

MEPL CLASSES
COMPANY LAW

APPOINTMENT & QUALIFICATIONS OF DIRECTORS

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(TIME ALLOTTED – 90 MINUTES)

(MARKS ALLOTTED – 50 MARKS)

Each Question Carries 5 Marks

Question 1.

“A” Ltd., a public company wants to appoint Alternate Directors. Examine the validity of acts of the company with reference to provisions of Companies Act, 2013 in following cases :

- (i) ‘D’ a director was absent for a period of two and half months. It is proposed to appoint an alternate director.
- (ii) ‘E’ a director was absent for 4 months. It is proposed to appoint ‘F’ as an alternate director in place of ‘E’. ‘F’ is already acting as an alternate director in “A” Ltd. for a director ‘G’ who was absent for 5 months.
- (iii) Can the said appointment, if permitted, be passed by circular resolution ?

Answer –

- (i) Section 161(2) of the Companies Act 2013 empowers the Board, if so authorized by articles or by a resolution passed by the company in general meeting, to appoint a director (termed as ‘alternate director’) to act in the absence of a original director during his absence for a period of not less than three months from India. Since as D is absent only for two and half months. Alternate director in place of D cannot be appointed.
- (ii) Section 161(2) of the Companies Act, 2013 states that in the conditions for appointment of an Alternate Director, the person to be appointed as the Alternate Director shall be the person other than the person holding any alternate directorship for any other Director in the company or holding directorship in the same company. Therefore since F is acting as an alternate director for another director i.e. “G”, he cannot be appointed again as alternate director for E in the same company.
- (iii) There is no specific provision in the Act which provides that the appointment of an Alternate Director shall be made at the meeting of the Board. In the absence of any such prohibition, an alternate director can be appointed by passing a resolution by circulation. Therefore in the given illustration, if permitted the alternate Director can be appointed by circular resolution.

Question 2.

Rakesh Agarwal is a Non-Executive & Non-Independent director of Happy Travels Limited, an unlisted company. The paid-up share capital of the company is ₹ 120 crore. The company has availed a term loan of ₹ 65 crore. The Board of directors, in their meeting passed a resolution to grant a housing loan of rupees one crore to Rakesh for purchase of an apartment in Navi Mumbai at concessional interest rate. The company has implemented a housing loan for its permanent employees at concessional interest rates. The Secretarial Auditor has objected to the loan granted to Rakesh in his Secretarial Audit report. Is the claim of Secretarial Auditor correct? Will your answer differ if the company is a private limited company?

Answer –

- As per Section 185 of Companies Act, 2013, no company shall advance any loan to a director of the company or his relative.
- However, a company may advance any loan to a director of a company by passing a special resolution by the company in general meeting. The explanatory statements to notice for the general meeting shall disclose full particulars of the proposed loan.
- As per Section 185(3) of the Act, the provisions of subsection shall not apply to giving of any loan to the Managing Director or Whole Time Director by the company as part of service conditions extended by the company to all its employees or as per any scheme approved by members by a special resolution.

As Rakesh is neither the Managing Director nor a whole time director of the company, the provisions of Section 185(1) & 185(2) are applicable to it. Hence, without passing a special resolution in the general meeting, no loan can be given to Rakesh.

If Happy Travels Ltd would have been a private company, the private company can give loan to a director as per Notification dated 5th June 2015 subject to the following conditions:

- a) No other body corporate has invested in the share capital of the private company
- b) The borrowings from banks is less than twice the paid up capital or rupees 50 crore whichever is lower.
- c) The private company has not defaulted on its borrowings from banks.

As Happy Travels Limited has availed a term loan of rupees 65 crore from a bank which is more than the ceiling of rupees 50 crore as per Notification dated 5th June 2015, it cannot grant the housing loan to Rakesh even if it is a private company.

Question 3.

David, director of Global Travels Limited, an unlisted public company was removed from the Office of Director u/s 169 of Companies Act, 2013 after following due process of Notice and the principles of Natural Justice. The board of directors sought your opinion on filling up the vacancy caused by removal of director. Advise.

Answer –

i) The vacancy resulting from removal of director under section 169 of the Act may be filled up by appointing another director at the same general meeting where David was removed from directorship by appointing any other person as a director. However, a special Notice for the proposed appointment of another person in the vacancy caused by removal of David needs to be given under section 169(2) of the Act.

ii) As per Section 169(5) of the Act, the vacancy caused by removal of David may be filled as a casual vacancy in accordance with provisions of Section 161(4) of the Act. As per Section 161(4) of the Act, in case of public company if the office of director appointed by the company is vacated before the expiry of his term of office in normal course, the resulting casual vacancy may be filled up by the Board of Directors at a meeting of the Board, which shall subsequently be approved by the members in the immediate next general meeting.

iii) In the given case, another person can be appointed in the place of the director removed from office by the Board. However, subject to the provisions of the Articles of Association of the company, the director appointed in the casual vacancy will hold office only up to the date which the director in whose place he was appointed would have held office if it had not been vacated.

iv) The company is required to file Form DIR-12 within 30 days of appointment of another person in the casual vacancy along with the fees provided under Companies (Registration Offices and Fees) Rules, 2014.

Question 4.

Jyoti Prasad obtained two Director Identification Number (DINs) by mistake in 2016 and 2019. He used his second DIN to become director in two private limited and three public limited companies. Later, on realisation, he applied to Registrar of Companies for deactivation of his first DIN. The Registrar rejected the application. Examining relevant legal provisions, discuss.

Answer –

As per section 155 of the Companies Act, 2013, no individual who has already been allotted a DIN under section 154 shall apply for, obtain or possess another DIN. As per Rule 11 of the Companies (Appointment and Qualifications of Directors) Rules, 2014 the Central Government or Regional

Director (Northern Region), Noida or any officer authorised by the Regional Director may, upon being satisfied on verification of particulars or documentary proof attached with the application received along with fee as specified in the Companies (Registration Offices and Fees) Rules, 2014 from any person, cancel or deactivate the DIN in case the DIN is found to be duplicated in respect of the same person provided the data related to both the DIN shall be merged with the validly retained number.

On an application made in Form DIR-5 by the DIN holder to surrender his or her DIN along with declaration that he has never been appointed as director in any company and the said DIN has never been used for filing of any document with any authority, the Central Government may deactivate such DIN: Provided that before deactivation of any DIN in such case, the Central Government shall verify e- records with the validly retained number. In this case, Jyoti may make an application in form DIR-5 to surrender his first DIN with declaration as stated in above provisions.

Question 5.

Peter is serving as the managing director of a listed company and she would like to know the answers for her following queries in light of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 :

- (i) In how many other listed companies she could be appointed as an independent director ?
- (ii) Could she be appointed as non-executive director in five more private companies ?

Answer –

According to Section 165 of the Companies Act, 2013, no person shall hold office as a director, including any alternate directorship, in more than twenty companies at the same time. The maximum number of public companies in which a person can be appointed as a director shall not exceed ten. For reckoning the limit of public companies in which a person can be appointed as director, directorship in private companies that are either holding or subsidiary company of a public company shall be included.

For reckoning the limit of directorships of twenty companies, the directorship in a dormant company shall not be included. Additionally, for listed entities SEBI vide recent notification in regulation 17A of SEBI (LODR) Regulation, 2015 provides that the directors of listed entities shall comply with the following conditions with respect to the maximum number of directorships, including any alternate directorships that can be held by them at any point of time –

- (1) A person shall not be a director in more than eight listed entities with effect from April 1, 2019 and in not more than seven listed entities with effect from April 1, 2020: Further it has been provided that a person shall not serve as an independent director in more than seven listed entities.

(2) Notwithstanding the above, any person who is serving as a whole time director / managing director in any listed entity shall serve as an independent director in not more than three listed entities. For the purpose of this regulation, the count for the number of listed entities on which a person is a director / independent director shall be only those whose equity shares are listed on a stock exchange.

(i) Peter can be appointed in three more listed companies as independent director.

(ii) She could be appointed in five more private companies as director which will be well within the limits of total directorship.

Question 6.

X, proposes his candidature as a director of X Ltd. along with the deposit of ₹1 Lakh. Later X failed to be appointed as director but received 39% of the total votes. X, claimed X Ltd. to refund the deposit but the company denied to pay as he failed to be elected having obtained only 39% of votes cast. Is the decision of the company valid ? Explain when the requirement of deposit of amount is not applicable ?

Answer –

As per section 160 of the Companies Act, 2013, a person who is not a retiring director shall be eligible for appointment to the office of a director at any general meeting, if he, or some member intending to propose him as a director, has, not less than fourteen days before the meeting, left at the registered office of the company, a notice in writing under his hand signifying his candidature as a director or as the case may be, the intention of such member to propose him as a candidate for that office. Such notice must come along with the deposit of one lakh rupees or such higher amount as may be prescribed which shall be refunded to such person or, as the case may be, to the member, if the person proposed gets elected as a director or gets more than twenty five percent of total valid votes cast either on show of hands or on poll on such resolution.

In the given case, Mr. X. has deposited a sum of Rs. 1 lakh with the company, but he failed to get appointed as a director. However, Mr. X secured 39% of total valid votes i.e. condition of securing more than 25% of total valid votes cast, has been satisfied. Hence the decision of the company not to refund Rs. 1 Lakh to Mr. X is not valid.

As per the proviso to section 160(1) of the Companies Act, 2013, the requirements of deposit of amount shall not apply in case of appointment of an independent director or a director recommended by the Nomination and Remuneration Committee, if any, constituted under sub-section (1) of section 178 or a director recommended by the Board of Directors of the company, in the case of a company not required to constitute Nomination and Remuneration Committee.

Question 7.

Happy Mobile Ltd. is engaged in the manufacturing of mobiles and accessories related to mobile. The Board of the company consists of nine directors i.e., Rakesh (Director), Shyam (Director), Mehul (Director), Jigisha (Director), Komal (Director), Kavita (Director), Ashish (Independent Director), Gagandeep (Independent Director) and Anil (Small Shareholder's Director). Articles of Association of the company does not provide for retirement of all directors at every Annual General Meeting.

Calculate the number of directors liable to retire at the Annual General Meeting to be held on 15th September, 2022.

Answer –

Section 152(6) of the Companies Act, 2013-states that unless it is provided by the articles of the company, $\frac{2}{3}$ rd directors are liable to retire by rotation and $\frac{1}{3}$ rd are liable to retire at every general meeting after the meeting at which first directors are appointed.

Directors who are liable to retire by rotation are known as rotational directors. Any fraction while calculating $\frac{2}{3}$ rd shall be rounded off to the one. Alternatively, it can be said that only $\frac{1}{3}$ rd of the total number of directors can be non- rotational directors. Here, total directors mean directors appointed by the company. $\frac{1}{3}$ rd of rotational directors shall retire at every General Meeting. The directors who have been longest in office since their last appointment are liable to retire by rotation at every Annual General Meeting. Small Shareholders' Director and Independent Directors are non-rotational directors.

Applying above provisions, Ashish (Independent Director), Gagandeep (Independent Director) and Anil (Small Shareholders' Director) are non-rotational directors.

Remaining six directors are liable to retire by rotation. $\frac{1}{3}$ rd of rotational directors are liable to retire at the forthcoming Annual General Meeting (i.e. $\frac{1}{3}$ rd of 6 = 2).

Therefore, any two directors from Rakesh, Shyam, Mehul, Jigisha, Komal and Kavita will retire by rotation.

Question 8.

Evaluate if in the following cases, the person will be disqualified for appointment as a director of Race Ltd. :

(i) Takur, who holds a directorship in Turf Ltd., a company which did not file the financial statements with the Registrar of Companies for the financial years 2015-16, 2016-17 and 2017-18. However, the Company has filed the financial statements during August, 2019 to rectify the lapse.

(ii) Umesh was convicted of an offence not involving moral turpitude for a period of eight years and he has gone on appeal to a higher court, where the decision is pending.

Answer –

Section 164(2) of the Companies Act, 2013 provides that where a person has been a director of a company which has not filed financial statements for a continuous period of three financial years, he shall not be eligible to be appointed as a director in any other company for a period of 5 years from the date on which the Company has failed to do so. Thus, Takur cannot be appointed as a director of any other company for a period of 5 years from 2018, owing to the failure of Turf Ltd to file the financial statements. Even if the lapse is rectified by the Turf Ltd subsequently, the disqualification of Takur remains for five years.

Proviso to Section 164 (1)(d) of the Companies Act, 2013 provides that where a person has been convicted of an offence for a period of 7 years or more, he shall not be eligible to be appointed as a director in any company.

Proviso to the Section 164(3) states that the disqualification referred above shall continue to apply even if an appeal or petition has been filed against the order of conviction.

In the given case, the Umesh was convicted for an offence for a period of 8 years, Therefore, Umesh cannot be appointed as a director of Race Ltd. even the decision on appeal is pending.

Question 9.

Ceramic Ltd. is a listed company with paid-up share capital of ₹ 40 crore, turnover ₹ 200 crore but having a loss of ₹ 10 crore for the year ended 31 March, 2018. The woman director in the Board of the company resigned on 1 October, 2018. The last Board meeting was held on 25th September, 2018. The Board is likely to meet next on 15th January, 2019. Lalita, aged 30 years, has conveyed her interest to be associated with the company as a woman director. Discuss if any woman director is required to fill the vacancy and if so, when the appointment should be made as per the provisions of the Companies Act, 2013 ?

Answer –

Second Proviso to section 149 of Companies Act, 2013 provides that such class or classes of companies as may be prescribed in Rule 3 of Companies (Appointment and Qualification of Directors) Rules, 2014, provides that the following class of companies shall appoint at least one woman director-

(i) every listed company;

(ii) every other public company having:-

- (a) paid-up share capital of one hundred Crore rupees or more; or
- (b) turn over of three hundred Crore rupees or more.

However, any intermittent vacancy of a woman director shall be filled-up by the Board at the earliest but not later than immediate next Board meeting or three months from the date of such vacancy, whichever is later.

In the given case, as Ceramic is a listed company hence, the company is required to appoint a woman director in its board irrespective of paid up capital, turnover and loss amounts.

The appointment of Ms. Lalita as woman director is to be made at the earliest but not later than immediate next board meeting i.e. 15th January, 2019 or 3 months from date of cause of vacancy i.e. 01st October, 2018; whichever is later, that means the appointment shall be made by 15th January, 2019.

Question 10.

The Articles of Association of Rajasthan Toys Private Limited provide that the maximum number of Directors in the company shall not exceed 10. Presently, the company has 8 directors. Its Board of Directors desires to increase the number of directors from 8 to 16. Advise whether under the provisions of the Companies Act, 2013, the Board can do so?

Answer –

Under Section 149(1) of the Companies Act, 2013 every company shall have a Board of Directors consisting of individuals as directors and shall have a minimum number of 3 directors in the case of a public company, 2 directors in the case of a private company, and one director in the case of a One Person Company. The maximum number of directors shall be 15.

The First Proviso to Section 149(1) states that a company may appoint more than 15 directors after passing a special resolution.

From the provisions of section 149 (1) as above, though the minimum number of directors may vary depending on whether the company is a public, private or a one person company, the maximum number of directors is same for all types of companies i.e. 15 directors.

In the given case since the number of directors is proposed to be increased from 8 to 16, the company will be required to comply with the following provisions:

- (i) Alter its Articles of Association as per the provisions of Section 14 of the Act by passing a special resolution, so as to increase the number of directors in the Articles from 10 to 16;
- (ii) Also take approval for increasing the maximum number of directors from 8 to 16 by means of a special resolution passed by the members at a duly convened general meeting.