company & **includes** -
LLP, foreign LLP, foreign
company,

Does not include - corporation

sole; co-operative society & any
other body corporate notified by
Central Government.

3. **Business [Section 2(1)(e)]:** “Business” includes every trade, profession, service and occupation except any activity which the Central Government may, by notification, exclude.
4. **Chartered Accountant [Section 2(1)(f)]:** means a Chartered Accountant as defined in clause (b) of sub-section (1) of section 2 of the Chartered Accountants Act, 1949 and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act.
5. **Designated Partner [Section 2(1)(j)]:** “Designated partner” means any partner designated as such pursuant to section 7.
6. **Entity [Section 2(1)(k)]:** “Entity” means any body corporate and includes, for the purposes of sections 18, 46, 47, 48, 49, 50, 52 and 53, a firm setup under the Indian Partnership Act, 1932.
7. **Financial Year [Section 2(1)(l)]:** “Financial year”, in relation to a LLP, means the period from the 1st day of April of a year to the 31st day of March of the following year. However, in the case of a LLP incorporated after the 30th day of September of a year, the financial year may end on the 31st day of March of the year next following that year.

Example 1: If a LLP has been incorporated on 15th October, 2022, then its financial year may be from 15th October, 2022 to 31st March, 2024. However, the LLP can always maintain its first accounts from 15th October, 2022 to 31st March, 2023 i.e. for a period of less than 12 months. The period for which the first accounts of LLP are prepared shall not exceed 18 months.
The Income Tax department has prescribed uniform financial year from 1st April to 31st March of next year. In keeping with the Income tax law, the financial year for LLP should always be from 1st April to 31st March each year.

8. **Foreign LLP [section 2(1)(m)]:** It means a LLP formed, incorporated or registered outside India which establishes a place of business within India.
9. **Limited liability partnership [Section 2(1)(n)]:** Limited Liability Partnership means a partnership formed and registered under this Act.
10. **Limited Liability partnership agreement [Section 2(1)(o)]:** It means any written agreement between the partners of the LLP or between the LLP and its partners which determines the mutual rights and duties of the partners and their rights and duties in relation to that LLP.
The First Schedule shall be applicable for all matters not covered by the Agreement w.r.t the mutual rights and duties of the partners and their rights and duties in relation to the LLP.
11. **Name [Section 2(1)(p)]:** in relation to a partner of a limited liability partnership, means—
 - (i) if an individual, his forename, middle name and surname; and
 - (ii) if a body corporate, its registered name;



12. **Partner [Section 2(1)(q)]:** Partner, in relation to a LLP, means any person who becomes a partner in the LLP in accordance with the LLP agreement.
13. **Regional Director [Section 2(1)(ra)]:** means a person appointed as such by the Central Government for the purpose of this Act or the Companies Act 2013, as the case may be.
14. **Registrar [Section 2(1)(s)]:** means a person appointed by Central Government as Registrar, an Additional Registrar, a Joint Registrar, a Deputy Registrar or an Assistant Registrar, for the purpose of this Act or the Companies Act, 2013, as the case may be.
15. **Small limited liability partnership [Section 2(1)(ta)]:** It means a limited liability partnership—
 - (i) the contribution of which, does not exceed twenty-five lakh rupees or such higher amount, not exceeding five crore rupees, as may be prescribed; and
 - (ii) the turnover of which, as per the Statement of Accounts and Solvency for the immediately preceding financial year, does not exceed forty lakh rupees or such higher amount, not exceeding fifty crore rupees, as may be prescribed; or
 - (iii) which meets such other requirements as may be prescribed, and fulfils such terms and conditions as may be prescribed;

Contribution	Up to ₹ 25L, &
Turnover for immediately preceding F.Y	Up to ₹ 40 L, or
Fulfills	prescribed terms and conditions

16. **Tribunal [Section 2(1)(u)]:** means the National Company Law Tribunal constituted u/s 408 of Companies Act 2013.

Note:

Applicability of the Companies Act, 2013: Words and expressions used and not defined in this Act but defined in the Companies Act, 2013 shall have the meanings respectively assigned to them in that Act. [Section 2(2)]

Non-applicability of the Indian Partnership Act, 1932: Save as otherwise provided, the provisions of the Indian Partnership Act, 1932 shall not apply to a LLP. [Section 4]

CHARACTERISTIC OF LLP

1. **LLP is a body corporate:** Section 2(1)(d) of the LLP Act, 2008 provides that a LLP is a body corporate formed and incorporated under this Act. Section 3 of the LLP Act provides that LLP is a legal entity separate from that of its partners and shall have perpetual succession. Therefore, any change in the partners of a LLP shall not affect the existence, rights or liabilities of the LLP.
2. **Perpetual Succession:** The LLP can continue its existence irrespective of changes in partners. Death, insanity, retirement or insolvency of partners has no impact on the existence of LLP. It is capable of entering into contracts and holding property in its own name.
3. **Separate Legal Entity:** Section 3 of LLP Act provides that a LLP is a body corporate formed and incorporated under this Act and is a legal entity separate from that of its partners. The LLP is liable to the full extent of its assets but liability of the partners is limited to their agreed contribution in the LLP. In other words, creditors of LLP shall be the creditors of LLP alone.



4. **Mutual Agency:** No partner is liable on account of the independent or un- authorized actions of other partners, thus individual partners are shielded from joint liability created by another partner's wrongful business decisions or misconduct. In other words, all partners will be the agents of the LLP alone. No one partner can bind the other partner by his acts.
5. **LLP Agreement:** Mutual rights and duties of the partners within a LLP are governed by an agreement between the partners. The LLP Act, 2008 provides flexibility to partner to devise the agreement as per their choice. In the absence of any such agreement, the mutual rights and duties shall be governed by Schedule I of the LLP Act, 2008.
6. **Artificial Legal Person:** A LLP is an artificial legal person because it is created by a legal process and is clothed with all rights of an individual. It can do everything which any natural person can do, except of course that, it cannot be sent to jail, cannot take an oath, cannot marry or get divorce nor can it practice a learned profession like CA or Medicine. A LLP is invisible, intangible, immortal (it can be dissolved by law alone) but not fictitious because it really exists.
7. **Common Seal:** A LLP being an artificial person can act through its partners and designated partners. LLP may have a common seal, if it decides to have one [Section 14(c)]. Thus, it is not mandatory for a LLP to have a common seal. It shall remain under the custody of some responsible official and it shall be affixed in the presence of at least 2 designated partners of the LLP.
8. **Limited Liability:** Every partner of a LLP is, for the purpose of the business of LLP, the agent of the LLP, but not of other partners (Section 26). The liability of the partners will be limited to their agreed contribution in the LLP. Such contribution may be of tangible or intangible nature or both.

Example 2: The professionals like Engineering consultants, Legal Advisors and Accounting Professional are afraid of entering into business due to unlimited liability. Hence, the LLP Act provides an avenue for these professionals to enter into Limited Liability Partnership firms which restrict their liability to the agreed amount. This has encouraged Professionals to form LLP.

9. **Management of Business:** The partners in the LLP are entitled to manage the business of LLP. But only the designated partners are responsible for legal compliances.
10. **Minimum and Maximum number of Partners:** Every LLP shall have at least two partners and shall also have at least 2 individuals as designated partners, of whom at least one shall be resident in India. There is no maximum limit on the partners in LLP.
11. **Business for Profit Only:** The essential requirement for forming LLP is carrying on a lawful business with a view to earn profit. Thus, LLP cannot be formed for charitable or non-economic purpose.
12. **Investigation:** The Central Government shall have powers to investigate the affairs of an LLP by appointment of competent authority for the purpose.
13. **Compromise or Arrangement:** Any compromise or agreements including merger and amalgamation of LLPs shall be in accordance with the provisions of the LLP Act, 2008.
14. **Conversion into LLP:** A firm, private company or an unlisted public company would be allowed to be converted into LLP in accordance with the provisions of LLP Act, 2008.



- 15. E-Filing of Documents:** Every form or application of document required to be filed or delivered under the act and rules made thereunder, shall be filed in computer readable electronic form on its website www.mca.gov.in and authenticated by a partner or designated partner of LLP by the use of electronic or digital signature.
- 16. Foreign LLPs:** Section 2(1)(m) defines foreign limited liability partnership “as a limited liability partnership formed, incorporated, or registered outside India which established a place of business within India”. Foreign LLP can become a partner in an Indian LLP.

ADVANTAGES OF LLP FORM

LLP form is a form of business model which:

1. Is organised and operates on the basis of an agreement.
2. Provides flexibility without imposing detailed legal and procedural requirements.
3. Easy to form.
4. All partners enjoy limited liability.
5. Easy to dissolve.

Partners [Section 5]

Any individual or body corporate may be a partner in a LLP. However, an individual shall not be capable of becoming a partner of a LLP, if—

- (a) he has been found to be of unsound mind by a Court of competent jurisdiction and the finding is in force;
- (b) he is an undischarged insolvent; or
- (c) he has applied to be adjudicated as an insolvent and his application is pending.

The following persons can become partner in LLP:

- (i) Individuals (Resident Indians including Non Resident Indians & Overseas Citizen of India as well as foreign nationals)*
- (ii) Limited Liability Partnerships
- (iii) Companies (including foreign companies)*
- (iv) Foreign Limited Liability Partnerships*
- (v) Limited Liability Partnerships incorporated outside India
- (vi) Foreign Companies.

Co-operative society and corporation sole cannot become partner in a LLP.

*In case of introduction of capital / acquisition of existing stake in LLP by Persons resident outside India (other than NRIs & OCIs investing on a non- repatriation basis), the Foreign Direct Investment (FDI) compliances shall have to be undertaken by the LLP in which such investment is made.



Minimum number of Partners [Section 6]

- (i) Every LLP shall have at least two partners.
- (ii) If at any time the number of partners of a LLP is reduced below two and the LLP carries on business for more than six months while the number is so reduced, the person, who is the only partner of the LLP during the time that it so carries on business after those six months and has the knowledge of the fact that it is carrying on business with him alone, shall be liable personally for the obligations of the LLP incurred during that period.

Designated Partners [Section 7]

- (1) Every LLP shall have at least two designated partners who are individuals and at least one of them shall be a resident in India.
Provided, if in LLP, all the partners are bodies corporate or in which one or more partners are individuals and bodies corporate, at least two individuals who are partners of such LLP or nominees of such bodies corporate shall act as designated partners.

Example 3: A LLP has three partners, one individual i.e. Mr. X and two bodies corporates viz. M/s XYZ Ltd and M/s ABC Ltd. In this case Mr. X and one nominee of any body's corporate shall be designated partners.

Example 4: A LLP by the name SMY LLP has three partners namely 1. SI Limited, 2. MIS Limited, 3. YI Private Limited. As there is no individual as partner in LLP, nominees of any two said body corporates shall act as designated partners.

Resident in India: For the purposes of this section, the term “resident in India” means a person who has stayed in India for a period of not less than one hundred twenty days during the financial year.

Example 5: There is a LLP by the name Indian Helicopters LLP having 5 partners namely Mr. A (Non Resident), Mr. B (Non Resident) Ms. C (resident), Ms. D (resident) and Ms. E (resident). In this case, at least 2 should be named as Designated Partner out of which 1 should be resident. Hence, if Mr. A and Mr. B are designated then it will not serve the purpose. One of the designated partners should be there out of Ms. C, Ms. D and Ms. E.

- 2.
 - (i) If the incorporation document
 - (a) specifies who are to be designated partners, such persons shall be designated partners on incorporation; or
 - (b) states that each of the partners from time to time of LLP is to be designated partners, every partner shall be a designated partners;
 - (ii) any partner may become a designated partner by and in accordance with the LLP Agreement and a partner may cease to be a designated partners in accordance with LLP agreement.
- 3. An individual shall not become a designated partner in any LLP unless he has given his prior consent to act as such to the LLP in such form and manner as may be prescribed.
- 4. Every LLP shall file with the Registrar the particulars of every individual who has given



his consent to act as designated partners in such form and manner as may be prescribed within 30 days of his appointment.

5. An individual eligible to be a designated partner shall satisfy such conditions and requirements as may be prescribed.
6. Every designated partner of the LLP shall obtain a Designated Partner Identification Number (DPIN) from the Central Government and the provisions of sections 153 to 159 of the Companies Act, 2013 shall apply mutatis mutandis for the said purpose.

Liabilities of Designated Partners [Section 8]

Unless expressly provided otherwise in this Act, a designated partner shall be—

- (a) responsible for the doing of all acts, matters and things as are required to be done by the limited liability partnership in respect of compliance of the provisions of this Act including filing of any document, return, statement and the like report pursuant to the provisions of this Act and as may be specified in the limited liability partnership agreement; and
- (b) liable to all penalties imposed on the limited liability partnership for any contravention of those provisions.

Changes in Designated Partners [Section 9]

A limited liability partnership may appoint a designated partner within 30 days of a vacancy arising for any reason and provisions of sub-section (4) and sub-section (5) of section 7 shall apply in respect of such new designated partner, provided that if no designated partner is appointed, or if at any time there is only one designated partner, each partner shall be deemed to be a designated partner.

Punishment for contravention of sections 7 and 9 [Section 10]

1. If the LLP contravenes the provisions of sub-section (1) of section 7 (meaning that the number of designated partners are less than two or none of the designated partner is a resident in India), the LLP and its every partner shall be liable to a penalty of ₹10,000 and in case of continuing contravention, with further penalty of ₹100 per day subject to maximum ₹1,00,000 for LLP and ₹50,000 for every partner of such LLP.
2. If the LLP contravenes the provisions of sub-section (4) of section 7 (failure to file the consent of appointment of designated partner within 30 days of his appointment), the LLP and its every designated partner shall be liable to a penalty of ₹5,000 and in case of continuing contravention, with further penalty of ₹100 per day subject to maximum ₹50,000 for LLP and ₹25,000 for every designated partner.
3. If the LLP contravenes the provisions of sub-section (5) of section 7 or section 9, the LLP and its every partner shall be liable to a penalty of ₹10,000 and in case of continuing contravention, with further penalty of ₹100 per day subject to maximum ₹1,00,000 for LLP and ₹50,000 for every partner of such LLP.



INCORPORATION OF LLP

Incorporation Document [Section 11]

The most important document needed for registration is the incorporation document.

(1) For a LLP to be incorporated:

- (a) two or more persons associated for carrying on a lawful business with a view to earn profit shall subscribe their names to an incorporation document;
- (b) the incorporation document shall be filed in such manner and with such fees, as may be prescribed with the Registrar of the State in which the registered office of the LLP is to be situated (Incorporation documents are now processed electronically by Registrar, Central Registration Centre since 2nd October 2018); and

(c) Statement to be filed:

- there shall be filed along with the incorporation document, a statement in the prescribed form:
 - o made by either an advocate, or a Company Secretary or a Chartered Accountant or a Cost Accountant, who is engaged in the formation of the LLP and
 - o by any one who subscribed his name to the incorporation document,
 - o that all the requirements of this Act and the rules made thereunder have been complied with,
 - o in respect of incorporation and matters precedent and incidental thereto.

(2) The incorporation document shall—

- (a) be in a form as may be prescribed;
- (b) state the name of the LLP;
- (c) state the proposed business of the LLP;
- (d) state the address of the registered office of the LLP;
- (e) state the name and address of each of the persons who are to be partners of the LLP on incorporation;
- (f) state the name and address of the persons who are to be designated partners of the LLP on incorporation;
- (g) contain such other information concerning the proposed LLP as may be prescribed.

(3) If a person makes a statement as discussed above which he—

- (a) knows to be false; or
 - (b) does not believe to be true,
- shall be punishable (Penalty for false declaration)
- with imprisonment for a term which may extend to 2 years and
 - with fine which shall not be less than ₹10,000 but which may extend to ₹5 Lakhs.

Incorporation by Registration [Section 12]

(1) When the requirements imposed by clauses (b) and (c) of sub-section (1) of section 11 have been complied with, the Registrar shall retain the incorporation document and, unless the requirement imposed by clause (a) of that sub-section has not been complied with, he shall, within a period of 14 days—

- (a) register the incorporation document; and
- (b) give a certificate that the LLP is incorporated by the name specified therein.



- (2) The Registrar may accept the statement delivered under clause (c) of sub-section (1) of section 11 as sufficient evidence that the requirement imposed by clause (a) of that sub-section has been complied with.
- (3) The certificate issued under clause (b) of sub-section (1) shall be signed by the Registrar and authenticated by his official seal.
- (4) The certificate shall be conclusive evidence that the LLP is incorporated by the name specified therein.

Registered Office of LLP and Change therein [Section 13]

- (1) Every LLP shall have a registered office to which all communications and notices may be addressed and where they shall be received.
- (2) A document may be served on a LLP or a partner or designated partner thereof by sending it by post under a certificate of posting or by registered post or by any other manner, as may be prescribed, at the registered office and any other address specifically declared by the LLP for the purpose in such form and manner as may be prescribed.
- (3) A LLP may change the place of its registered office and file the notice of such change with the Registrar in such form and manner and subject to such conditions as may be prescribed and any such change shall take effect only upon such filing.
- (4) If the LLP contravenes any provisions of this section, the LLP and its every partner shall be punishable with penalty of ₹ 500 per day subject to maximum ₹ 50,000.

Effect of registration [Section 14]

On Registration, LLP shall by its name, be capable of -

- i. Suing and being sued;
- ii. Acquiring, owning, holding and developing or disposing of property, whether movable or immovable, tangible or intangible;
- iii. Having a common seal, if it decides to have one; and
- iv. Doing and suffering other acts and things as bodies corporate may lawfully do and suffer.

Name [Section 15]

- (1) Every limited liability partnership shall have either the words “limited liability partnership” or the acronym “LLP” as the last words of its name.
- (2) No LLP shall be registered by a name which, in the opinion of the Central Government is—
 - (a) undesirable; or
 - (b) identical or too nearly resembles to that of any other LLP or a company or a registered trademark of any other person under the Trade Marks Act, 1999.

Reservation of name [Section 16]

- (1) A person may apply in such form and manner and accompanied by such fee as may be prescribed to the Registrar for the reservation of a name set out in the application as—
 - (a) the name of a proposed LLP; or
 - (b) the name to which a LLP proposes to change its name.
- (2) Upon receipt of an application under sub-section (1) and on payment of the prescribed fee, the Registrar may, if he is satisfied, subject to the rules prescribed by the Central

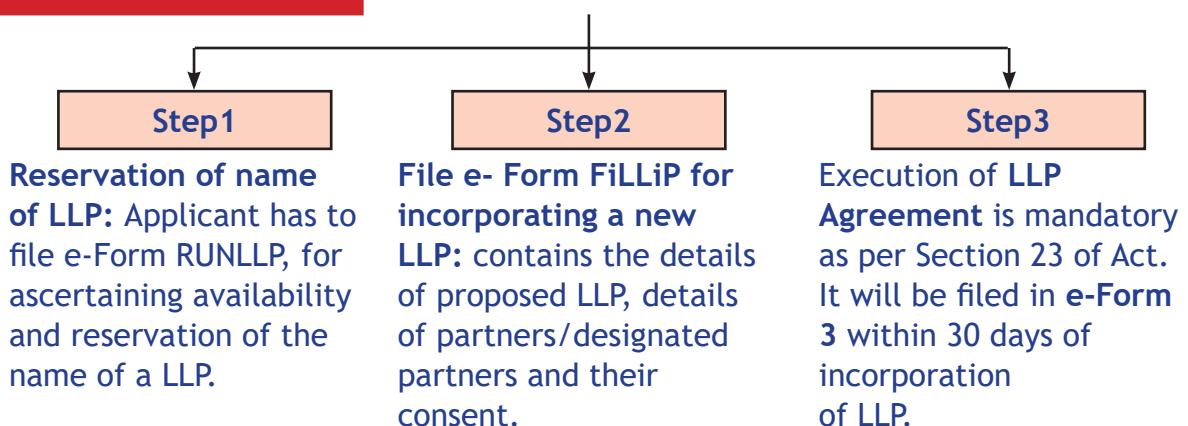


Government in the matter, that the name to be reserved is not one which may be rejected on any ground referred to in sub-section (2) of section 15, reserve the name for a period of 3 months from the date of intimation by the Registrar.

Rectification of name of LLP [Section 17]

1. Notwithstanding anything contained in sections 15 and 16, if through inadvertence, or otherwise, the LLP, on its first registration or on its registration by new name, is registered by a name which is identical with or too nearly resembles to-
 - (a) that of any other LLP or a company; or
 - (b) a registered trade mark of a proprietor under the Trade Marks Act, 1999as likely to be mistaken, then on an application of such LLP or proprietor referred to in clauses (a) and (b) respectively or a company, the Central Government may direct such LLP to change its name or new name within a period of 3 months from the date of issue of such direction,
Provided that an application of the proprietor of the registered trade marks shall be maintainable within a period of 3 years from the date of incorporation or registration or change of name of the LLP under this Act.
2. Where an LLP changes its name or obtains new name, it shall within a period of 15 days from the date of such change, give notice of the change to Registrar along with the order of the Central Government, who shall carry out necessary changes in the certificate of incorporation and within 30 days of such change in the certificate of incorporation, such LLP shall change its name in the LLP agreement.
3. If the LLP is in default in complying with any direction given under sub- section (1), the Central Government shall allot a new name to the LLP and the Registrar shall enter the new name in the register of LLP in place of the old name and issue a fresh certificate of incorporation with new name.
Provided that nothing contained in this sub-section shall prevent a LLP from subsequently changing its name.

STEPS TO INCORPORATE LLP





PARTNERS AND THEIR RELATIONS

Eligibility to be partners [Section 22]

On the incorporation of a LLP, the persons who subscribed their names to the incorporation document shall be its partners and any other person may become a partner of the LLP by and in accordance with the LLP agreement.

Relationship of partners [Section 23]

- (1) Save as otherwise provided by this Act, the mutual rights and duties of the partners of a LLP, and the mutual rights and duties of a LLP and its partners, shall be governed by the LLP agreement between the partners, or between the LLP and its partners.
- (2) The LLP agreement and any changes, if any, made therein shall be filed with the Registrar in such form, manner and accompanied by such fees as may be prescribed.
- (3) An agreement in writing made before the incorporation of a LLP between the persons who subscribe their names to the incorporation document may impose obligations on the LLP, provided such agreement is ratified by all the partners after the incorporation of the LLP.
- (4) In the absence of agreement as to any matter, the mutual rights and duties of the partners and the mutual rights and duties of the LLP and the partners shall be determined by the provisions relating to that matter as are set-out in the First Schedule.

Cessation of partnership interest [Section 24]

- (1) A person may cease to be a partner of a LLP in accordance with an agreement with the other partners or, in the absence of agreement with the other partners as to cessation of being a partner, by giving a notice in writing of not less than 30 days to the other partners of his intention to resign as partner.
- (2) A person shall cease to be a partner of a LLP—
 - (a) on his death or dissolution of the LLP; or
 - (b) if he is declared to be of unsound mind by a competent court; or
 - (c) if he has applied to be adjudged as an insolvent or declared as an insolvent.
- (3) Where a person has ceased to be a partner of a LLP (hereinafter referred to as “former partner”), the former partner is to be regarded (in relation to any person dealing with the LLP) as still being a partner of the LLP unless—
 - (a) the person has notice that the former partner has ceased to be a partner of the LLP; or
 - (b) notice that the former partner has ceased to be a partner of the LLP has been delivered to the Registrar.
- (4) The cessation of a partner from the LLP does not by itself discharge the partner from any obligation to the LLP or to the other partners or to any other person which he incurred while being a partner.
- (5) Where a partner of a LLP ceases to be a partner, unless otherwise provided in the LLP agreement, the former partner or a person entitled to his share in consequence of the death or insolvency of the former partner, shall be entitled to receive from the LLP—
 - (a) an amount equal to the capital contribution of the former partner actually made to the LLP; and
 - (b) his right to share in the accumulated profits of the LLP, after the deduction of

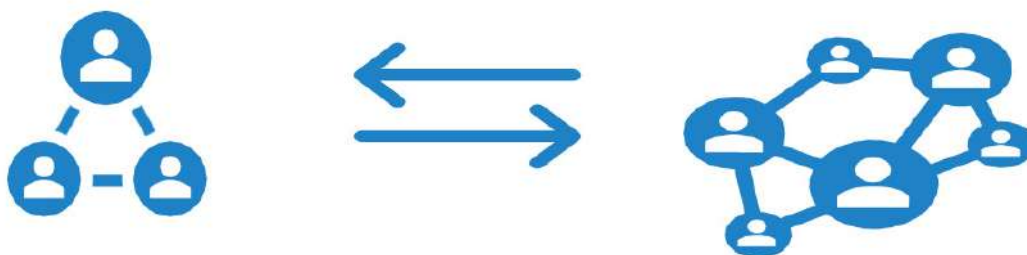


accumulated losses of the LLP, determined as at the date the former partner ceased to be a partner.

- (6) A former partner or a person entitled to his share in consequence of the death or insolvency of the former partner shall not have any right to interfere in the management of the LLP.

Registration of changes in partners [Section 25]

- (1) Every partner shall inform the LLP of any change in his name or address within a period of 15 days of such change.



- (2) A LLP shall—
- (a) where a person becomes or ceases to be a partner, file a notice with the Registrar within 30 days from the date he becomes or ceases to be a partner; and
 - (b) where there is any change in the name or address of a partner, file a notice with the Registrar within 30 days of such change.
- (3) A notice filed with the Registrar under sub-section (2)—
- (a) shall be in such form and accompanied by such fees as may be prescribed;
 - (b) shall be signed by the designated partner of the LLP and authenticated in a manner as may be prescribed; and
 - (c) if it relates to an incoming partner, shall contain a statement by such partner that he consents to becoming a partner, signed by him and authenticated in the manner as may be prescribed.
- (4) If the LLP contravenes the provisions of sub-section (2), the LLP and every designated partner of the LLP shall be 'liable to penalty of ₹10,000.
- (5) If any partner contravenes the provisions of sub-section (1), such partner shall be 'liable to penalty of ₹10,000.
- (6) Any person who ceases to be a partner of a LLP may himself file with the Registrar the notice referred to in sub-section (3) if he has reasonable cause to believe that the LLP may not file the notice with the Registrar and in case of any such notice filed by a partner, the Registrar shall obtain a confirmation to this effect from the LLP unless the LLP has also filed such notice.
- However, where no confirmation is given by the LLP within 15 days, the registrar shall register the notice made by a person ceasing to be a partner under this section.



EXTENT AND LIMITATION OF LIABILITY OF LLP AND PARTNER

Partner as agent [Section 26]:

Every partner of a LLP is, for the purpose of the business of the LLP, the agent of the LLP, but not of other partners.

Extent of liability of LLP [Section 27]

- (1) A LLP is not bound by anything done by a partner in dealing with a person if—
 - (a) the partner in fact has no authority to act for the LLP in doing a particular act; and
 - (b) the person knows that he has no authority or does not know or believe him to be a partner of the LLP.
- (2) The LLP is liable if a partner of a LLP is liable to any person as a result of a wrongful act or omission on his part in the course of the business of the LLP or with its authority.
- (3) An obligation of the LLP whether arising in contract or otherwise, shall be solely the obligation of the LLP.
- (4) The liabilities of the LLP shall be met out of the property of the LLP.

Extent of liability of partner [Section 28]

- (1) A partner is not personally liable, directly or indirectly for an obligation referred to in sub-section (3) of section 27 solely by reason of being a partner of the LLP.
- (2) The provisions of sub-section (3) of section 27 and sub-section (1) of this section shall not affect the personal liability of a partner for his own wrongful act or omission, but a partner shall not be personally liable for the wrongful act or omission of any other partner of the LLP.

Holding out [Section 29]

- (1) Any person,
 - who by words spoken or written or by conduct,
 - represents himself, or knowingly permits himself to be represented to be a partner in a LLP
 - is liable to any person
 - who has on the faith of any such representation
 - given credit to the LLP, whether the person representing himself or represented to be a partner does or does not know that the representation has reached the person so giving credit.

However,

- where any credit is received by the LLP as a result of such representation,
 - the LLP shall,
 - without prejudice to the liability of the person so representing himself or represented to be a partner,
 - be liable to the extent of credit received by it or any financial benefit derived thereon.
- (2) Where after a partner's death the business is continued in the same LLP name, the continued use of that name or of the deceased partner's name as a part thereof shall not by itself make his legal representative or his estate liable for any act of the LLP done after his death.



Unlimited liability in case of fraud [Section 30]

- (1) In case of fraud:
 - In the event of an act carried out by a LLP, or any of its partners,
 - with intent to defraud creditors of the LLP or any other person, or for any fraudulent purpose,
 - the liability of the LLP and partners who acted with intent to defraud creditors or for any fraudulent purpose
 - shall be unlimited for all or any of the debts or other liabilities of the LLP.

However, in case any such act is carried out by a partner, the LLP is liable to the same extent as the partner unless it is established by the LLP that such act was without the knowledge or the authority of the LLP.
- (2) Where any business is carried on with such intent or for such purpose as mentioned in sub-section (1), every person who was knowingly a party to the carrying on of the business in the manner aforesaid shall be punishable with
 - imprisonment for a term which may extend to five years and
 - with fine which shall not be less than ₹ 50,000 but which may extend to ₹ 5 Lakhs.
- (3) Where a LLP or any partner or designated partner or employee of such LLP has conducted the affairs of the LLP in a fraudulent manner, then without prejudice to any criminal proceedings which may arise under any law for the time being in force, the LLP and any such partner or designated partner or employee shall be liable to pay compensation to any person who has suffered any loss or damage by reason of such conduct.

However, such LLP shall not be liable if any such partner or designated partner or employee has acted fraudulently without knowledge of the LLP.

Whistle blowing [Section 31]

- (1) The Court or Tribunal may reduce or waive any penalty leviable against any partner or employee of a LLP, if it is satisfied that—
 - such partner or employee of an LLP has provided useful information during investigation of such LLP; or
 - when any information given by any partner or employee (whether or not during investigation) leads to LLP or any partner or employee of such LLP being convicted under this Act or any other Act.
- (2) No partner or employee of any LLP may be discharged, demoted, suspended, threatened, harassed or in any other manner discriminated against the terms and conditions of his LLP or employment merely because of his providing information or causing information to be provided pursuant to sub-section (1).

CONTRIBUTIONS

Form of contribution [Section 32]

- (1) A contribution of a partner may consist of tangible, movable or immovable or intangible property or other benefit to the limited liability partnership, including money, promissory notes, other agreements to contribute cash or property, and contracts for services performed or to be performed.
- (2) The monetary value of contribution of each partner shall be accounted for and disclosed in the accounts of the limited liability partnership in the manner as may be prescribed.



Obligation to contribute [Section 33]

- (1) The obligation of a partner to contribute money or other property or other benefit or to perform services for a limited liability partnership shall be as per the limited liability partnership agreement.
- (2) A creditor of a limited liability partnership, which extends credit or otherwise acts in reliance on an obligation described in that agreement, without notice of any compromise between partners, may enforce the original obligation against such partner.

FINANCIAL DISCLOSURES

1. Maintain proper books of account in prescribed manner.
2. File Statement of Account and Solvency within 6 months from end of each F.Y.
3. Statement of Account and Solvency shall be filed with the Registrar every year in prescribed form and manner and with prescribed fees.
4. Audit of Accounts. Central Government may exempt.

Maintenance of books of account, other records and audit, etc. [Section 34]

- (1) Proper Books of account:
 - The LLP shall maintain such proper books of account as may be prescribed
 - relating to its affairs for each year of its existence
 - on cash basis or accrual basis and
 - according to double entry system of accounting and
 - shall maintain the same at its registered office
 - for such period as may be prescribed.
- (2) Statement of Account and Solvency:
 - Every LLP shall,
 - within a period of 6 months from the end of each financial year,
 - prepare a Statement of Account and Solvency
 - for the said financial year as at the last day of the said financial year
 - in such form as may be prescribed, and
 - such statement shall be signed by the designated partners of the LLP.
- (3) Every LLP shall file within the prescribed time, the Statement of Account and Solvency prepared pursuant to sub-section (2) with the Registrar every year in such form and manner and accompanied by such fees as may be prescribed.
- (4) The accounts of LLP shall be audited in accordance with such rules as may be prescribed. However, the Central Government may, by notification in the Official Gazette, exempt any class or classes of LLP from the requirements of this sub-section.
- (5) Penalty for non-compliance of provisions of sub-section 3-
LLP - ₹100 per day subject to maximum ₹1,00,000
Every Designated Partners - ₹100 per day subject to maximum ₹50,000.
- (6) Penalty for non-compliance of provisions of sub-section 1, 2 & 4 - LLP - not less than ₹25,000 which may extend to ₹ 5 Lakhs.
Every designated partner -not less than ₹10,000 which may extend to ₹1 Lakh.



Accounting and auditing standards [Section 34A]

Central Government may, in consultation with the National Financial Reporting Authority constituted under Section 132 of the Companies Act 2013 –

- (a) Prescribe the standards of accounting; and
- (b) Prescribe the standards of auditing, as recommended by ICAI.

Annual Return [Section 35]

- (1) Every LLP shall file an annual return duly authenticated with the Registrar within 60 days of closure of its financial year in such form and manner and accompanied by such fee as may be prescribed.

Example 6: Suppose, the financial year of a LLP closes on 31st March, 2022 then the LLP has to file an annual return with the Registrar latest by 30th May, 2022.

Note

The LLP contra-distinct from Partnership Act, 1932 has prescribed the filing of Annual Return in accordance with Companies Act, 2013. This is a new feature of the LLPs.

- (2) Penalty for non-filing of annual return -
LLP - ₹100 per day subject to maximum ₹1,00,000
Every Designated Partners - ₹100 per day subject to maximum ₹50,000

INSPECTION OF DOCUMENTS KEPT BY REGISTRAR [SECTION 36]

The incorporation document, name of partners and changes, if any, made therein, Statement of Account and Solvency and annual return filed by each LLP with the Registrar shall be available for inspection by any person in such manner and on payment of such fee as may be prescribed.

PENALTY FOR FALSE STATEMENT [SECTION 37]

If in any return, statement or other document required by or for the purposes of any of the provisions of this Act, any person makes a statement—

- (a) which is false in any material particular, knowing it to be false; or
 - (b) which omits any material fact knowing it to be material,
- he shall, save as otherwise expressly provided in this Act, be punishable with imprisonment for a term which may extend to 2 years, and shall also be liable to fine which may extend to 5 lakh rupees but which shall not be less than 1 lakh rupees.

POWER OF REGISTRAR TO OBTAIN INFORMATION [SECTION 38]

- (1) In order to obtain such information as the Registrar may consider necessary for the purposes of carrying out the provisions of this Act, the Registrar may require any person including any present or former partner or designated partner or employee of a limited liability partnership to answer any question or make any declaration or supply any details or particulars in writing to him within a reasonable period.
- (2) In case any person referred to in sub-section (1) does not answer such question or make such declaration or supply such details or particulars asked for by the Registrar within a



reasonable time or time given by the Registrar or when the Registrar is not satisfied with the reply or declaration or details or particulars provided by such person, the Registrar shall have power to summon that person to appear before him or an inspector or any other public officer whom the Registrar may designate, to answer any such question or make such declaration or supply such details, as the case may be.

- (3) Any person who, without lawful excuse, fails to comply with any summons or requisition of the Registrar under this section shall be punishable with fine which shall not be less than two thousand rupees but which may extend to twenty-five thousand rupees.

COMPOUNDING OF OFFENCES [SECTION 39]

- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, the Regional Director or any other officer not below the rank of Regional Director authorised by the Central Government may compound any offence under this Act which is punishable with fine only, by collecting from a person reasonably suspected of having committed the offence, a sum which may extend to the amount of the maximum fine provided for the offence but shall not be lower than the minimum amount provided for the offence.

- (2) Nothing contained in sub-section (1) shall apply to an offence committed by a limited liability partnership or its partner or its designated partner within a period of three years from the date on which similar offence committed by it or him was compounded under this section.

Explanation.—For the removal of doubts, it is hereby clarified that any second or subsequent offence committed after the expiry of the period of three years from the date on which the offence was previously compounded, shall be deemed to be the first offence.

- (3) Every application for the compounding of an offence shall be made to the Registrar who shall forward the same, together with his comments thereon, to the Regional Director or any other officer not below the rank of Regional Director authorised by the Central Government, as the case may be.
- (4) Where any offence is compounded under this section, whether before or after the institution of any prosecution, intimation thereof shall be given to the Registrar within a period of seven days from the date on which the offence is so compounded.
- (5) Where any offence is compounded before the institution of any prosecution, no prosecution shall be instituted in relation to such offence.
- (6) Where the compounding of any offence is made after the institution of any prosecution, such compounding shall be brought by the Registrar in writing, to the notice of the court in which prosecution is pending and on such notice of the compounding of the offence being given, the offender in relation to which the offence is so compounded shall be discharged.
- (7) The Regional Director or any other officer not below the rank of Regional Director authorised by the Central Government, while dealing with the proposal for compounding of an offence may, by an order, direct any partner, designated partner or other employee of the LLP to file or register, or on payment of fee or additional fee as required to be paid under this Act, such return, account or other document within such time as may be specified in the order.
- (8) Notwithstanding anything contained in this section, if any partner or designated partner



or other employee of the LLP who fails to comply with any order made by the Regional Director or any other officer not below the rank of Regional Director authorised by the Central Government, under sub- section (7), the maximum amount of fine for the offence, which was under consideration Regional Director or such authorised officer for compounding under this section shall be twice the amount provided in the corresponding section in which punishment for such offence is provided.

ASSIGNMENT AND TRANSFER OF PARTNERSHIP RIGHTS

PARTNER'S TRANSFERABLE INTEREST [SECTION 42]

- (1) The rights of a partner to a share of the profits and losses of the limited liability partnership and to receive distributions in accordance with the limited liability partnership agreement are transferable either wholly or in part.
- (2) The transfer of any right by any partner pursuant to sub-section (1) does not by itself cause the disassociation of the partner or a dissolution and winding up of the limited liability partnership.
- (3) The transfer of right pursuant to this section does not, by itself, entitle the transferee or assignee to participate in the management or conduct of the activities of the limited liability partnership, or access information concerning the transactions of the limited liability partnership.

CONVERSION INTO LLP

Conversion from firm into LLP [Section 55]: A firm may convert into an LLP in accordance with the provisions of this Chapter and the Second Schedule.

Conversion from private company into LLP [Section 56]: A private company may convert into an LLP in accordance with the provisions of this Chapter and the Third Schedule.

Conversion from unlisted public company into LLP [Section 57]: An unlisted public company may convert into an LLP in accordance with the provisions of this Chapter and the Fourth Schedule.

Registration and effect of conversion [Section 58]

- (i) The Registrar, on satisfying that a firm, private company or an unlisted public company, as the case may be, has complied with the respective Schedules, provisions of this Act and the rules made thereunder, register the documents submitted under such schedules and issue a certificate of registration in such form as the Registrar may determine stating that the LLP is, on and from the date specified in the certificate, registered under this Act.
- (ii) The LLP shall, within 15 days of the date of registration, inform the concerned Registrar of Firms or Registrar of Companies, as the case may be, with which it was registered under the provisions of the Indian Partnership Act, 1932 or the Companies Act, 1956 (Now Companies Act, 2013) as the case may be, about the conversion and of the particulars of the LLP in such form and manner as may be prescribed.
- (iii) Upon such conversion, the partners of the firm, the shareholders of private company or unlisted public company, as the case may be, the LLP to which such firm or such company has converted, and the partners of the LLP shall be bound by the respective Schedules, as the case may be, applicable to them.



- (iv) Upon such conversion, on and from the date of certificate of registration, the effects of the conversion shall be such as specified in the respective schedules, as the case may be.

Effect of Registration: Notwithstanding anything contained in any other law for the time being in force, on and from the date of registration specified in the certificate of registration issued under the respective Schedule, as the case may be,—

- (a) there shall be a LLP by the name specified in the certificate of registration registered under this Act;
- (b) all tangible (movable or immovable) and intangible property vested in the firm or the company, as the case may be, all assets, interests, rights, privileges, liabilities, obligations relating to the firm or the company, as the case may be, and the whole of the undertaking of the firm or the company, as the case may be, shall be transferred to and shall vest in the limited liability partnership without further assurance, act or deed; and
- (c) the firm or the company, as the case may be, shall be deemed to be dissolved and removed from the records of the Registrar of Firms or Registrar of Companies, as the case may be.

FOREIGN LLP

Foreign limited liability partnerships [Section 59]

The Central Government may make rules for provisions in relation to establishment of place of business by foreign LLP within India and carrying on their business therein by applying or incorporating, with such modifications, as appear appropriate, the provisions of the Companies Act, 2013 or such regulatory mechanism with such composition as may be prescribed.

COMPROMISE, ARRANGEMENT OR RECONSTRUCTION OF LIMITED LIABILITY PARTNERSHIPS

Compromise or arrangement of limited liability partnerships [Section 60]

- (1) Where a compromise or arrangement is proposed—
 - (a) between a limited liability partnership and its creditors; or
 - (b) between a limited liability partnership and its partners,the Tribunal may, on the application of the limited liability partnership or of any creditor or partner of the limited liability partnership, or, in the case of a limited liability partnership which is being wound up, of the liquidator, order a meeting of the creditors or of the partners, as the case may be, to be called, held and conducted in such manner as may be prescribed or as the Tribunal directs.
- (2) If a majority representing three-fourths in value of the creditors, or partners, as the case may be, at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Tribunal, by order be binding on all the creditors or all the partners, as the case may be, and also on the limited liability partnership, or in the case of a limited liability partnership which is being wound up, on the liquidator and contributories of the limited liability partnership:
Provided that no order sanctioning any compromise or arrangement shall be made by the Tribunal unless the Tribunal is satisfied that the limited liability partnership or any other person by whom an application has been made under sub-section (1) has disclosed to the Tribunal, by affidavit or otherwise, all material facts relating to the limited liability



partnership, including the latest financial position of the limited liability partnership and the pendency of any investigation proceedings in relation to the limited liability partnership.

- (3) An order made by the Tribunal under sub-section (2) shall be filed by the limited liability partnership with the Registrar within thirty days after making such an order and shall have effect only after it is so filed.
- (4) If default is made in complying with the provisions of sub-section (3), the LLP and its every designated partner shall be 'liable to a penalty of ₹10,000 and in case of continuing default, with further penalty of ₹100 for each day after the first during which such default continues, subject to maximum ₹1,00,000 for LLP and ₹50,000 for every designated partner'.
- (5) The Tribunal may, at any time after an application has been made to it under this section, stay the commencement or continuation of any suit or proceeding against the limited liability partnership on such terms as the Tribunal thinks fit, until the application is finally disposed of.

Power of Tribunal to enforce compromise or arrangement (Section 61)

- (1) Where the Tribunal makes an order under section 60 sanctioning a compromise or an arrangement in respect of a limited liability partnership, it—
 - (a) shall have power to supervise the carrying out of the compromise or an arrangement; and
 - (b) may, at the time of making such order or at any time thereafter, give such directions in regard to any matter or make such modifications in the compromise or arrangement as it may consider necessary for the proper working of the compromise or arrangement.
- (2) If the Tribunal aforesaid is satisfied that a compromise or an arrangement sanctioned under section 60 cannot be worked satisfactorily with or without modifications, it may, either on its own motion or on the application of any person interested in the affairs of the limited liability partnership, make an order for winding up the limited liability partnership, and such an order shall be deemed to be an order made under section 64 of this Act.

Provisions for facilitating reconstruction or amalgamation of limited liability partnerships [Section 62]

- (1) Where an application is made to the Tribunal under section 60 for sanctioning of a compromise or arrangement proposed between a limited liability partnership and any such persons as are mentioned in that section, and it is shown to the Tribunal that—
 - (a) compromise or arrangement has been proposed for the purposes of, or in connection with, a scheme for the reconstruction of any limited liability partnership or limited liability partnerships, or the amalgamation of any two or more limited liability partnerships; and
 - (b) under the scheme the whole or any part of the undertaking, property or liabilities of any limited liability partnership concerned in the scheme (in this section referred to as a "transferor limited liability partnership") is to be transferred to another limited liability partnership (in this section referred to as the "transferee



limited liability partnership”), the Tribunal may, either by the order sanctioning the compromise or arrangement or by a subsequent order, make provisions for all or any of the following matters, namely:—

- (i) the transfer to the transferee limited liability partnership of the whole or any part of the undertaking, property or liabilities of any transferor limited liability partnership;
- (ii) the continuation by or against the transferee limited liability partnership of any legal proceedings pending by or against any transferor limited liability partnership;
- (iii) the dissolution, without winding up, of any transferor limited liability partnership;
- (iv) the provision to be made for any person who, within such time and in such manner as the Tribunal directs, dissent from the compromise or arrangement; and
- (v) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out:

Provided that no compromise or arrangement proposed for the purposes of, or in connection with, a scheme for the amalgamation of a limited liability partnership, which is being wound up, with any other limited liability partnership or limited liability partnerships, shall be sanctioned by the Tribunal unless the Tribunal has received a report from the Registrar that the affairs of the limited liability partnership have not been conducted in a manner prejudicial to the interests of its partners or to public interest:

Provided further that no order for the dissolution of any transferor limited liability partnership under clause (iii) shall be made by the Tribunal unless the Official Liquidator has, on scrutiny of the books and papers of the limited liability partnership, made a report to the Tribunal that the affairs of the limited liability partnership have not been conducted in a manner prejudicial to the interests of its partners or to public interest.

- (2) Where an order under this section provides for the transfer of any property or liabilities, then, by virtue of the order, that property shall be transferred to and vest in, and those liabilities shall be transferred to and become the liabilities of, the transferee limited liability partnership; and in the case of any property, if the order so directs, freed from any charge which is, by virtue of the compromise or arrangement, to cease to have effect.
- (3) Within thirty days after the making of an order under this section, every limited liability partnership in relation to which the order is made shall cause a certified copy thereof to be filed with the Registrar for registration.
- (4) If default is made in complying with the provisions of sub-section (3), the LLP and its every designated partner shall be ‘liable to a penalty of ₹10,000 and in case of continuing contravention, with further penalty of ₹100 for each day after the first during which such default continues, subject to maximum ₹1,00,000 for LLP and ₹50,000 for every designated partner’.

Explanation: (i) In this section “property” includes property, rights and powers of every description; and “liabilities” includes duties of every description.

- (ii) a LLP shall not be amalgamated with a company.



WINDING UP AND DISSOLUTION

Winding up and dissolution [Section 63]: The winding up of a LLP may be either voluntary or by the Tribunal and LLP, so wound up may be dissolved.

Circumstances in which LLP may be wound up by Tribunal [Section 64]: A LLP may be wound up by the Tribunal:

- (a) if the LLP decides that LLP be wound up by the Tribunal;
- (b) if, for a period of more than six months, the number of partners of the LLP is reduced below two;
- (c) if the LLP has acted against the interests of the sovereignty and integrity of India, the security of the State or public order¹;
- (d) if the LLP has made a default in filing with the Registrar the Statement of Account and Solvency or annual return for any five consecutive financial years; or
- (e) if the Tribunal is of the opinion that it is just and equitable that the LLP be wound up.

Rules for winding up and dissolution [Section 65]: The Central Government may make rules for the provisions in relation to winding up and dissolution of LLP.

MISCELLANEOUS

Business Transactions of Partner with LLP [Section 66]:

A partner may lend money to and transact other business with the LLP and has the same rights and obligations with respect to the loan or other transactions as a person who is not a partner.

Application of the Provisions of the Companies Act [Section 67]

- (1) The Central Government may, by notification in the Official Gazette, direct that any of the provisions of the Companies Act, 1956 specified in the notification—
 - shall apply to any LLP; or
 - shall apply to any LLP with such exception, modification and adaptation, as may be specified, in the notification.
- (2) A copy of every notification proposed to be issued under sub-section (1)
 - shall be laid in draft before each House of Parliament, while it is in session,
 - for a total period of 30 days which may be comprised in one session or in two or more successive sessions, and
 - if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in disapproving the issue of the notification or both Houses agree in making any modification in the notification,
 - the notification shall not be issued or, as the case may be, shall be issued only in such modified form as may be agreed upon by both the Houses.

Payment of Additional Fee [Section 69]

Any document or return required to be registered or filed under this Act with Registrar, if, is not registered or filed in time provided therein, may be registered or filed after that time, on payment of such additional fee as may be prescribed in addition to any fee as is payable for filing of such document or return:

Provided that such document or return shall be filed after the due date of filing, without prejudice to any other action or liability under this Act:

Provided further that a different fee or additional fee may be prescribed for different classes of limited liability partnerships or for different documents or returns required to be filed under this Act or rules made thereunder.



Enhanced Punishment [Section 70]

In case a limited liability partnership or any partner or designated partner of such limited liability partnership commits any offence, the limited liability partnership or any partner or designated partner shall, for the second or subsequent offence, be punishable with imprisonment as provided, but in case of offences for which fine is prescribed either along with or exclusive of imprisonment, with fine which shall be twice the amount of fine for such offence.

DIFFERENCES WITH OTHER FORMS OF ORGANISATION

Distinction between LLP and Partnership Firm: The points of distinction between a limited liability partnership and partnership firm are tabulated as follows:

	Basis	LLP	Partnership firm
1.	Regulating Act	The Limited Liability Partnership Act, 2008	The Indian Partnership Act, 1932.
2.	Body corporate	It is a body corporate.	It is not a body corporate,
3.	Separate legal entity	It is a legal entity separate from its members.	It is a group of persons with no separate legal entity.
4.	Creation	It is created by a legal process called registration under the LLP Act, 2008.	It is created by an agreement between the partners.
5.	Registration	Registration is mandatory. LLP can sue and be sued in its own name.	Registration is voluntary. Only the registered partnership firm can sue the third parties.
6.	Perpetual succession	The death, insanity, retirement or insolvency of the partner(s) does not affect its existence of LLP. Members may join or leave but its existence continues forever.	The death, insanity, retirement or insolvency of the partner(s) may affect its existence. It has no perpetual succession.
7.	Name	Name of the LLP to contain the word limited liability partners (LLP) as suffix.	No guidelines. The partners can have any name as per their choice.
8.	Liability	Liability of each partner limited to the extent to agreed contribution except in case of willful fraud.	Liability of each partner is unlimited. It can be extended up to the personal assets of the partners.
9.	Mutual agency	Each partner can bind the LLP by his own acts but not the other partners.	Each partner can bind the firm as well as other partners by his own acts.
10.	Designated partners	At least two designated partners and at least one of them shall be resident in India.	There is no provision for such partners under the Partnership Act, 1932.
11.	Common seal	It may have its common seal as its official signatures.	There is no such concept in partnership



12.	Legal compliances	Only designated partners are responsible for all the compliances and penalties under this Act.	All partners are responsible for all the compliances and penalties under the Act.
13.	Annual filing of documents	LLP is required to file: (i) Statement of accounts and solvency (to be filed annually) (ii) Annual return with the registration of LLP every year.	Partnership firm is not required to file any annual document with the registrar of firms.
14.	Foreign partnership	Foreign nationals can become a partner in a LLP.	Foreign nationals cannot become a partner in a partnership firm.
15.	Minor as partner	Minor cannot be admitted to the benefits of LLP.	Minor can be admitted to the benefits of the partnership with the prior consent of the existing partners.

DISTINCTION BETWEEN LLP AND LIMITED LIABILITY COMPANY

	Basis	LLP	Limited Liability Company
1.	Regulating Act	The LLP Act, 2008.	The Companies Act, 2013.
2.	Members/ Partners	The persons who contribute to LLP are known as partners of the LLP.	The persons who invest the money in the shares are known as members of the company.
3.	Internal governance structure	The internal governance structure of a LLP is governed by contract agreement between the partners.	The internal governance structure of a company is regulated by statute (i.e., Companies Act, 2013).
4.	Name	Name of the LLP to contain the word “Limited Liability partnership” or “LLP” as suffix.	Name of the public company to contain the word “limited” and Pvt. Co. to contain the word “Private limited” as suffix.
5.	No. of members/ partners	Minimum - 2 members Maximum - No such limit on the members in the Act. The members of the LLP can be individuals/or body corporate through the nominees.	Private company: Minimum - 2 members Maximum 200 members Public company: Minimum - 7 members Maximum - No such limit on the members. Members can be organizations, trusts, another business form or individuals.
6.	Liability of members/ partners	Liability of a partners is limited to the extent of agreed contribution in case of intention is fraud.	Liability of a member is limited to the amount unpaid on the shares held by them.



7.	Management	The business of the company is managed by the partners including the designated partners authorized in the agreement.	The affairs of the company are managed by board of directors elected by the shareholders.
8.	Minimum number of directors/ designated partners	Minimum 2 designated partners	Pvt. Co. - 2 directors Public co. - 3 directors

SUMMARY

- **Applicability:** From 31st March, 2009 (Extends whole of India)
- **Non- Applicability:** The Indian Partnership Act, 1932 to LLPs.
- **Who can be a partner in LLP:** Any individual or body corporate may be a partner in a LLP. But not, person of unsound mind, undischarged insolvent; or who has applied to be adjudicated as an insolvent.
- **Minimum partners:**
 1. Two partners.
 2. If LLP carries on business for more than 6 months with only one partner, he shall be liable personally for the obligations of the LLP incurred during that period.
- **Designated Partners:**
 1. At least two designated partners who are individuals and at least one of them shall be a resident in India.
 2. Resident in India: a person who has stayed in India for a period of not less than 120 days during the immediately preceding one year.
- **Registration of conversion to LLP**
 1. Registrar, on satisfying, will register the documents and issue a certificate of registration.
 2. Information of conversion to Registrar of Firms or Companies by LLP, within 15 days from registration.
 3. Upon such conversion, provisions of LLP will be applicable.
- **Effect of Registration of conversion**
 1. There shall be a LLP by name specified in certificate of registration.
 2. All tangible (movable or immovable) and intangible property of firm or the company, shall vest in LLP 3. Firm or company shall be deemed to be dissolved.



- **Name of LLP:**
 1. Use of words “**limited liability partnership**” or “**LLP**” as the last words of its name.
 2. **No LLP** registration by a name which, **in the opinion of the CG is—**
 - a) undesirable; or
 - b) identical or too nearly resembles to any other partnership firm or LLP or company or a registered trade mark.
- **Change of name of LLP:** If name of registered LLP is **identical or too nearly resembles** to any other partnership firm or LLP or company or a registered trade mark, **CG may direct such LLP to change its name within 3 months.** (On Application)
- Extent & Limitation of Liability of LLP & Partner
- **Partner as agent:** Agent of the LLP, but not of other partners.
- **Liability of LLP:**
 1. LLP not bound by anything done by a partner if Partner has no authority.
 2. Obligation of the LLP shall be solely the obligation of the LLP.
 3. Liabilities of LLP shall be met out of the property of LLP.
- **Liability of partner:**
 1. Partner is not personally liable for obligations of the LLP.
 2. Partner is personally liable for his own wrongful act or omission
- **Unlimited liability in case of Fraud:**
 1. If act carried out by a LLP or partner to defraud creditors, liability of LLP and partners shall be unlimited.
 2. Penalty: imprisonment upto 5 years and fine of ₹50,000 to ₹5 Lakhs.
 3. Defaulted person also liable to pay compensation.



QUESTION & ANSWERS



Descriptive Questions



Question 1

“LLP is an alternative corporate business form that gives the benefits of limited liability of a company and the flexibility of a partnership”. Explain.



Solution:

LLP is an alternative corporate business form that gives the benefits of limited liability of a company and the flexibility of a partnership

Limited Liability: Every partner of a LLP is, for the purpose of the business of LLP, the agent of the LLP, but not of other partners (Section 26 of the LLP Act, 2008). The liability of the partners will be limited to their agreed contribution in the LLP, while the LLP itself will be liable for the full extent of its assets.

Flexibility of a partnership: The LLP allows its members the flexibility of organizing their internal structure as a partnership based on a mutually arrived agreement. The LLP form enables entrepreneurs, professionals and enterprises providing services of any kind or engaged in scientific and technical disciplines, to form commercially efficient vehicles suited to their requirements. Owing to flexibility in its structure and operation, the LLP is a suitable vehicle for small enterprises and for investment by venture capital.



Question 2

Mr. Ankit Sharma wants to form a LLP taking him, his wife Mrs. Archika Sharma and One HUF as partners for that. Whether this LLP can be incorporated under LLP Act, 2008? Explain.



Solution:

Section 5 of Limited Liability Partnership Act, 2008 provides any individual or body corporate may be a partner in an LLP. However, an individual shall not be capable of becoming a partner of a LLP, if—

- (a) he has been found to be of unsound mind by a Court of competent jurisdiction and the finding is in force;
- (b) he is an undischarged insolvent; or
- (c) he has applied to be adjudicated as an insolvent and his application is pending.

Further, Section (2)(1)(e) provides that a Body Corporate it means a company as defined in ‘clause (20) of section 2 of the Companies Act, 2013 and includes—

- (i) an LLP registered under this Act;
- (ii) an LLP incorporated outside India; and
- (iii) a company incorporated outside India, but does not include—
 - (i) a corporation sole;
 - (ii) a co-operative society registered under any law for the time being in force; and
 - (iii) any other body corporate (not being a company as defined in ‘clause (20) of section 2



of the Companies Act, 2013' or a limited liability partnership as defined in this Act), which the Central Government may, by notification in the Official Gazette, specify in this behalf.

Therefore, HUF is not covered in the definition of body corporate and cannot be partner in LLP.



Question 3

There is an LLP by the name Ram Infra Development LLP which has 4 partners namely Mr. Rahul, Mr. Raheem, Mr. Kartar and Mr. Albert. Mr. Rahul and Mr. Albert are non - resident while other two are resident. LLP wants to take Mr. Rahul and Mr. Raheem as Designated Partner. Explain in the light of Limited Liability Partnership Act, 2008 whether LLP can do so?



Solution:

According to Section 7 of LLP Act, 2008 every LLP shall have at least two designated partners who are individuals and at least one of them shall be a resident in India. Further, explanation to the section provides, the term "resident in India" means a person who has stayed in India for a period of not less than one hundred twenty days during the financial year. Hence, in the given problem, besides Mr. Ram and Mr. Raheem, Mr. Albert should also be designated partners.



Question 4

Mr. Mudit is the creditor of Devi Ram Food Circle LLP. He has a claim of ₹10,00,000 against the LLP but the worth of the assets of LLP are only ₹7,00,000. Now Mr. Mudit wants to make the partners of LLP personally liable for the deficiency of ₹3,00,000. Whether by virtue of provisions of Limited Liability Act, 2008, Mr. Mudit can claim the deficiency from the partners of Devi Ram Food Circle LLP?



Solution:

A limited liability partnership is a body corporate formed and incorporated under this Act and is a legal entity separate from that of its partners. The LLP itself will be liable for the full extent of its assets but the liability of the partners will be limited. Creditors of LLP shall be the creditors of LLP alone. In other words, creditors of LLP cannot claim from partners. The liability of the partners will be limited to their agreed contribution in the LLP. Hence the creditors of Devi Ram Food Circle LLP are the creditors of Devi Ram Food Circle LLP only. Partners of LLP are not personally liable towards creditors. Mr. Mudit can not claim his deficiency of ₹ 3,00,000 from the partners of Devi Ram Food Circle LLP.



Question 5

M/s Vardhman Steels LLP was incorporated on 01.09.2022. On 01.01.2023, one partner of a partnership firm named M/s Vardhimaan Steels is registered with Indian Partnership Act, 1932 since 01.01.2000 requested ROC that as the name of LLP is nearly resembles with the name of already registered partnership firm, the name of LLP should be changed. Explain whether M/s Vardhman Steels LLP is liable to change its name under the provisions of Limited Liability Act, 2008?



Solution:

Section 15 of LLP Act, 2008 provides no LLP shall be registered by a name which, in the opinion of the Central Government is—

- (a) undesirable; or
- (b) identical or too nearly resembles to that of any other 'LLP or a company or a registered trade mark of any other person under the Trade Marks Act, 1999'.

Further, section 17 provides, if the name of LLP is identical with or too nearly resembles to—

- (a) that of any other LLP or a company; or
 - (b) a registered trade mark of a proprietor under the Trade Marks Act, 1999
- then on an application of such LLP or proprietor referred to in clauses (a) and (b) respectively or a company, the CG may direct that such LLP to change its name within a period of 3 months from the date of issue of such direction.

Following the above provisions, LLP need not change its name if its name resembles with the name of a partnership firm. These provisions are applicable only in case where name is resembles with LLP, company or a registered trade mark of a proprietor.

Hence, M/s Vardhman Steels LLP need not change its name even it resembles with the name of partnership firm.



Question 6

Kanik, Priyansh, Abhinav and Bhawna were partners in Singh Jain & Associates LLP. Abhinav resigned from the firm w.e.f. 01.11.2022 but this was not informed to ROC by LLP or Abhinav. Whether Abhinav will still be liable for the loss of firm of the transactions entered after 01.11.2022?



Solution:

According to section 24(3), where a person has ceased to be a partner of a LLP (hereinafter referred to as “former partner”), the former partner is to be regarded (in relation to any person dealing with the LLP) as still being a partner of the LLP unless—

- (a) the person has notice that the former partner has ceased to be a partner of the LLP; or
- (b) notice that the former partner has ceased to be a partner of the LLP has been delivered to the Registrar.

Hence, by virtue of the above provisions, as no notice of resignation was given to ROC, Abhinav will still be liable for the loss of firm of the transactions entered after 01.11.2022.

MCQ Based Questions



Question 1

Which of the following cannot be converted into LLP?

- (a) Partnership firm
- (b) Private company
- (c) Listed company
- (d) Unlisted company



Solution:

- (c) Listed company



Question 2

The approved name of LLP shall be valid for a period of ____ from the date of approval:

- (a) 1 Month
- (b) 2 Months
- (c) 3 months
- (d) 6 months



Solution:

- (a) 3 months



Question 3

Name of the Limited Liability Partnership shall be ended by:

- (a) Limited
- (b) Limited Liability partnership or LLP
- (c) Private Limited
- (d) OPC



Solution:

- (b) Limited Liability partnership or LLP



Question 4

Which one of the following statements about limited liability partnerships (LLPs) is incorrect?

- (a) An LLP has a legal personality separate from that of its members.
- (b) The liability of each partner in an LLP is limited.
- (c) Members of an LLP are taxed as partners.
- (d) A listed company can convert to an LLP.



Solution:

- (b) A listed company can convert to an LLP



Question 5

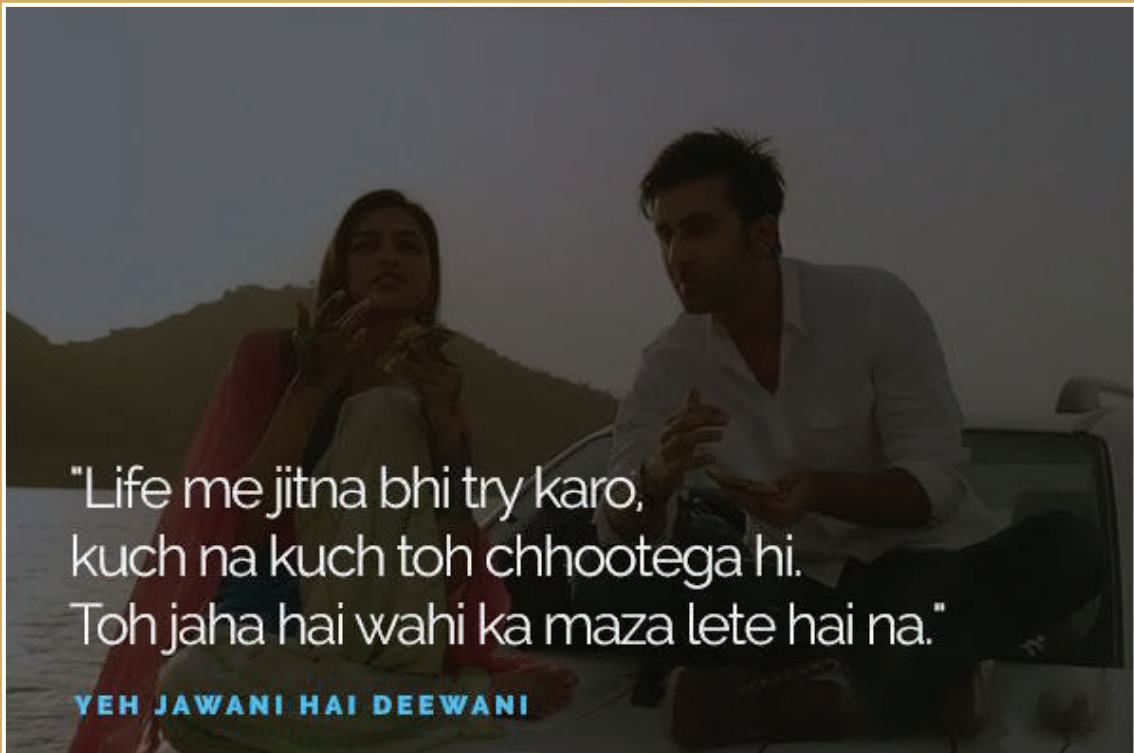
For the purpose of LLP, Resident in India means:

- (a) Person who has stayed in India for a period of not less than 182 days during the current year.
- (b) Person who has stayed in India for a period of not less than 180 days during the immediately preceding one year.
- (c) Person who has stayed in India for a period of not less than 181 days during the immediately preceding one year
- (d) Person who has stayed in India for a period of not less than 120 days during the financial year.



Solution:

- (d) Person who has stayed in India for a period of not less than 120 days during the financial year

A man and a woman are sitting in the back of a car, eating and talking. The woman is on the left, wearing a red jacket, and the man is on the right, wearing a white shirt. They are both looking at each other and smiling. The background shows a hilly landscape under a clear sky. The image is framed by a thick orange border.

"Life me jitna bhi try karo,
kuch na kuch toh chhootega hi.
Toh jaha hai wahi ka maza lete hai na."

YEH JAWANI HAI DEEWANI



02

THE GENERAL CLAUSES ACT, 1897

OBJECT, PURPOSE AND IMPORTANCE OF THE GENERAL CLAUSES ACT

The objects of the Act are several, namely:

- (1) to shorten the language of Central Acts;
- (2) to provide, as far as possible, for uniformity of expression in Central Acts, by giving definitions of a series of terms in common use;
- (3) To state explicitly certain convenient rules for the construction and interpretation of central acts.
- (4) To guard against slips and oversights by importing into every act certain common form clauses, which otherwise ought to be inserted in every central act

The purpose of the General Clauses Act is to place in one single statute different provisions as regards interpretation of words and legal principles which would otherwise have to be specified separately in many different Acts and Regulations. So, whatever General Clauses Act says whether as regards to the meaning of words or as regards legal principles, has to be read in every statute to which it applies.

APPLICATION OF THE GENERAL CLAUSES ACT

The Act not defines any “territorial extent” clause. Its application is primarily with reference to all Central legislation and also to rules and regulations made under a Central Act. It is in a sense a part of every Central Acts or Regulations. If a Central Act is extended to any territory, the General Clauses Act would also deem to be applicable in that territory and would apply in the construction of that Central Act. The Central Acts to which this Act apply are: –

- (a) Acts of the Indian Parliament (central act) along with the rules and regulations made under the central act;
- (b) Acts of the Dominion Legislature passed between the 15th August, 1947 and the 26th January, 1950;
- (c) Acts passed before the commencement of the Constitution by the Governor-General in Council or the Governor-General acting in a legislative capacity. The Act does not define any “territorial extent” clause.

PRELIMINARY [SECTION 1]

“Short title” [Section 1(1)]: This Act may be called the General Clauses Act, 1897.

The General Clauses Act, 1897 contains only short title in the Preliminary part of the Act.

Note: Section 2 of the General Clauses Act, 1897 has been repealed.



DEFINITIONS [SECTION 3]

1. **“Act” [Section 3(2)]:** ‘Act’, used with reference to an offence or a civil wrong, shall include a series of acts, and words which refer to acts done extend also to illegal omissions;
2. **“Affidavit” [Section 3(3)]:** ‘Affidavit’ shall include affirmation and declaration in the case of persons by law allowed to affirm or declare instead of swearing.

There are two important points derived from the above definition:

1. Affirmation and declaration,
2. In case of persons allowed affirming or declaring instead of swearing.

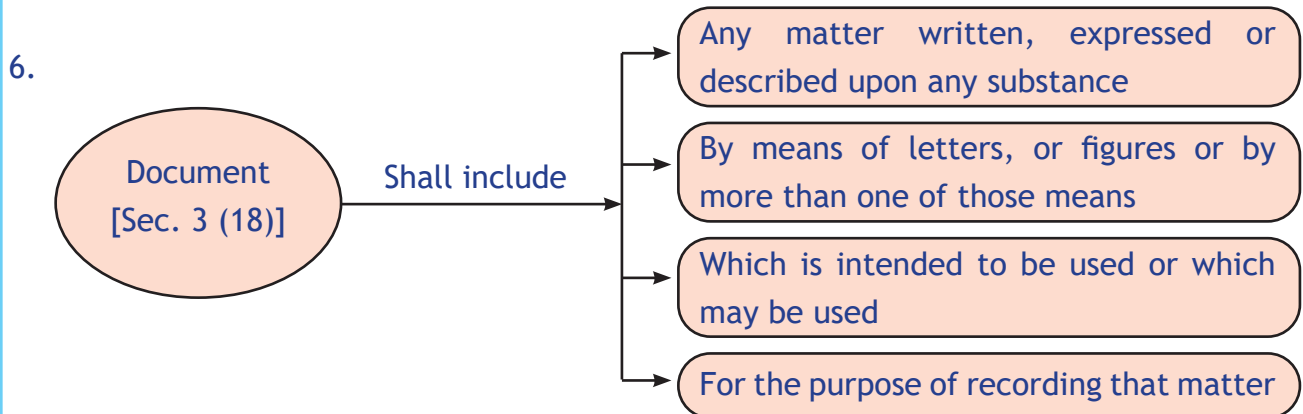
The above definition is inclusive in nature. It states that Affidavit shall include affirmation and declarations. This definition does not define affidavit. However, we can understand this term in general parlance. Affidavit is a written statement confirmed by oath or affirmation for use as evidence in Court or before any authority.

3. **“Central Act” [Section 3(7)]:** ‘Central Act’ shall mean an Act of Parliament, and shall include-
 - (a) An Act of the Dominion Legislature or of the Indian Legislature passed before the commencement of the Constitution*, and
 - (b) An Act made before such commencement by the Governor General in Council or the Governor General, acting in a legislative capacity;
4. **“Central Government” [Section 3(8)]:** ‘Central Government’ shall-
 - (a) In relation to anything done before the commencement of the Constitution, mean the Governor General in Council, as the case may be; and shall include,-
 - (i) In relation to functions entrusted under sub-section (1) of the section 124 of the Government of India Act, 1935, to the Government of a Province, the Principal Government acting within the scope of the authority given to it under that sub- section; and
 - (ii) In relation to the administration of a Chief Commissioner’s Province, the Chief Commissioner acting within the scope of the authority given to him under sub-section (3) of section 94 of the said Act; and
 - (b) In relation to anything done or to be done after the commencement of the constitution of the Constitution, mean the President; and shall include;-
 - (i) In relation to function entrusted under clause (1) of the article of the Constitution, to the Government of a state, the State Government acting within the scope of the authority given to it under that clause;
 - (ii) In relation to the administration of a Part C State before the commencement of the Constitution (Seventh Amendment) Act, 1956*, the Chief Commissioner or the Lieutenant Governor or the Government of a neighboring State or other authority acting within the scope of the authority given to him or it under article 239 or article 243 of the Constitution, as the case may be; and
 - (iii) In relation to the administration of a Union territory, the administrator thereof



acting within the scope of the authority given to him under article 239 of the Constitution;

5. **“Commencement” [Section 3(13)]:** ‘Commencement’ used with reference to an Act or Regulation, shall mean the day on which the Act or Regulation comes into force; Coming into force or entry into force (also called commencement) refers to the process by which legislation; regulations, treaties and other legal instruments come to have legal force and effect.

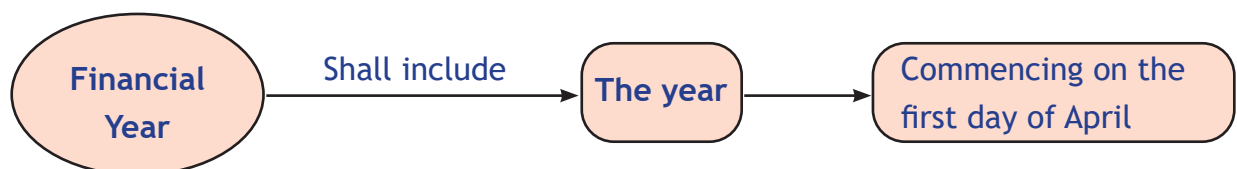


7. **“Enactment” [Section 2(19)]:** ‘Enactment’ shall include a Regulation (as hereinafter defined) and any Regulation of Bengal, Madras or Bombay Code, and shall also include any provision contained in any Act or in any such Regulation as aforesaid;

8. **“Financial Year” [Section 3(21)]:** Financial year shall mean the year commencing on the first day of April.

The term Year has been defined under Section 3(66) as a year reckoned according to the British calendar. Thus, as per General Clauses Act, Year means calendar year which starts from January to December.

Difference between Financial Year and Calendar Year: Financial year starts from first day of April but Calendar Year starts from first day of January.



9. **“Good Faith” [Section 3(22)]:** A thing shall be deemed to be done in “good faith” where it is in fact done honestly, whether it is done negligently or not; The question of good faith under the General Clauses Act, 1897 is one of fact. It is to determine with reference to the facts and circumstances of each case. Thus, anything done with due care and attention, which is not malafide is presumed to have been done in good faith. For eg: An authority is not acting honestly where it had a suspicion that there was something wrong and did not make further enquiries



The term “good faith” has been defined differently in different enactments. This definition of the good faith does not apply to that enactment which contains a special definition of the term “good faith” and the definition given in that particular enactment has to be followed. This definition may be applied only if there is nothing repugnant in subject or context.

10. **“Government” [Section 3(23)]**: ‘Government’ or ‘the Government’ shall include both the Central Government and State Government.
Hence, wherever, the word ‘Government’ is used, it will include Central Government and State Government both.
11. **“Government Securities” [Section 3(24)]**: ‘Government securities’ shall mean securities of the Central Government or of any State Government, but in any Act or Regulation made before the commencement of the Constitution shall not include securities of the Government of any Part B state.
12. **“Immovable Property” [Section 3(26)]**: ‘Immovable Property’ shall include:
 - i) Land,
 - ii) Benefits to arise out of land, and
 - iii) Things attached to the earth, or
 - iv) Permanently fastened to anything attached to the earth.

Where, in any enactment, the definition of immovable property is in the negative and not exhaustive, the definition as given in the General Clauses Act will apply to the expression given in that enactment.

Example ∴ In *Shantabai v. State of Bombay*, the Supreme Court pointed out that **trees must be regarded as immovable property** because they are attached to or rooted in the earth.

An agreement to convey forest produce like tendu leaves, timber, bamboos etc., the soil for making bricks, the right to build on and occupy the land for business purposes and the right to grow new trees and to get leaves from trees that grow in further are all included in the term immovable property.

13. **“Imprisonment” [Section 3(27)]**: ‘Imprisonment’ shall mean imprisonment of either description as defined in the Indian Penal Code (45 of 1860);
14. **“Indian law” [Section 3(29)]**: ‘Indian law’ shall mean any Act, Ordinance, Regulation, rule, order, bye law or other instrument which before the commencement of the Constitution, had the force of law in any Province of India or part thereof or thereafter has the force of law in any Part A or Part C State or part thereof, but does not include any Act of Parliament of the United Kingdom or any Order in Council, rule or other instrument made under such Act;



15. **“Month” [Section 3(35)]**: ‘Month’ shall mean a month reckoned according to the British calendar;
16. **“Movable Property” [Section 3(36)]**: ‘Movable Property’ shall mean property of every description, except immovable property.
Thus, any property which is not immovable property is movable property. Debts, share, electricity are moveable property.
17. **“Oath” [Section 3(37)]**: ‘Oath’ shall include affirmation and declaration in the case of persons by law allowed to affirm or declare instead of swearing.
18. **“Offence” [Section 3(38)]**: ‘Offence’ shall mean any act or omission made punishable by any law for the time being in force.
Any act or omission which is if done, is punishable under any law for the time being in force, is called as offence.
19. **“Official Gazette” [Section 3(39)]**: ‘Official Gazette’ or ‘Gazette’ shall mean:
 - (i) The Gazette of India, or
 - (ii) The Official Gazette of a state.
20. **“Person” [Section 3(42)]**: “Person” shall include:
 - (i) any company, or
 - (ii) association, or
 - (iii) body of individuals, whether incorporated or not
21. **“Registered” [Section 3(49)]**: ‘Registered’ used with reference to a document, shall mean registered in India under the law for the time being force for the registration of documents.
22. **“Rule” [Section 3(51)]**: ‘Rule’ shall mean a rule made in exercise of a power conferred by any enactment, and shall include a Regulation made as a rule under any enactment;
23. **“Schedule” [Section 3(52)]**: ‘Schedule’ shall mean a schedule to the Act or Regulation in which the word occurs;
24. **“Section” [Section 3(54)]**: ‘Section’ shall mean a section of the Act or Regulation in which the word occurs;
25. **“Sub-section” [Section 3(61)]**: ‘Sub-section’ shall mean a sub-section of the section in which the word occurs;
26. **“Swear” [Section 3(62)]**: “Swear”, with its grammatical variations and cognate expressions, shall include affirming and declaring in the case of persons by law allowed to affirm or declare instead of swearing.
Note: The terms “Affidavit”, “Oath” and “Swear” have the same definitions in the Act.



27. **“Writing” [Section 3(65)]:** Expressions referring to ‘writing’ shall be construed as including references to printing, lithography, photography and other modes of representing or reproducing words in a visible form; and
28. **“Year” [Section 3(66)]:** ‘Year’ shall mean a year reckoned according to the British calendar.

Application to foregoing definitions to previous enactments [Section 4]

There are certain definitions in section 3 of the General Clauses Act, 1897 which would also apply to the Acts and Regulations made prior to 1987 i.e., on the previous enactments of 1868 and 1887. This provision is divided into two parts-

(1) Application of terms/expressions to all [Central Acts] made after 3rd January, 1868, and to all Regulations made on or after the 14th January, 1887-

Here the given relevant definitions in section 3 of the following words and expressions, that is to say, ‘affidavit’, ‘immovable property’, ‘imprisonment’, ‘month’, ‘movable property’, ‘oath’, ‘person’, ‘section’, ‘and ‘year’ apply also, unless there is anything repugnant in the subject or context, to all Central Acts made after the 3rd January, 1868, and to all Regulations made on or after the 14th January, 1887.

- (2) Application of terms/expressions to all Central Acts and Regulations made on or after the fourteenth day of January, 1887- The relevant given definitions in the section 3 of the following words and expressions, that is to say, ‘commencement’, ‘financial year’, ‘offence’, ‘registered’, ‘schedule’, ‘sub-section’ and ‘writing’ apply also, unless there is anything repugnant in the subject or context, to all Central Acts and Regulations made on or after the fourteenth day of January, 1887.

Application of certain definitions to Indian Laws [Section 4A]-

- (1) The definitions in section 3 of the expressions ‘Central Act’, ‘Central Government’, ‘Gazette’, ‘Government’, ‘Government Securities’, ‘Indian Law’, and ‘Official Gazette’, ‘shall apply, unless there is anything repugnant in the subject or context, to all Indian laws.
- (2) In any Indian law, references, by whatever form of words, to revenues of the Central Government or of any State Government shall, on and from the first day of April, 1950, be construed as references to the Consolidated Fund of India or the Consolidated Fund of the State, as the case may be.

GENERAL RULES OF CONSTRUCTION: [SECTION 5 TO SECTION 13]

“Coming into operation of enactment” [Section 5]:

Where any Central Act has not specifically mentioned a particular date to come into force, it shall be implemented on the day on which it receives the assent of the Governor General in case of a Central Act made before the commencement of the Indian Constitution and/or, of the President in case of an Act of Parliament.



“Effect of Repeal” [Section 6]:

Where any Central legislation or any regulation made after the commencement of this Act repeals any Act made or yet to be made, unless another purpose exists, the repeal shall not:

- **Revive anything not enforced** or prevailed during the period at which repeal is effected or; **Sec. 9 of wealth tax was not notified ever : Even after Repeat it cannot be Revived OR Notified.**
- **Affect the previous operation** of any enactment so repealed or anything duly done or suffered thereunder; or
- **Affect any right, privilege,** obligation or liability acquired, accrued or incurred under any enactment so repealed; or **Refund of Tax with interest**
- **Affect any penalty,** forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or **Penalty/Tax Payable**
- **Affect any inquiry, litigation or remedy** with regard to such claim, privilege, debt or responsibility or any inquiry, litigation or remedy may be initiated, continued or insisted.

1. In State of Uttar Pradesh v. Hirendra Pal Singh, (2011), 5 SCC 305, SC held that whenever an Act is repealed, it must be considered as if it had never existed. Object of repeal is to obliterate the Act from statutory books, except for certain purposes as provided under Section 6 of the Act.
2. In Kolhapur Canesugar Works Ltd. V, Union of India, AIR 2000, SC 811, Supreme Court held that Section 6 only applies to repeal and not to omissions and applies when the repeal is of a Central Act or Regulation and not of a Rule.
3. In Navrangpura Gam Dharmada Milkat Trust v. Ramtuji Ramaji, AIR 1994 Guj 75: ‘Repeal’ of provision is in distinction from ‘deletion’ of provision. ‘Repeal’ ordinarily brings about complete obliteration of the provision as if it never existed, thereby affecting all incoherent rights and all causes of action related to the ‘repealed’ provision while ‘deletion’ ordinarily takes effect from the date of legislature affecting the said deletion, never to effect total effecting or wiping out of the provision as if it never existed. For the purpose of this section, the above distinction between the two is essential.

“Repeal of Act making textual amendment in Act or Regulation” [Section 6A]

Where any Central Act or Regulation made after the commencement of this Act repeals any enactment by which the text of any Central Act or Regulation was amended by the express omission, insertion or substitution of any matter, then unless a different intention appears, the repeal shall not affect the continuance of any such amendment made by the enactment so repealed and in operation at the time of such repeal.

“Revival of repealed enactments” [Section 7]

(1) In any Central Act or Regulation made after the commencement of this Act, it shall be necessary, for the purpose of reviving, either wholly or partially, any enactment wholly or partially repealed, expressed to state that purpose.

In other words, to revive a repealed statute, it is necessary to state an intention to do so.



“Construction of references to repealed enactments” [Section 8]

(1) Where this Act or Central Act or Regulation made after the commencement of this Act, repeals and re-enacts, with or without modification, any provision of a former enactment, then references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted.

(2) Where before the fifteenth day of August, 1947, any Act of Parliament of the United Kingdom repealed and re-enacted, with or without modification, any provision of a former enactment, then reference in any Central Act or in any Regulation or instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted.

In *Gauri Shankar Gaur v. State of U.P.*, AIR 1994 SC 169, it was held that every Act has its own distinction. If a later Act merely makes a reference to a former Act or existing law, it is only by reference and all amendments, repeals new law subsequently made will have effect unless its operation is saved by the relevant provision of the section of the Act.

“Commencement and termination of time”[Section 9]:

In any legislation or regulation, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time to use the word “from” and for the purpose of including the last in a series of days or any other period of time, to use the word “to”.

30/9/22 → within 30 days → 1/10/22 “FROM” to 30/10/22 “TO”

“Computation of time” [Section 10]:

Where by any legislation or regulation, any act or proceeding is directed or allowed to be done or taken in any court or office on a certain day or within a prescribed period then, if the Court or office is closed on that day or last day of the prescribed period, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards on which the Court or office is open.

“Duty to be taken pro rata in enactments” [Section 12]:

Where, by any enactment now in force or hereafter to be in force, any duty of customs or excise or in the nature thereof, is leviable on any given quantity, by weight, measure or value of any goods or merchandise, then a like duty is leviable according to the same rate on any greater or less quantity. **Same Rate to be Levied on Greater OR Less Quantity**

“Gender and number” [Section 13]:

In all legislations and regulations, unless there is anything repugnant in the subject or context-

- (1) Words importing the masculine gender shall be taken to include females, and
- (2) Words in singular shall include the plural and vice versa.

POWER AND FUNCTIONARIES [SECTION 14 TO SECTION 19]

“Power conferred to be exercisable from time to time” [Section 14]:

(1) Where, by any Central Act or Regulation made after the commencement of this Act, any power is conferred, then unless a different intention appears that power may be exercised from time to time as occasion requires. **eg:- Lok Sabha Elections voting every 5 years**



“Power to appoint to include power to appoint ex-officio” [Section 15]:

Where by any legislation or regulation, a power to appoint any person to fill any office or execute any function is conferred, then unless it is otherwise expressly provided, any such appointment, may be made either by name or by virtue of office.

Ex-officio is a Latin word which means by virtue of one's position or office. Provision under this section states that where there is a power to appoint, the appointment may be made by appointing ex-officio as well.

“Power to appoint to include power to suspend or dismiss” [Section 16]:

The authority having for the time being power to make the appointment shall also have power to suspend or dismiss any person appointed whether by itself or any other authority in exercise of that power. **Members shall have power to Appoint as well as Remove the Auditor**

“Substitution of functionaries” [Section 17]:

(1) In any Central Act or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of indicating the application of a law to every person or number of persons for the time being executing the functions of an office, to mention the official title of the officer at present executing the functions, or that of the officer by whom the functions are commonly executed.

(2) This section applies also to all Central Acts made after the third day of January, 1868 and to all Regulations made on or after the fourteenth day of January, 1887.

“Successors” [Section 18]:

(1) In any Central Act or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of indicating the relation of a law to the successors of any functionaries or of corporations having perpetual succession, to express its relation to the functionaries or corporations.

Law which Applies to Superiors shall Equally Apply to Subordinates

“Official Chiefs and subordinates” [Section 19]:

A law relative to the chief or superior of an office shall apply to the deputies or subordinates lawfully performing the duties of that office in the place of their superior, to prescribe the duty of the superior.

PROVISION AS TO ORDERS, RULES ETC. MADE UNDER ENACTMENTS [SECTION 20 TO SECTION 24]

Notification, Order, rule, by-law shall be considered as a part of the Act.

“Construction of orders, etc., issued under enactments” [Section 20]:

Where by any legislation or regulation, a power to issue any notification, order, scheme, rule, form, or by-law is conferred, then expression used in the notification, order, scheme, rule, form or bye-law, shall, unless there is anything repugnant in the subject or context, have the same respective meaning as in the Act or regulation conferring power.



“Power to issue, to include power to add to, amend, vary or rescind notifications, orders, rules or bye-laws” [Section 21]:

Where by any legislations or regulations a power to issue notifications, orders, rules or bye-laws is conferred, then that power, exercisable in the like manner and subject to the like sanction and conditions (if any), to add, to amend, vary or rescind any notifications, orders, rules or bye laws so issued.

Authority who has power to issue notification, order, rule, by laws shall have to Power to Amend, vary OR Recind the same

“Making of rules or bye-laws and issuing of orders between passing and commencement of enactment” [Section 22]:

Where, by any Central Act or Regulation which is not to come into force immediately, on the passing thereof, a power is conferred to make rules or bye-laws, or to issue orders with respect to the application of the Act or Regulation or with respect to the establishment of any Court or the appointment of any Judge or officer thereunder, or with respect to the person by whom, or the time when, or the place where, or the manner in which, or the fees for which, anything is to be done under the Act or Regulation, then that power may be exercised at any time after passing of the Act or Regulation; but rules, bye-laws or orders so made or issued shall not take effect till the commencement of the Act or Regulation.

“Provisions applicable to making of rules or bye-laws after previous publications” [Section 23]:

Where, by any Central Act or Regulation, a power to make rules or bye-laws is expressed to be given subject to the condition of the rules or bye-laws being made after previous publication, then the following provisions shall apply, namely:-

- (1) The authority having power to make the rules or bye-laws shall, before making them, publish a draft of the proposed rules or bye-laws for the information of persons likely to be affected thereby;
- (2) The publication shall be made in such manner as that authority deems to be sufficient, or, if the condition with respect to previous publication so requires, in such manner as the Government concerned prescribes;
- (3) There shall be published with the draft a notice specifying a date on or after which the draft will be taken into consideration;
- (4) The authority having power to make the rules or bye-laws, and, where the rules or bye-laws are to be made with the sanction, approval or concurrence of another authority, that authority also shall consider any objection or suggestion which may be received by the authority having power to make the rules or bye-laws from any person with respect to the draft before the date so specified;
- (5) The publication in the Official Gazette of a rule or bye-law purporting to have been made in exercise of a power to make rules or bye-laws after previous publication shall be conclusive proof that the rule or bye-laws has been duly made.

Section 23(5) raises a conclusive presumption that after the publication of the rules in the Official Gazette, it is to be inferred that the procedure for making the rules had been followed. Any irregularities in the publication of the draft cannot therefore be questioned.



MISCELLANEOUS [SECTION 25 TO SECTION 30]

“Recovery of fines” [Section 25]: Arrears of Land Revenue

Section 63 to 70 of the Indian Penal Code and the provisions of the Code of Criminal Procedure for the time being in force in relation to the issue and the execution of warrants for the levy of fines shall apply to all fines imposed under any Act, Regulation, rule or bye-laws, unless the Act, Regulation, rule or bye-law contains an express provision to the contrary.

“Provision as to offence punishable under two or more enactments” [Section 26]: Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be punished twice for the same offence.

Article 20(2) of the Constitution states that no person shall be prosecuted and punished for the same offence more than once.

According to the Supreme Court, a plain reading of section 26 shows that there is no bar to the trial or conviction of an offender under two enactments, but there is only a bar to the punishment of the offender twice for the same offence. In other words, the section provides that where an act or omission constitutes an offence under two enactments, the offender may be prosecuted and punished under either or both the enactments but shall not be liable to be punished twice for the same offence.

In *State of M.P. v. V.R. Agnihotri*, AIR 1957 SC 592 it was held that when there are two alternative charges in the same trial, e.g., section 409 of the Indian Penal Code and section 5(2) of the Prevention of Corruption Act, the fact that the accused is acquitted of one of the charges will not bar his conviction on the other.

Provisions of Section 26 and Article 20(2) of the Constitution apply only when the two offences which form the subject of prosecution is the same, i.e., the ingredients which constitute the two offences are the same. If the offences under the two enactments are distinct and not identical, none of these provisions will apply.

“Meaning of Service by post” [Section 27]:

Where any legislation or regulation requires any document to be served by post, then unless a different intention appears, the service shall be deemed to be effected by:

- (i) Properly addressing
- (ii) Pre-paying, and
- (iii) Posting by registered post.

A letter containing the document to have been effected at the time at which the letter would be delivered in the ordinary course of post.



“Citation of enactments” [Section 3(28)]:

(1) In any Central Act or Regulation, and in any rule, bye law, instrument or document, made under, or with reference to any such Act or Regulation, any enactment may be cited by reference to the title or short title (if any) conferred thereon or by reference to the number and years thereof, and any provision in an enactment may be cited by reference to the section or sub-section of the enactment in which the provision is contained.

(2) In this Act and in any Central Act or Regulation made after the commencement of this Act, a description or citation of a portion of another enactment shall, unless a different intention appears, be construed as including the word, section or other part mentioned or referred to as forming the beginning and as forming the end of the portion comprised in the description or citation.



QUESTION & ANSWERS



Descriptive Questions



Question 1.

What is “Financial Year” under the General Clauses Act, 1897?



Solution:

According to Section 3(21) of the General Clauses Act, 1897, ‘Financial Year’ shall mean the year commencing on the first day of April.

The term year has been defined under Section 3(66) as a year reckoned according to the British calendar. Thus, as per the General Clauses Act, 1897, Year means calendar year which starts from January to December.

Hence, in view of both the above definitions, it can be concluded that Financial Year is a year which starts from first day of April to the end of March.



Question 2.

What is “Immovable Property” under the General Clauses Act, 1897?



Solution:

According to Section 3(26) of the General Clauses Act, 1897, ‘Immovable Property’ shall include:

- (i) Land,
- (ii) Benefits to arise out of land, and
- (iii) Things attached to the earth, or
- (iv) Permanently fastened to anything attached to the earth.

For example, trees are immovable property because trees are benefits arise out of the land and attached to the earth. However, timber is not immovable property as the same are not permanently attached to the earth. In the same manner, buildings are immovable property.



Question 3.

As per the provisions of the Companies Act, 2013, a whole time Key Managerial Personnel (KMP) shall not hold office in more than one company except its subsidiary company at the same time. Referring to the section 13 of the General Clauses Act, 1897, examine whether a whole time KMP can be appointed in more than one subsidiary company?



Solution:

Section 203(3) of the Companies Act, 2013 provides that whole time key managerial personnel shall not hold office in more than one company except in its subsidiary company at the same time. With respect to the issue that whether a whole time KMP of holding company be appointed in more than one subsidiary companies or can be appointed in only one subsidiary company.



It can be noted that Section 13 of the General Clauses Act, 1897 provides that the word 'singular' shall include the 'plural', unless there is anything repugnant to the subject or the context. Thus, a whole time key managerial personnel may hold office in more than one subsidiary company as per the present law.



Question 4.

A notice when required under the Statutory rules to be sent by "registered post acknowledgment due" is instead sent by "registered post" only. Whether the protection of presumption regarding serving of notice by "registered post" under the General Clauses Act is tenable? Referring to the provisions of the General Clauses Act, 1897, examine the validity of such notice in this case.



Solution:

As per the provisions of Section 27 of the General Clauses Act, 1897, where any legislation or regulation requires any document to be served by post, then unless a different intention appears, the service shall be deemed to be effected by:

- (i) Properly addressing,
- (ii) Pre-paying, and
- (iii) Posting by registered post.

A letter containing the document to have been effected at the time at which the letter would be delivered in the ordinary course of post.

Therefore, in view of the above provision, since the statutory rules itself provides about the service of notice that a notice when required under said statutory rules to be sent by 'registered post acknowledgement due', then, if notice was sent by 'registered post' only it will not be the compliance of said rules. However, if such provision was not provided by such statutory rules, then service of notice if by registered post only shall be deemed to be effected.

Furthermore, in similar case of *In United Commercial Bank v. Bhim Sain Makhija*, AIR 1994 Del 181, a notice when required under the statutory rules to be sent by 'registered post acknowledgement due' is instead sent by 'registered post' only, the protection of presumption regarding serving of notice under 'registered post' under this section of the Act is neither tenable nor based upon sound exposition of law.



Question 5.

X owned a land with fifty tamarind trees. He sold his land and the timber (obtained after cutting the fifty trees) to Y. X wants to know whether the sale of timber tantamount to sale of immovable property. Advise him with reference to provisions of the General Clauses Act, 1897.



Solution:

"Immovable Property" [Section 3(26) of the General Clauses Act, 1897]:

'Immovable Property' shall include:

- (i) Land,
- (ii) Benefits to arise out of land, and
- (iii) Things attached to the earth, or



(iv) Permanently fastened to anything attached to the earth.

It is an inclusive definition. It contains four elements: land, benefits to arise out of land, things attached to the earth and things permanently fastened to anything attached to the earth. Where, in any enactment, the definition of immovable property is in the negative and not exhaustive, the definition as given in the General Clauses Act will apply to the expression given in that enactment.

In the instant case, X sold Land along with timber (obtained after cutting trees) of fifty tamarind trees of his land. According to the above definition, Land is immovable property; however, timber cannot be immovable property since the same are not attached to the earth.



Question 6.

What is the meaning of service by post as per provisions of the General Clauses Act, 1897?



Solution:

“Meaning of Service by post” [Section 27 of the General Clauses Act, 1897]: Where any legislation or regulation requires any document to be served by post, then unless a different intention appears, the service shall be deemed to be effected by:

- (i) properly addressing
- (ii) pre-paying, and
- (iii) posting by registered post.

A letter containing the document to have been effected at the time at which the letter would be delivered in the ordinary course of post.



Question 7.

Komal Ltd. declares a dividend for its shareholders in its AGM held on 27 th September, 2022. Referring to provisions of the General Clauses Act, 1897 and the Companies Act, 2013, advice:

- (i) The dates during which Komal Ltd. is required to pay the dividend?
- (ii) The dates during which Komal Ltd. is required to transfer the unpaid or unclaimed dividend to unpaid dividend account?



Solution:

As per section 9 of the General Clauses Act, 1897, for computation of time, the section states that in any legislation or regulation, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time to use the word “from” and for the purpose of including the last in a series of days or any other period of time, to use the word “to”.

- (i) **Payment of dividend:** In the given instance, Komal Ltd. declares dividend for its shareholder in its Annual General Meeting held on 27/09/2022. Under the provisions of Section 127 of the Companies Act, 2013, a company is required to pay declared dividend within 30 days from the date of declaration, i.e. from 28/09/2022 to 27/10/2022. In this series of 30 days, 27/09/2022 will be excluded and last 30th day, i.e. 27/10/2022 will be included. Accordingly, Komal Ltd. will be required to pay dividend within 28/09/2022 and 27/10/2022 (both days inclusive).



- (ii) **Transfer of unpaid or unclaimed dividend:** As per the provisions of Section 124 of the Companies Act, 2013, where a dividend has been declared by a company but has not been paid or claimed within 30 days from the date of the declaration, to any shareholder entitled to the payment of the dividend, the company shall, within 7 days from the date of expiry of the said period of 30 days, transfer the total amount of dividend which remains unpaid or unclaimed to a special account to be opened by the company in that behalf in any scheduled bank to be called the “Unpaid Dividend Account” (UDA). Therefore, Komal Ltd. shall transfer the unpaid/unclaimed dividend to UDA within the period of 28th October, 2022 to 3rd November, 2022 (both days inclusive).



Question 8.

‘Repeal’ of provision is different from ‘deletion’ of provision. Explain as per the General Clauses Act, 1897.



Solution:

In Navrangpura Gam Dharmada Milkat Trust v. Rmtuji Ramaji, AIR 1994 Guj 75 case, it was decided that ‘Repeal’ of provision is in distinction from ‘deletion’ of provision. ‘Repeal’ ordinarily brings about complete obliteration (abolition) of the provision as if it never existed, thereby affecting all incoherent rights and all causes of action related to the ‘repealed’ provision while ‘deletion’ ordinarily takes effect from the date of legislature affecting the said deletion, never to effect total effecting or wiping out of the provision as if it never existed.



Question 9.

The Companies Act, 2013 provides that the amount of dividend remained unpaid/unclaimed on expiry of 30 days from the date of declaration of dividend shall be transferred to unpaid dividend account within 7 days from the date of expiry of such period of 30 days. If the expiry date of such 30 days is 30.10.2022, decide the last date on or before which the unpaid/unclaimed dividend amount shall be required to be transferred to a separate bank account in the light of the relevant provisions of the General Clauses Act, 1897?



Solution:

Section 9 of the General Clauses Act, 1897 provides that, for computation of time, in any legislation or regulation, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time to use the word “from” and for the purpose of including the last in a series of days or any other period of time, to use the word “to”.

As per the facts of the question the company shall transfer the unpaid/unclaimed dividend to unpaid dividend account within the period of 7 days. 30th October, 2022 will be excluded and 6th November 2022 shall be included, i.e. 31st October, 2022 to 6th November, 2022 (both days inclusive).



Question 10.

Referring to the provisions of the General Clauses Act, 1897, find out the day/ date on which the following Act/Regulation comes into force. Give reasons also,

- (1) An Act of Parliament which has not specifically mentioned a particular date.
- (2) The Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements)



(Fifth Amendment) Regulations, 2015 was issued by SEBI vide Notification dated 14th August, 2015 with effect from 1st January, 2016.



Solution:

- (1) According to section 5 of the General Clauses Act, 1897, where any Central Act has not specifically mentioned a particular date to come into force, it shall be implemented on the day on which it receives the assent of the President in case of an Act of Parliament.
- (2) If any specific date of enforcement is prescribed in the Official Gazette, the Act shall come into enforcement from such date.

Thus, in the given question, the SEBI (Issue of Capital and Disclosure Requirements) (Fifth Amendment) Regulations, 2015 shall come into enforcement on 1st January, 2016 rather than the date of its notification in the Gazette.

MCQ based Questions



Question 1

Which of the following is not an Immovable Property?

- (a) Land
- (b) Building
- (c) Timber
- (d) Machinery permanently attached to the land



Solution:

- (c) Timber



Question 2

Where an act of parliament does not expressly specify any particular day as to the day of coming into operation of such Act, then it shall come into operation on the day on which:

- (a) It receives the assent of the President
- (b) It receives the assent of the Governor General
- (c) It receives assent of both the houses of Parliament
- (d) It receives assent of the Prime Minister



Solution:

- (a) It receives the assent of the President



Question 3

An act or omission constitutes an offence under two enactments. Referring to the provisions of the General Clauses Act, 1897, state which among the following is correct in such a situation:

- (a) The offender shall be liable to be prosecuted and punished under that enactment only, which was enacted last and not under the other enactment.
- (b) The offender shall be liable to be prosecuted and punished under that enactment only, which was enacted first and not under the other enactment.
- (c) The offender shall be liable to be prosecuted and punished under both the enactments.
- (d) The offender shall be liable to be prosecuted and punished under that either or any of those enactments, but shall not be punished twice for the same offence.



Solution:

- (d) The offender shall be liable to be prosecuted and punished under that either or any of those enactments, but shall not be punished twice for the same offence



Question 4

Every Act has a which expresses the scope, object and purpose of the Act. It is the main source for understanding the intention of lawmaker behind the Act.

- (a) Definition
- (b) Preamble
- (c) Affidavit
- (d) Document



Solution:

- (b) Preamble



Question 5

What among the following could be considered in the term 'Immovable Property' as defined under section 3(26) of the General Clauses Act, 1897?

- (i) The soil for making bricks
 - (ii) Right to catch fish
 - (iii) Right to drain water
 - (iv) Doors and Windows of the house
- (a) Only (i) and (iv)
 - (b) Only (i), (ii) and (iv)
 - (c) Only (i) and (ii)
 - (d) Only (ii), (iii) and (iv)



Solution:

- (b) Only (i), (ii) and (iv)



“
WIN YOUR BATTLES BEFORE
THEY’VE EVEN BEEN FOUGHT

”
Harvey Spectre



03

INTERPRETATION OF STATUTES



Interpretation of statutes

1. Rule of literal interpretation:

1. Literal means “as it is”
 2. Meaning of the word is clear.
 3. There is NO ambiguity.
 4. Multiple meanings cannot be derived.
 5. Such sections / provisions shall be interpreted literally
- Example: Penalty for dishonour of a cheque in NI Act: Imprisonment < 2 years OR penalty twice the amount of cheque OR Both

2. Things to be considered:

Ordinary/Natural meaning:

Example: - Term ‘cheque’ shall include a bearer as well as crossed cheque.

- ‘Word’ contract shall mean return as well as oral contract

3. Technical meaning:

Example: Finder of goods has right to sell goods however technically if he incurs > 2/3rd value of goods as expenditure.

4. Grammatical meaning:

Example: As per general clause ‘HE’ includes ‘SHE’

5. Trade Meaning:

Party → Ordinary - celebration
 ↘ Business - client

‘SALE’ → Ordinary - Selling goods
 ↘ Business - Discount



II. Rule of reasonable Interpretation

1. Where meaning of the word is not clear.
2. There is ambiguity.
3. Multiple meanings can be derived..
4. Such provisions shall be interpreted “liberally” i.e. “as it should be.”

This rule gives consideration to the Intention of the Law maker (purpose of law)

Eg:

1. As per NI Act, the stamp on the negotiable instrument should be cancelled by the signature, but the intention of the law maker is to make the drawer sign across the stamp.
2. As per NI Act, “Notice of dishonour” shall be served within reasonable period of time... Intention is to allow time on factual basis.
3. As per IT Act, definition of the term “spouse” shall reasonable mean only “one spouse”
4. Inadequate consideration shall be interpreted reasonably.

III. Haydon’s Rule/Beneficial Construction/ Mischief Rule

1. There is an existing law.
2. Existing law consists loopholes.
3. The user of the law (assessee) misuses the loophole.
4. Government discovers the misuse.
5. As a result the government alters the law.

Objective of this rule is to enhance the remedy and suppress the mischief.

Eg:

1. Amendment in Income Tax Act (Section 54 & 54F)
2. Capital Gains.
3. Essential Services during lockdown.
4. Demonetization - RBI Circulars.



IV. Rule of Harmonious Construction

When on a given subject two or more laws are applicable then the ideal way to interpret the subject is to:

1. Co. apply both the laws i.e. Harmonize.
2. In the event of conflict, following shall be done
 - A. The specific law will prevail over the general law.
 - B. Amended law shall prevail over the old law.

Eg: HDFC Bank Ltd. is a Bank & therefore banking regulation Act, 1949 shall be applicable. But since it is also a company, companies Act shall also apply to it. However, in the event of conflict. Banking regulation Act shall prevail over the Co. Act.

V. Rule of Exceptional Construction

1. Common Sense Rule: Full Effect must be given to every word contained in a statute. But words may be eliminated if no sensible meaning can be drawn.
2. “AND” = Conjunction eg: Non-compounding offence “Imprisonment AND Fine”
3. “OR” = Voluntary Choice. eg: Compounding offence “Imprisonment AND Fine”
4. “MAY” = Voluntary/ Discretionary eg: A Bills of exchange MAY be made payable to a bearer or order
5. “SHALL” = Mandatory/ Compulsory eg: A Promissory Note SHALL be made payable only to an order .
6. “MAY to be treated as SHALL” eg: Section 3 of Companies Act, 2013, A Company may be incorporated for lawful objects. Here the word “May” is to be treated as “SHALL”
7. “A”- General Reference - eg: “A High court” “THE” - Specific Reference - eg: The Supreme Court

(vi) Rule of Ejusdem Generis:

The term 'ejusdem generis' means 'of the same kind or species'. Simply stated, the rule is as follows: **Where specific words pertaining to a class or category or genus are followed by general words, the general words shall be construed as limited to the things of the same kind as those specified.**

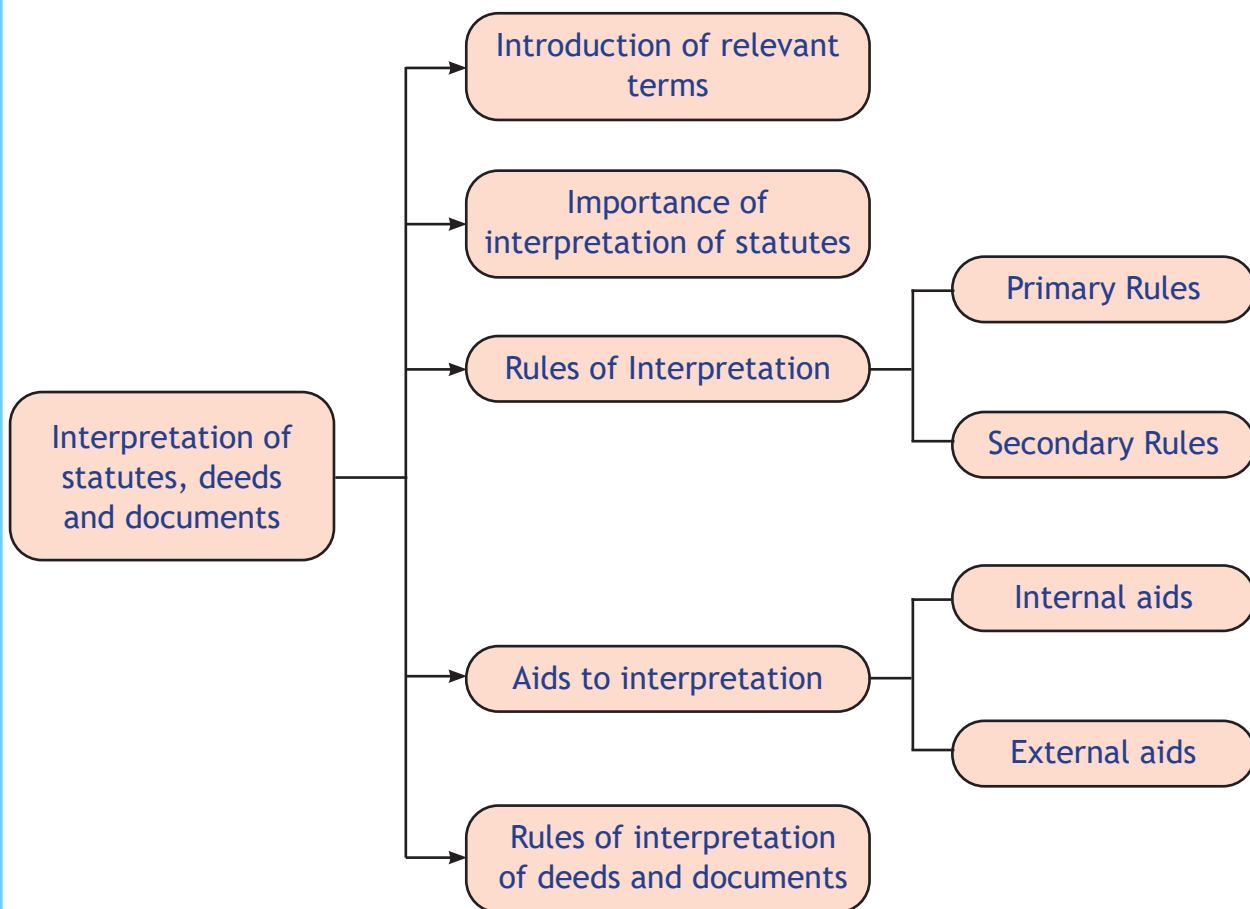
This rule applies when

1. The statute contains an enumeration of specific words
2. The subject of enumeration constitutes a class or category;
3. That class or category is not exhausted by the enumeration
4. General terms follow the enumeration; and
5. There is no indication of a different legislative intent.

The rule of ejusdem generis is not an absolute rule of law but only a part of a wider principle of construction and therefore this rule has no application where the intention of the legislature is clear.



UNIT OVERVIEW



INTRODUCTION

As a Chartered Accountant in practice or in service, you will be required to read various laws and statutes. Often these enactments may be capable of more than one interpretation. It is in this context that awareness of interpretation as a skill becomes relevant. This chapter will enable you to understand certain rules of interpretation as well as the various internal and external aids to interpretation. We shall also discuss the art of interpreting deeds and documents.

‘Statute’: To the common man the term **‘Statute’** generally means laws and regulations of various kinds irrespective of the source from which they emanate.

In short ‘statute’ signifies written law as against unwritten law.

‘Interpretation’: By interpretation is meant the process by which the Courts seek to ascertain the meaning of the legislature through the medium of the words in which it is expressed. Simply stated, ‘interpretation’ is the process by which the real meaning of an Act (or a document) and the intention of the legislature in enacting it (or of the parties executing the document) is ascertained.

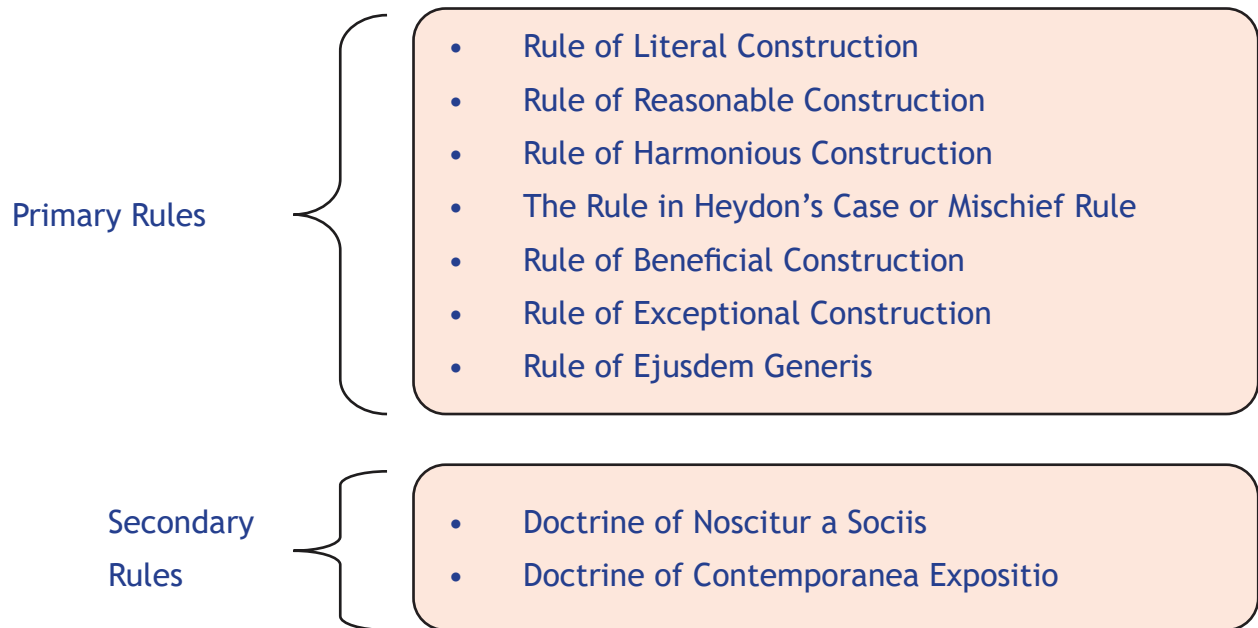
Importance of Interpretation: Interpretation, thus, process of considerable significance. In relation to statute law, interpretation is of importance because of the inherent nature of



legislation as a source of law. The process of statute making and the process of interpretation of statutes take place separately from each other, and two different agencies are concerned. Interpretation serves as the bridge of understanding between the two.

RULES OF INTERPRETATION/ CONSTRUCTION

Over a period, certain rules of interpretation/construction have come to be well recognized. However, these rules are considered as guides only and are not inflexible. These rules can be broadly classified as follows:



(A) PRIMARY RULES

(1) Rule of Literal Construction:

The first and primary rule of construction is that the intention of the legislature must be found in the words used by the legislature itself. Thus, if the words of a statute are capable of one construction only, then it would not be open to the courts to adopt any hypothetical construction on the ground that such hypothetical construction is more consistent with the alleged object and policy of the Act.

It is a cardinal rule of construction that a statute must be construed literally and grammatically giving the words their ordinary and natural meaning. Therefore, the language used in the statute must be construed in its grammatical sense. The correct course is to take the words themselves and arrive if possible, at their meaning without reference to cases, in the first instance.

If the phraseology of a statute is clear and unambiguous and capable of one and only one interpretation, then it would not be correct to extrapolate these words out of their natural and ordinary sense. When the language of a statute is plain and unambiguous it is not open to the courts to adopt any other hypothetical construction simply with a view to carrying out the supposed intention of the legislature.



Thus, it is the primary duty of the court to interpret the words used in legislation according to their ordinary grammatical meaning in the absence of any ambiguity or doubt.

Normally, where the words of a statute are in themselves clear and unambiguous, then these words should be construed in their natural and ordinary sense and it is not open to the court to adopt any other hypothetical construction. This is called the rule of literal construction.

Sometimes, occasions may arise when a choice has to be made between two interpretations - one narrower and the other wider or bolder. In such a situation, if the narrower interpretation would fail to achieve the manifest purpose of the legislation, one should rather adopt the wider one.

This Rule of literal interpretation can be read and understood under the following headings:
Natural and grammatical meaning: Statutes are to be first understood in their natural, ordinary, or popular sense and must be construed according to their plain, literal and grammatical meaning. If there is an inconsistency with any express intention or declared purpose of the statute, or it involves any absurdity, repugnancy, inconsistency, the grammatical sense must then be modified, extended or abridged only to avoid such an inconvenience, but no further. [(State of HP v. Pawan Kumar (2005))]

Technical words are to be understood in technical sense: This point of literal construction is that technical words are understood in the technical sense only.

(2) Rule of Reasonable Construction:

Generally the words or phrases of a statute are to be given their ordinary meaning. It is only when the words of an enactment are capable of two constructions that there is scope for interpretation or construction. Then, that interpretation, which furthers the object, can be preferred to that which is likely to defeat or impair the policy or object.

Similarly, when the grammatical interpretation leads to a manifest absurdity then the courts shall interpret the statute so as to resolve the inconsistency and make the enactment a consistent whole. This principle is based on the rule that the words of a statute must be construed reasonably so as to give effect to the enactment rather than reduce it to a futility. This principle is contained in the

Thus, when grammatical interpretation leads to certain absurdity, it is permissible to depart there from and to interpret the provision of the statutes in a manner so as to avoid that absurdity. This departure from the grammatical construction is permissible only to the extent it avoids such absurdity and no further. This is also called the Golden Rule of Interpretation. Thus, if the Court finds that giving a plain meaning to the words will not be a fair or reasonable construction, it becomes the duty of the court to depart from the dictionary meaning and adopt the construction which will advance the remedy and suppress the mischief provided the Court does not have to resort to conjecture or surmise. A reasonable construction will be adopted in accordance with the policy and object of the statute.



(3) Rule of Harmonious Construction:

It is a recognized rule of interpretation of statutes and deeds that the expressions used therein should ordinarily be understood in a sense in which they best harmonize with the object of the statute. The opposite of “harmony” is conflict. Thus, this rule is applied when there is a conflict between two provisions of a statute. Similarly, this Rule comes to our aid when there is conflict between the provisions of a statute and the object, which the legislature had in view.

Thus, where an expression is susceptible of a narrow or technical meaning, as well as a popular meaning, the court would be justified in assuming that the legislature used the expression in the sense, which would carry out its objects and reject that which renders it invalid. (New India Sugar Mills Ltd., Vs. Commissioner, Sales Tax)

It is a basic rule of interpretation that if it is possible to avoid a conflict between two provisions on a proper construction thereof, then it is the duty of the court to so construe them that they are in harmony with each other. The statute must be read as a whole and every provision in the statute must be construed with reference to the context and other clauses in the statute so as to make the statute a consistent enactment and not reduce it to a futility. But where it is not possible to give effect to both the provisions harmoniously, collision may be avoided by holding that one section which is in conflict with another merely provides for an exception or a specific rule different from the general rule contained in the other. **A specific rule will override a general rule.** This principle is usually expressed by the maxim, “**generalia specialibus non derogant**”.

(4) The Rule in Heydon’s Case or Mischief Rule:

Where the language used in a statute is capable of more than one interpretation, the most firmly established rule for construction is the principle laid down in Heydon’s case. The intention of this rule is always to make such construction as shall suppress the mischief and advance the remedy according to the true intention of the legislation.

In Heydon’s case (1584 3 Co Rep 79 P. 637), it was laid down by the Barons of the Exchequer that “for the true and sure interpretation of all statutes in general, four things are to be discerned and considered.

1. What was the law before the making of the act?
2. What was the defect, mischief, hardship caused by the earlier law?
3. How does the act of Parliament seek to resolve or cure the mischief or deficiency?
4. What are the true reasons for the remedy?

And then the courts shall make such construction as will suppress the mischief and advance the remedy and suppress the subtle inventions and evasions for the continuance of the mischief.”

Thus, applying Heydon’s case courts will be bound to look at the state of the law at the time of the passing of the enactment and not only as it then stood, but under previous statutes too.



(5) Rule of Beneficial Construction:

This is strictly speaking not a rule but a method of interpreting a provision liberally so as to give effect to the declared intention of the legislation. Beneficial construction will be given to a statute, which brings into effect provisions for improving the conditions of certain classes of people who are under privileged or who have not been treated fairly in the past. In such cases it is permissible to give an extended meaning to words or clauses in enactments. But this can only be done when two constructions are reasonably possible and not when the words in a statute are quite unequivocal.

(6) Rule of Exceptional Construction:

We have already seen that the words of a statute must be construed so as to give a sensible meaning to them if possible. They ought to be construed *ut res magis valeat quam pereat*. In fact, Maxwell goes to the extent of stating, “notwithstanding the general rule that full effect must be given to every word, yet if no sensible meaning can be given to a word or phrase, or if it would defeat the real object of the enactment, it may, or rather it should, be eliminated.”

“And” and “Or”

“And” is a particle joining words and sentences and expressing the relation of connection or addition. The word “and” is normally conjunctive. In its conjunctive sense the word is used to conjoin words, clauses or sentences, signifying that something is to follow in addition to that, which precedes.

The word “or” is a disjunctive particle that marks an alternative, generally corresponding to “either”, as “either this or that”.

Can “and” be read as “or” and vice versa?

Not only in statutes but also in documents the two words “and” and “or” are sometimes used synonymously and in the same sense. That would depend on the context and meaning of other provisions in the same statute or document. Similarly where statements or stipulations are coupled by “and/or” they are to read either disjunctively or conjunctively.

“May”, “Must” and “Shall”

Let us first appreciate the distinction between mandatory and directory provisions. Where the enactment or provision prescribes that the contemplated action be taken without any option or discretion, then such statute or provision or enactment will be called mandatory. Where, the acting authority is vested with discretion, choice or judgment, the statute or provision will be called directory. In deciding whether the statute is directory or mandatory, the question is whether there is anything that makes it the duty of the person on whom the power is conferred to exercise that power. If it is so then the Statute is a mandatory one; otherwise it is directory.

The words ‘may’, ‘shall’, and ‘must’ should initially be deemed to have been used in their natural and ordinary sense.

“Shall” though mandatory is to be read as may.



(B) OTHER (SECONDARY) RULES OF INTERPRETATION.

(1) Doctrine of Noscitur a Sociis

Noscitur a Sociis means that when two or more words that are susceptible of analogous meaning, are coupled together they are understood to be used in their cognate sense. They take, as it were, their colour from each other, that is the meaning of the more general word being restricted to a sense analogous to that of the less general.

(2) Doctrine of Contemporanea Expositio

This doctrine is based on the concept that a statute or a document is to be interpreted by referring to the exposition it has received from contemporary authority. The maxim “Contemporanea Expositio est optima et fortissima in lege” means “contemporaneous exposition is the best and strongest in the law.” This means a law should be understood in the sense in which it was understood at the time when it was passed.

But remember that this maxim is to be applied for construing ancient statutes, but not to acts that are comparatively modern.

INTERNAL AIDS TO INTERPRETATION/ CONSTRUCTION

The various parts of an enactment enumerated below may be referred to while interpreting or construing an enactment. They are referred to as internal aids to interpretation and can be of immense help in interpreting/construing the enactment or any of its parts.

(a) Long Title:

An enactment would have what is known as a ‘Short Title’ and also a ‘Long Title’. The ‘Short Title’ merely **identifies** the enactment and is chosen merely for convenience, the ‘Long Title’ on the other hand, describes the enactment and does not merely identify it.

It is now settled that the Long Title of an Act is a part of the Act. We can, therefore, refer to it to ascertain the object, scope and purpose of the Act and so is admissible as an aid to its construction.

(b) Preamble:

The Preamble expresses the scope, object and purpose of the Act more comprehensively than the Long Title. The Preamble may recite the ground and the cause of making a statute and the evil which is sought to be remedied by it.

(c) Heading and Title of a Chapter:

If we glance through any Act, we would generally find that a number of its sections referring to a particular subject are grouped together, sometimes in the form of chapters, prefixed by headings and/or Titles. These Heading and Titles prefixed to sections or groups of sections can legitimately be referred to for the purpose of construing the enactment or its parts.

(d) Marginal Notes:

Marginal notes are summaries and side notes often found at the side of a section or group of sections in an act, purporting to sum up the effect of that section or sections.



(e) **Definitional Sections/Interpretation Clauses:**

The legislature has the power to embody in a statute itself the definitions of its language and it is quite common to find in the statutes 'definitions' of certain words and expressions used in the body of the statute.

Construction of definitions may understood under the following headings:

- (i) **Restrictive and extensive definitions:** The definition of a word or expression in the definition section may either be restricting of its ordinary meaning or may be extensive of the same.

When a word is defined to '**mean**' such and such, the definition is 'prima facie' restrictive and exhaustive we must restrict the meaning of the word to that given in the definition section.

But where the word is defined to '**include**' such and such, the definition is 'prima facie' extensive: here the word defined is not restricted to the meaning assigned to it but has extensive meaning which also includes the meaning assigned to it in the definition section.

We may also find a word being defined as '**means and includes**' such and such. In this case, the definition would be exhaustive.

On the other hand, if the word is defined '**to apply to and include**', the definition is understood as extensive.

- (ii) **Definitions subject to a contrary context:** When a word is defined to bear a number of inclusive meanings, the sense in which the word is used in a particular provision must be ascertained from the context of the scheme of the Act, the language of the provision and the object intended to be served thereby.

- (f) **Illustrations:** We would find that many, though not all, sections have illustrations appended to them. These illustrations follow the text of the Sections and, therefore, do not form a part of the Sections. However, illustrations do form a part of the statute and are considered to be of relevance and value in construing the text of the sections. However, illustrations cannot have the effect of modifying the language of the section and can neither curtail nor expand the ambit of the section.

- (g) **Proviso:**

The normal function of a proviso is to except something out of the enactment or to qualify something stated in the enactment which would be within its purview if the proviso were not there. Usually, a proviso is embedded in the main body of the section and becomes an integral part of it. Provisos that are so included begin with the words, "provided that".

Distinction between Proviso, exception and saving Clause		
'Exception' is intended to restrain the enacting clause to particular cases	'Proviso' is used to remove special cases from general enactment and provide for them specially	'Saving clause' is used to preserve from destruction certain rights, remedies or privileges already existing



(h) **Explanation:**

An Explanation is at times appended to a section to explain the meaning of certain words or phrases used in the section or of the purport of the section. An Explanation may be added to include something within the section or to exclude something from it. An Explanation should normally be so read as to harmonise with and clear up any ambiguity in the main section. It should not be so construed as to widen the ambit of the section.

(i) **Schedules:**

The Schedules form part of an Act. Therefore, they must be read together with the Act **for all purposes of construction**. However, the expressions in the Schedule cannot control or prevail over the expression in the enactment. If there appears to be any inconsistency between the schedule and the enactment, the enactment shall always prevail. They often contain details and forms for working out the policy underlying the sections of the statute **for example** schedules appended to the Companies Act, 2013, to the Constitution of India.

(j) **'Read the Statute as a Whole':**

It is the elementary principle that construction of a statute is to be made of all its parts taken together and not of one part only. The deed must be read as a whole in order to ascertain the true meaning of its several clauses, and the words of each clause should be so interpreted as to bring them into harmony with other provisions - if that interpretation does no violence to the meaning of which they are naturally susceptible. And the same approach would apply with equal force with regard to Acts and Rules passed by the legislature.

EXTERNAL AIDS TO INTERPRETATION/ CONSTRUCTION

Society does not function in a void. Everything done has its reasons, its background, the particular circumstances prevailing at the time, and so on. These factors apply to enactments as well. These factors are of great help in interpreting/construing an Act and have been given the convenient nomenclature of **'External Aids to Interpretation'**. Apart from the statute itself there are many matters which may be taken into account when the statute is ambiguous. These matters are called external aids. Some of these factors are enumerated below:

External Aids					
Historical Setting	Consolidating Statutes & Previous Law	Usage	Earlier & Later Acts and Analogous Acts	Dictionary Definitions	Use of Foreign Decisions

- (a) **Historical Setting:** The history of the external circumstances which led to the enactment in question is of much significance in construing any enactment. We have, for this purpose, to take help from all those external or historical facts which are necessary in the understanding and comprehension of the subject matter and the scope and object of the enactment. History in general and Parliamentary History in particular, ancient statutes, contemporary or other authentic works and writings all are relevant in interpreting



and construing an Act. We have also to consider whether the statute in question was intended to alter the law or leave it where it stood before.

- (b) **Consolidating Statutes & Previous Law:** The Preambles to many statutes contain expressions such as “An Act to consolidate” the previous law, etc. In such a case, the Courts may stick to the presumption that it is not intended to alter the law. They may solve doubtful points in the statute with the aid of such presumption in intention, rejecting the literal construction.
- (c) **Usage:** Usage is also sometimes taken into consideration in construing an Act. The acts done under a statute provide quite often the key to the statute itself. It is well known that where the meaning of the language in a statute is doubtful, **usage** - how that language has been interpreted and acted upon over a long period - may determine its true meaning. It has been emphasized that when a legislative measure of doubtful meaning has, for several years, received an interpretation which has generally been acted upon by the public, the Courts should be very unwilling to change that interpretation, unless they see cogent reasons for doing so.
- (d) **Earlier & Later Acts and Analogous Acts:** Exposition of One Act by Language of Another: The general principle is that where there are different statutes in ‘pari materia’ (i.e. in an analogous case), though made at different times, or even expired and not referring to each other, they shall be taken and construed together as one system and as explanatory of each other.

If two Acts are to be read together then every part of each Act has to be construed as if contained in one composite Act. But if there is some clear discrepancy then such a discrepancy may render it necessary to hold the later Act (in point of time) had modified the earlier one. However, this does not mean that every word in the later Act is to be interpreted in the same way as in the earlier Act.

- (e) **Dictionary Definitions:** First we have to refer to the Act in question to find out if any particular word or expression is defined in it. Where we find that a word is not defined in the Act itself, we may refer to dictionaries to find out the general sense in which that word is commonly understood. However, in selecting one out of the several meanings of a word, we must always take into consideration the context in which it is used in the Act. It is the fundamental rule that the meanings of words and expressions used in an Act must take their colour from the context in which they appear. Further, judicial decisions laying down the meaning of words in construing statutes in ‘pari materia’ will have greater weight than the meaning furnished by dictionaries. However, for technical terms reference may be made to technical dictionaries.
- (f) **Use of Foreign Decisions:** Foreign decisions of countries following the same system of jurisprudence as ours and given on laws similar to ours can be legitimately used for construing our own Acts. However, prime importance is always to be given to the language of the Indian statute. Further, where guidance can be obtained from Indian decisions, reference to foreign decisions may become unnecessary.



RULES OF INTERPRETATION/ CONSTRUCTION OF DEEDS AND DOCUMENTS

The first and foremost point that has to be borne in mind is that one has to find out what a reasonable man, who has taken care to inform himself of the surrounding circumstances of a deed or a document, and of its scope and intendments, would understand by the words used in that deed or document. The principle of construction in case of a document and a deed, as of statute, does not differ so much except in some minor details. A deed must be read as a whole in order to ascertain the true meaning of its several clauses and the words of each clause should be so interpreted as to bring them in harmony with other provisions if that interpretation does no violence to the meaning of which they are naturally susceptible.

The golden rule of construction is to ascertain the intention of the parties to the instrument after considering all the words in their ordinary, natural sense. To ascertain this intention the Court has to consider the relevant portion of the document as a whole and also to take into account the circumstances under which the particular words were used. Very often the status and the training of the parties using the words have to be taken into consideration. It has to be borne in mind that very many words are used in more than one sense and that sense differs in different circumstances.

It is an elementary rule of construction that the same word cannot have two different meanings in the same document, unless the context compels the adoption of such a course. The document must be read as a whole and the intention deduced therefrom as to what the actual term the parties intended to agree.

It may also happen that there is a conflict between two or more clauses of the same document. An effort must be made to resolve the conflict by interpreting the clauses so that all the clauses are given effect to. If, however, it is not possible to give effect to all of them, then it is the earlier clause that will over-ride the latter one.

Similarly, if one part of the document is in conflict with another part, an attempt should always be made to read the two parts of the document harmoniously, if possible. If that is not possible, then the earlier part will prevail over the latter one which should, therefore, be disregarded.



QUESTION & ANSWERS



Descriptive Questions



Question 1

Explain the rule in 'Heydon's Case' while interpreting the Statutes quoting an example.



Solution:

Where the language used in a statute is capable of more than one interpretation, the most firmly established rule for construction is the principle laid down in the Heydon's case. This rule enables, consideration of four matters in constituting an Act:

- (1) what was the law before making of the Act,
- (2) what was the mischief or defect for which the law did not provide,
- (3) what is the remedy that the Act has provided, and
- (4) what is the reason for the remedy.

The rule then directs that the courts must adopt that construction which 'shall suppress the mischief and advance the remedy'. Therefore, even in a case where the usual meaning of the language used falls short of the whole object of the legislature, a more extended meaning may be attributed to the words, provided they are fairly susceptible of it. If the object of any enactment is public safety, then its working must be interpreted widely to give effect to that object. Thus, in the case of Workmen's Compensation Act, 1923 the main object being provision of compensation to workmen, it was held that the Act ought to be so construed, as far as possible, so as to give effect to its primary provisions.

However, it has been emphasized by the Supreme Court that the rule in Heydon's case is applicable only when the words used are ambiguous and are reasonably capable of more than one meaning [CIT v. Sodra Devi (1957) 32 ITR 615 (SC)].



Question 2

Explain the principles of "Grammatical Interpretation" and "Logical Interpretation" of a Statute. What are the duties of a court in this regard?



Solution:

Principles of Grammatical Interpretation and Logical Interpretation: In order to ascertain the meaning of any law/ statute the principles of Grammatical and Logical Interpretation is applied to conclude the real meaning of the law and the intention of the legislature behind enacting it.

Meaning: Grammatical interpretation concerns itself exclusively with the verbal expression of law. It does not go beyond the letter of the law, whereas Logical interpretation on the other hand, seeks more satisfactory evidence of the true intention of the legislature.

Application of the principles in the court: In all ordinary cases, the grammatical interpretation is the sole form allowable. The court cannot delete or add to modify the letter of the law. However, where the letter of the law is logically defective on account of ambiguity,



inconsistency or incompleteness, the court is under a duty to travel beyond the letter of law so as to determine the true intentions of the legislature. So that a statute is enforceable at law, however, unreasonable it may be. The duty of the court is to administer the law as it stands rather than it is just or unreasonable.

However, if there are two possible constructions of a clause, the courts may prefer the logical construction which emerges from the setting in which the clause appears and the circumstances in which it came to be enacted and also the words used therein.



Question 3

- (i) What is the effect of proviso? Does it qualify the main provisions of an Enactment?
- (ii) Does an explanation added to a section widen the ambit of a section?



Solution:

- (i) Normally a Proviso is added to a section of an Act to except something or qualify something stated in that particular section to which it is added. A proviso should not be, ordinarily, interpreted as a general rule. A proviso to a particular section carves out an exception to the main provision to which it has been enacted as a Proviso and to no other provision. [Ram Narayan Sons Ltd. v. Commissioner of Sales Tax AIR (1955) S.C. 765]
- (ii) Sometimes an explanation is added to a section of an Act for the purpose of explaining the main provisions contained in that section. If there is some ambiguity in the provisions of the main section, the explanation is inserted to harmonise and clear up any ambiguity in the main section. Something may be added to or something may be excluded from the main provision by insertion of an explanation. But the explanation should not be construed to widen the ambit of the section.



Question 4

Gaurav Textile Company Limited has entered into a contract with a Company. You are invited to read and interpret the document of contract. What rules of interpretation of deeds and documents would you apply while doing so?



Solution:

The rules regarding interpretation of deeds and documents are as follows:

First and the foremost point that has to be borne in mind is that one has to find out what a reasonable man, who has taken care to inform himself of the surrounding circumstances of a deed or a document, and of its scope and intentions, would understand by the words used in that deed or document.

It is inexpedient to construe the terms of one deed by reference to the terms of another. Further, it is well established that the same word cannot have two different meanings in the same documents, unless the context compels the adoption of such a rule.

The Golden Rule is to ascertain the intention of the parties of the instrument after considering all the words in the documents/deed concerned in their ordinary, natural sense. For this purpose, the relevant portions of the document have to be considered as a whole. The circumstances in which the particular words have been used have also to be taken into account. Very often, the status and training of the parties using the words have also to be taken into account as the same words maybe used by an ordinary person in one sense and by a trained person or



a specialist in quite another sense and a special sense. It has also to be considered that very many words are used in more than one sense. It may happen that the same word understood in one sense will give effect to all the clauses in the deed while taken in another sense might render one or more of the clauses ineffective. In such a case the word should be understood in the former and not in the latter sense.

It may also happen that there is a conflict between two or more clauses of the same documents. An effect must be made to resolve the conflict by interpreting the clauses so that all the clauses are given effect. If, however, it is not possible to give effect of all of them, then it is the earlier clause that will override the latter one.



Question 5

How will you interpret the definitions in a statute, if the following words are used in a statute?

- (i) Means
- (ii) Includes

Give one illustration for each of the above from Statutes you are familiar with.



Solution:

Interpretation of the words “Means” and “Includes” in the definitions- The definition of a word or expression in the definition section may either be restricting of its ordinary meaning or may be extensive of the same.

When a word is defined to ‘mean’ such and such, the definition is ‘prima facie’ restrictive and exhaustive, we must restrict the meaning of the word to that given in the definition section. But where the word is defined to ‘include’ such and such, the definition is ‘prima facie’ extensive, here the word defined is not restricted to the meaning assigned to it but has extensive meaning which also includes the meaning assigned to it in the definition section.

Example—

Definition of Director [section 2(34) of the Companies Act, 2013]—Director means a director appointed to the board of a company. The word “means” suggests exhaustive definition.

Definition of Whole time director [Section 2(94) of the Companies Act, 2013]—Whole time director includes a director in the whole time employment of the company. The word “includes” suggests extensive definition. Other directors may be included in the category of the whole time director.



Question 6

Differentiate Mandatory Provision from a Directory Provision. What factors decide whether a provision is directory or mandatory?



Solution:

Practically speaking, the distinction between a provision which is ‘mandatory’ and one which is ‘directory’ is that when it is mandatory, it must be strictly observed; when it is ‘directory’ it would be sufficient that it is substantially complied with. However, we have to look to the substance and not merely the form, an enactment in mandatory form might substantially be directory and, conversely, a statute in directory form may in substance be mandatory. Hence, it is the substance that counts and must take precedence over mere form. If a provision gives a power coupled with a duty, it is mandatory: whether it is or is not so would depend on such



consideration as:

- the nature of the thing empowered to be done,
- the object for which it is done, and
- the person for whose benefit the power is to be exercised.



Question 7

Define Grammatical Interpretation. What are the exceptions to grammatical interpretation?



Solution:

Grammatical Interpretation and its exceptions: 'Grammatical interpretation' concerns itself exclusively with the verbal expression of the law, it does not go beyond the letter of the law. In all ordinary cases, 'grammatical interpretation' is the sole form allowable. The Court cannot take from or add to modify the letter of the law.

This rule, however, is subject to some exceptions:

- (i) Where the letter of the law is logically defective on account of ambiguity, inconsistency or incompleteness. As regard the defect to ambiguity, the Court is under a duty to travel beyond the letter of the law so as to determine from the other sources the true intention of the legislature. In the case of the statutory expression being defective on account of inconsistency, the court must ascertain the spirit of the law.
- (ii) If the text leads to a result which is so unreasonable that it is self-evident that the legislature could not mean what it says, the court may resolve such impasse by inferring logically the intention of the legislature.



Question 8

When can the Preamble be used as an aid to interpretation of a statute?



Solution:

While the Preamble can be used to know the aims and objects of the legislation it cannot be used to control or qualify the precise and unambiguous language of an enactment. The preamble is the key to the mind of the maker of the law, but it cannot override in order to enlarge or restrict the enacting provision of the Act. A provision contained in the Act cannot be considered as invalid because they do not accord with the preamble, which is only a brief summary of legislative objectives behind the Act, and if there is any conflict between the preamble and any provision of an Act, the provision prevails.

The preamble merely affords help in the matter of construction if there is any ambiguity. Where the language of the Act is clear, the court is bound to give it effect.

When will courts refer to the preamble as an aid to construction?

Situation 1: Where there is any ambiguity in the words of an enactment the assistance of the preamble may be taken to resolve the conflict.

Situation 2: Where the words of an enactment appear to be too general in scope or application then courts may resort to the preamble to determine the scope or limited application for which the words are meant.



Question 9

Explain how 'Dictionary Definitions' can be of great help in interpreting/ constructing an Act when the statute is ambiguous.



Solution:

Dictionary Definitions: First we refer the Act in question to find out if any particular word or expression is defined in it. Where we find that a word is not defined in the Act itself, we may refer to dictionaries to find out the general sense in which that word is commonly understood. However, in selecting one out of the several meanings of a word, we must always take into consideration the context in which it is used in the Act. It is the fundamental rule that the meanings of words and expressions used in an Act must take their colour from the context in which they appear. Further, judicial decisions laying down the meaning of words in construing statutes in pari materia will have greater weight than the meaning furnished by dictionaries. However, for technical terms, reference may be made to technical dictionaries.



Question 10

Preamble does not over-ride the plain provision of the Act. Comment. Also give suitable example.



Solution:

Preamble: The Preamble expresses the scope, object and purpose of the Act more comprehensively. The Preamble of a Statute is a part of the enactment and can legitimately be used as an internal aid for construing it. However, the Preamble does not over-ride the plain provision of the Act. But if the wording of the statute gives rise to doubts as to its proper construction, for example, where the words or phrase has more than one meaning and a doubt arises as to which of the two meanings is intended in the Act, the Preamble can and ought to be referred to in order to arrive at the proper construction.

In short, the Preamble to an Act discloses the primary intention of the legislature but can only be brought in as an aid to construction if the language of the statute is not clear. However, it cannot override the provisions of the enactment.

Example: Use of the word 'may' in section 5 of the Hindu Marriage Act, 1955 provides that "a marriage may be solemnized between two Hindus....." has been construed to be mandatory in the sense that both parties to the marriage must be Hindus as defined in section 2 of the Act. It was held that a marriage between a Christian male and a Hindu female solemnized under the Hindu Marriage Act was void. This result was reached also having regard to the preamble of the Act which reads: 'An Act to amend and codify the law relating to marriage among Hindus' [GullipoliSowria Raj v. BandaruPavani, (2009)1 SCC714].



Question 11

At the time of interpreting a Statute what will be the effect of 'Usage' or 'customs and Practices'?

**Solution:**

Effect of usage: Usage or practice developed under the statute is indicative of the meaning recognized to its words by contemporary opinion. A uniform notorious practice continued under an old statute and inaction of the Legislature to amend the same are important factors to show that the practice so followed was based on correct understanding of the law. When the usage or practice receives judicial or legislative approval it gains additional weight.

In this connection, we have to bear in mind two Latin maxims:

- (i) 'Optima Legum interpret est consuetude' (the custom is the best interpreter of the law); and
- (ii) 'Contemporanea Expositio est optima et fortissima in lege' (the best way to interpret a document is to read it as it would have been read when made).

Therefore, the best interpretation/construction of a statute or any other document is that which has been made by the contemporary authority. Simply stated, old statutes and documents should be interpreted as they would have been at the time when they were enacted/written. Contemporary official statements throwing light on the construction of a statute and statutory instruments made under it have been used as contemporanea expositio to interpret not only ancient but even recent statutes in India.

MCQ based Questions**Question 1**

The Rule in Heydon's case is also known as—

- (a) Purposive construction
- (b) Mischief Rule
- (c) Golden Rule
- (d) Exceptional Construction

**Solution:**

- (b) Mischief Rule

**Question 2**

Pick the odd one out of the following aids to interpretation—

- (a) Preamble (b) Marginal Notes
- (c) Proviso (d) Usage

**Solution:**

- (d) Usage

**Question 3**

_____ is the cardinal rule of construction that words, sentences and phrases of a statute should be read in their ordinary, natural and grammatical meaning so that they may have effect in their widest amplitude.

- (a) Rule of Literal Construction
- (b) Rule of Harmonious Construction
- (c) Rule of Beneficial Construction
- (d) Rule of Exceptional Construction



Solution:

- (a) Rule of Literal Construction



Question 4

An internal aid that may be added to include something within the section or to exclude something from it, is—

- (a) Proviso
- (b) Explanation
- (c) Schedule
- (d) Illustrations



Solution:

- (b) Explanation



Question 5

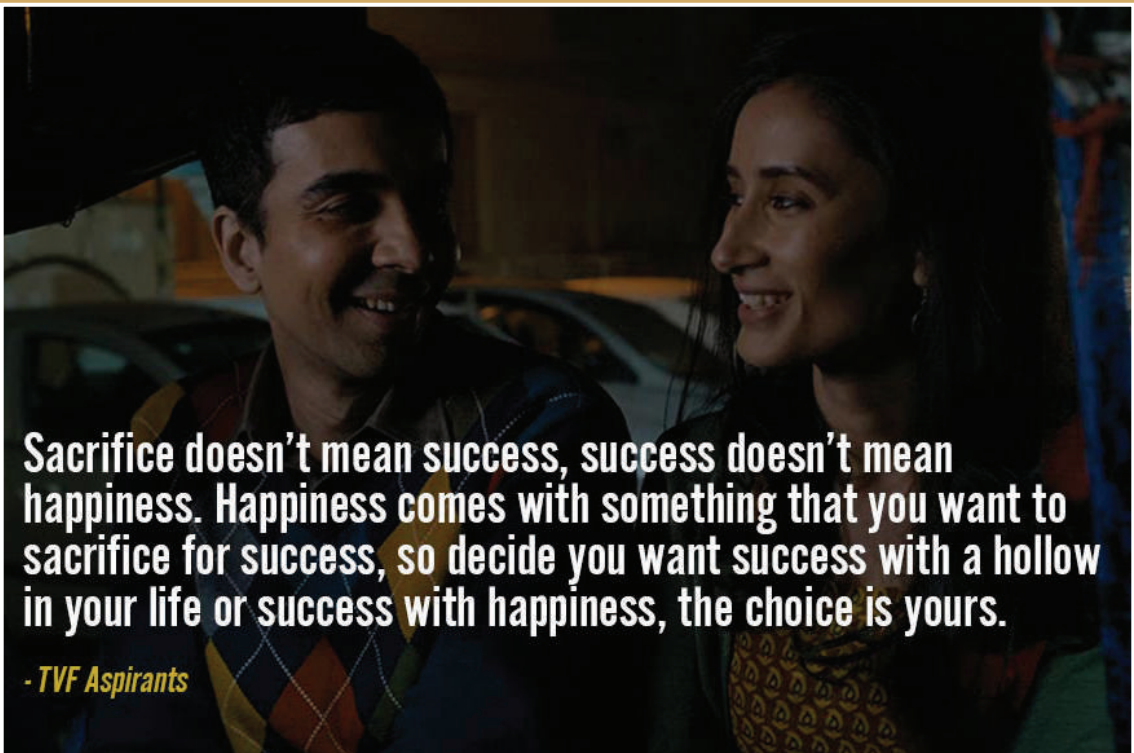
When there is a conflict between two or more statutes or two or more parts of a statute then which rule is applicable:

- (a) Welfare construction
- (b) Strict construction
- (c) Harmonious construction
- (d) Mischief Rule



Solution:

- (c) Harmonious construction

A man and a woman are shown in a close-up, smiling at each other. The man is on the left, wearing a colorful argyle sweater, and the woman is on the right, wearing a patterned top. They are in a dimly lit environment, possibly a car or a small room, with a car visible in the background. The image is framed by a thick orange border.

Sacrifice doesn't mean success, success doesn't mean happiness. Happiness comes with something that you want to sacrifice for success, so decide you want success with a hollow in your life or success with happiness, the choice is yours.

- TVF Aspirants

