



# CS EXECUTIVE NEW SYLLABUS

## COMPANY LAW CASE STUDY BOOK

# समाधान

### All India Rankers

|                                       |                                       |                                      |                                   |                                |                                       |                                      |                                    |                                     |                                    |                                     |                                         |
|---------------------------------------|---------------------------------------|--------------------------------------|-----------------------------------|--------------------------------|---------------------------------------|--------------------------------------|------------------------------------|-------------------------------------|------------------------------------|-------------------------------------|-----------------------------------------|
| <b>AIR 1</b><br><br>Chiraag Agarwal   | <b>AIR 1</b><br><br>Yogita Daswani    | <b>AIR 1</b><br><br>Vaishnavi Biyani | <b>AIR 2</b><br><br>Swathi S      | <b>AIR 2</b><br><br>Sonia Boob | <b>AIR 2</b><br><br>Sanskriti Saraf   | <b>AIR 2</b><br><br>Rakesh Chaudhary | <b>AIR 2</b><br><br>Aparna Agarwal | <b>AIR 3</b><br><br>Khushi Mehta    | <b>AIR 6</b><br><br>Manav Shingari | <b>AIR 6</b><br><br>Harsh Chaudhari | <b>AIR 7</b><br><br>Ishika Basu         |
| <b>AIR 9</b><br><br>Dolly Kevalrama   | <b>AIR 9</b><br><br>Ummay Rabab Oruba | <b>AIR 11</b><br><br>Ashita Goyal    | <b>AIR 11</b><br><br>Ekta Motwani | <b>AIR 12</b><br><br>Saumya S  | <b>AIR 12</b><br><br>Shyam rajpurohit | <b>AIR 13</b><br><br>Asmita Jinde    | <b>AIR 14</b><br><br>Vaibhav Wable | <b>AIR 14</b><br><br>Sakshi Agarwal | <b>AIR 14</b><br><br>Mayank        | <b>AIR 14</b><br><br>Akash Oswal    | <b>AIR 15</b><br><br>Alefiya Ilyas Raja |
| <b>C-LAW<br/>TOPPER<br/>STUDENT'S</b> |                                       |                                      | <b>72</b><br><br>malika Nagrani   | <b>69</b><br><br>Sarthak Joshi | <b>63</b><br><br>Shubham sawant       | <b>62</b><br><br>Lavish jindal       | <b>62</b><br><br>Bhawarth Baghel   | <b>62</b><br><br>Alinaqi Mithwani   |                                    |                                     |                                         |





# CS Executive

## All India Rankers



**1**  
**AIR 1**  
Chiraag Agarwal



**2**  
**AIR 2**  
S Swathi



**3**  
**AIR 3**  
Khushi Mehta



**6**  
**AIR 6**  
MANAV SHINGARI



**6**  
**AIR 6**  
HARSH CHAUDHARY



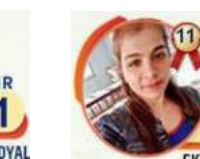
**7**  
**AIR 7**  
ISHIKA BASU



**8**  
**AIR 8**  
VAISHNAVI BIYANI



**11**  
**AIR 11**  
ASHITA GOYAL



**11**  
**AIR 11**  
EKTA



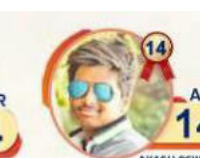
**12**  
**AIR 12**  
SAUMYA S



**12**  
**AIR 12**  
SHYAM RAJPUROHIT



**14**  
**AIR 14**  
MAYANK



**14**  
**AIR 14**  
AKASH OSWAL



**15**  
**AIR 15**  
ASHISH RAGHUWANSHI



**16**  
**AIR 16**  
KARAN GOYAL



**16**  
**AIR 16**  
NIDHI SURANA



**17**  
**AIR 17**  
PRAJAKTA KAMBLE



**19**  
**AIR 19**  
SUREKHA LIMBURDE



**19**  
**AIR 19**  
GIRIJA CHAVAN



**21**  
**AIR 21**  
HAMDIYA FATIMA



**22**  
**AIR 22**  
MANSI SINGH



**23**  
**AIR 23**  
MANSI R

& Many More...

### • OUR TOP SCORED STUENTS •



**MARKS 561**  
SSWATHI



**MARKS 522**  
MANAV SHINGARI



**MARKS 503**  
SAUMVA S



**MARKS 499**  
ASHISH RAGHUWANSHI



**MARKS 475**  
MANSIR



**MARKS 455**  
TIKSHA LOHIT



**MARKS 435**  
ANJALI



**MARKS 426**  
HARSHALA MAVAVANSHI



**MARKS 426**  
DIKSHA MISHRA



**MARKS 426**  
AAYUSHI PORWAL



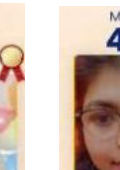
**MARKS 416**  
SIDDHI SINGH



**MARKS 410**  
PRAGATI SINGH



**MARKS 407**  
DIVVA



**MARKS 402**  
JAVA TVAGI



**MARKS 403**  
SIMONA AGRAWAL



**MARKS 402**  
AISHWARVA VERMA

Dil se... 

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The team at Unique Academy For Commerce wishes each and every student all the very best in their learning journeys and continuous guidance at every level of their examinations.

Happy Learning!

Unique Academy For Commerce

# INDEX

## **PART A :- COMPANY LAW – PRINCIPLES AND CONCEPTS**

- Chapter 1: Introduction to company law
- Chapter 2: legal status and types of registered companies
- Chapter 3: Memorandum and articles of association and its alteration
- Chapter 4: Share and share capital
- Chapter 5: Members and shareholders
- Chapter 6: Debt instruments
- Chapter 7: Charges
- Chapter 8: Distribution of profits
- Chapter 9: Accounts and auditors
- Chapter10: Compromise, arrangement and amalgamation
- Chapter11: Dormant companies
- Chapter12: Inspection , inquiry and investigation

## **PART B :- COMPANY ADMINISTRATION AND MEETINGS**

- Chapter 13:- General meetings
- Chapter 14:- Directors
- Chapter 15:- Board composition and powers of the boards
- Chapter 16:- Meetings of board and its committiees
- Chapter 17:- Coporate social responsibility

Chapter 18:- Annual report

Chapter 19:- Key managerial persons and their remuneration

## CHAPTER 1 – INTRODUCTION TO COMPANY LAW

### 1. Question

A private company and a banking company, can freely accept deposits.

#### Answer

Rule 1(3) of the Companies (Acceptance of Deposits) Rule, 2014 made under Section 73 and 76 of the Companies Act, 2013 provide that the Companies (Acceptance of Deposits) Rule, 2014 shall apply to a company other than -

- (i) a banking company;
- (ii) a non-banking financial company as defined in the Reserve Bank of India Act, 1934 registered with the Reserve Bank of India;
- (iii) a housing finance company registered with the National Housing Bank established under the National Housing Bank Act, 1987; and
- (iv) a company specified by the Central Government under the proviso to sub-section (1) of section 73 of the Act.

Accordingly, the Companies (Acceptance of Deposits) Rules, 2014 is not applicable to banking company. Hence, a banking company can freely accept deposits.

A private company is allowed to accept deposits from its members subject to fulfillment of conditions provided under section 73(2)(a) to (e) of the Companies Act, 2013.

However, the Ministry of Corporate Affairs vide the notification dated 13th June 2017 provides that the section 73(2)(a) to (e) shall not apply to following classes of 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 five years from the date of its incorporation; or
- (C) which fulfills 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 anybody 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:

The company referred to in clauses (A), (B) or (C) shall file the details of monies accepted to the Registrar in Form DPT-3.

### 2. Question

A public limited company has only seven shareholders. Being all the shares paid in full, one such shareholder purchased all the shares of another shareholder in a private settlement between them reducing the no. of shareholders to six. The company continues to carry on its business thereafter. Discuss with reference to the Companies Act, 2013 the implications of this transaction on the functioning of the company.

*Answer*

Section 3A of the Companies Act, 2013 provides that if at any time the number of members of a company is reduced, in the case of a public company, below seven or 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 cognizant 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.

In view of the above provision, if the company continued to carry on the business with that reduced membership (i.e. 6) beyond six months period, only those members who are cognizant of the fact that it is carrying on business with less than seven members shall be severally liable for the payment of the whole of debts of the company contracted during that time, and may be severally sued therefor.

**3. Question**

Arup entered into a transaction with Brilliant Merchandise Ltd. for a contract worth ` 51 lakh. The Articles of Association of the company stipulate that a contract above ` 25 lakh should be approved by a meeting of the Board of directors. Anjaan, Deputy General Manager (Commercial) produces a forged document which shows a resolution approving the contract having been passed in a Board Meeting. Later, the forgery is discovered. Arup pleads that his contract with the company is protected by the Doctrine of Indoor Management. Will Arup succeed ?

*Answer*

The doctrine of Constructive Notice protects a company from outsiders. The doctrine provides that an outsider must read the Memorandum and Articles of the Company and satisfy himself that the contract he is seeking to enter into with the company is within its powers.

As far as internal procedures are concerned, an outsider is entitled to presume that everything has been according to the procedures laid down and there is no irregularity. An outsider cannot find out what is going on inside the doors as the doors of management are closed. This is known as the doctrine of Indoor Management [also known as rule in Royal British Bank v. Turquand (1856) 12 Q.B. 273].

However, in certain exceptional situations the doctrine of indoor management is not applicable and one of them is when a person relies on a forged document. Nothing can validate forgery. A company cannot be held liable for forgery committed by its officers. This has been established in the case Ruben v. Great Fingall Consolidated case [1906] 1 AC 439.

In the instant case Arup has relied on a forged document. Therefore he will not be protected and he will not succeed in his pleading.

**4. Question**

The privilege of Limited Liability for Business Debts is one of the principal advantage of doing business under the corporate form of organization with some exceptions.



*Answer*

The company, being a separate person, is the owner of its assets and bound by its liabilities. The liabilities of a member as shareholder, extends to the contribution to the capital of the company up to the nominal value of the shares held and not paid by him. Members, even as a whole, are neither owners of the company's undertaking, nor liable for its debts. In other words, a shareholder is liable to pay the balance, if any, due on the shares held by him, when called upon to pay and nothing more, even if the liabilities of the company far exceed its assets. This means that the liability of a member is limited. If a person holds fully-paid shares, he has no further liability to pay even if the company is declared insolvent. In case of a company limited by guarantee, the liability of members is limited to a specified amount of the guarantee mentioned in the memorandum.

The exceptions to the principle of limited liability are –

- a. As per section 3A of the Companies Act, 2013 (the Act), 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 the 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 therefor.
- b. When the company is incorporated as an unlimited company under section 3(2)(c) of the Act.
- c. As per section 7(7)(b) of the Act, where a company has been got incorporated by furnishing any false or incorrect information or representation or by suppressing any material fact or information in any of the documents or declaration filed or made for incorporating such company or by any fraudulent action, the Tribunal may, on an application made to it, on being satisfied that the situation so warrants, direct that liability of the members of such company shall be unlimited.
- d. Under section 339(1) of the Act, wherein the course of winding up it appears that any business of the company has been carried on with an intent to defraud creditors of the company or any other persons or for any fraudulent purpose, the Tribunal may declare the persons who were knowingly parties to the carrying on of the business in the manner aforesaid as personally liable, without limitation of liability, for all or any of the debts/liabilities of the company.
- e. Under section 35(3) of the Act, 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 who was a director at the time of issue of the prospectus or has been named as a director in the prospectus or every person who has authorised the issue of prospectus or every promoter or a person referred to as an expert in the prospectus 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.
- f. As per section 75(1) of the Act, where a company fails to repay the deposit or part thereof or any interest thereon referred to in section 74 within the time specified or such further time as may be allowed by the Tribunal and it is proved that the deposits had been accepted with intent to defraud the depositors or for

any fraudulent purpose, every officer of the company who was responsible for the acceptance of such deposit shall, without prejudice to other liabilities, also be personally responsible, without any limitation of liability, for all or any of the losses or damages that may have been incurred by the depositors.

- g. As per section 224(5) of the Act, where the report made by an inspector states that fraud has taken place in a company and due to such fraud any director, key managerial personnel, other officer of the company or any other person or entity has taken undue advantage or benefit, whether in the form of any asset, property or cash or in any other manner, the Central Government may file an application before the Tribunal for appropriate order disgorgement of such asset, property, or cash, and also for holding such director, key managerial personnel, officer or other person liable personally without any limitation of liability.

#### 5. Question

Articles of Association of a company limited by guarantee provides that entire income of company shall be applied towards promotion of the objects of the company.

#### Answer

A company limited by guarantee is primarily used for non-profit purposes and the profits are reinvested and used for promoting its non-profit activities. Although the Companies Act, 2013, does not specifically prohibit distribution of dividend in such companies; however, the Articles of Association of such companies usually provides that all the income of the company shall be applied solely towards the promotion of the objects of the company and that no portion shall be paid or transferred directly or indirectly by way of dividend or bonus or by way of profit to its members.

Therefore, the statement is correct. Articles of Association of the company limited by guarantee may provide that all the income of company shall be applied towards promotion of the objects of company.

#### 6. Question

Explain in brief : A company though a legal person is not a citizen.

#### Answer

The Statement is correct.

A company though a legal person, is not a citizen under the:

- Constitution of India; or
- Citizenship Act, 1955

However, company has "nationality", domicile and "residence".

In the matter of State Trading Corporation of India Ltd. vs. C.T.O., the Supreme Court has held that State Trading Corporation though a legal person, was not a citizen and can act only through natural persons. Nevertheless, it is to be noted that certain fundamental rights enshrined in the Constitution for protection of "person", e.g., right to equality (Article 14) etc. are also available to company. Section 2(f) of Citizenship Act, 1955 expressly excludes a company or association or body of individuals from citizenship.

## 2 CHAPTER : LEGAL STATUS AND TYPES OF REGISTER COMPANY

**Que. 1] Varun is interested to start a new business under company type of organization. Since Varun is science graduate, he wants to know from you which type of companies can be formed in India under the Companies Act, 2013. Advice him suitably.**

**Ans.:** The Companies Act, 2013 provides for the companies that can be promoted and registered under the Act. The types of companies which may be registered under the Act are:

- (a) Public Companies
- (b) Private Companies
- (c) One Person Company [OPC] (to be formed as private limited)
- (d) Producer Companies [The Companies Act, 2013 do not make any provisions for producer company. The provisions of the Companies Act, 1956 will continue to apply until special Act is enacted for producer company. The provisions relating to producer companies are discussed in details in Chapter No. 26]

**Formation of Company [Section 3(1)]:** A company may be formed for any lawful purpose by -

- (a) 7 or more persons, where the company to be formed is a public company;
- (b) 2 or more persons, where the company to be formed is a private company; or
- (c) 1 person, where the company to be formed is a One Person Company [OPC] that is to say, a private company,

by subscribing their names or his name to a memorandum and complying with the requirements of registration.

**Types of company that can be formed [Section 3(2)]:** A company formed u/s 3(1) may be either -

- (a) A company limited by shares or
- (b) A company limited by guarantee or
- (c) An unlimited company.

**Que. 2] Write a short note on: Classification of Companies**

**Ans.:** Companies can be classified as follows:

**(1) Classification on the basis of incorporation:** There are three ways in which companies may be incorporated:

- (a) Statutory Companies:** These are constituted by a special Act of Parliament or State Legislature. The provisions of the Companies Act, 2013 do not apply to them. Examples of these types of companies are Reserve Bank of India, Life Insurance Corporation of India, etc.
- (b) Registered Companies:** The companies which are incorporated under the Companies Act, 2013 or under any previous company law, with ROC fall under this category.

**(2) Classification on the basis of Liability:** Under this category there are three types of companies:

- (a) Unlimited Liability Companies:** In this type of company, the members are liable for the company's debts in proportion to their respective interests in the company and their liability is unlimited. Such companies may or may not have share capital. They may be either a public company or a private company.
- (b) Companies limited by guarantee:** A company that has the liability of its members limited to such amount as the members may respectively undertake, by the memorandum, to contribute to the assets of the company in the event of its being wound-up, is known as a company limited by guarantee. The members of a guarantee company are, in effect, placed in the position of guarantors of the company's debts up to the agreed amount.
- (c) Companies limited by shares:** A company that has the liability of its members limited by the liability clause in the memorandum to the amount, if any, unpaid on the shares respectively held by them is termed as a company limited by shares. For example, a shareholder who has paid Rs. 75 on a share of face value Rs. 100 can be called upon to pay the balance of Rs. 25 only. Companies limited by shares are by far the most common and it may be either public or private.

**(3) Other forms of Companies:**

- (a) Associations not for profit having license u/s 8 which may be either private or public company.
- (b) Government Companies
- (c) Foreign Companies
- (d) Holding and Subsidiary Companies;
- (e) Associate Companies/Joint Venture Companies
- (f) Investment Companies
- (g) Producer Companies
- (h) Nidhi Companies
- (i) Dormant Companies
- (j) Non-Banking Financial Companies (NBFC).

**Que. 3] Write a short note on: Companies Limited by Shares**

**The liability of the members of limited company can never be unlimited. Comment. CS (Inter) - Dec 1999 (5 Marks), June 2007 (5 Marks)**

**Ans.: Company Limited by Shares [Section 2(22)]:** Company limited by shares means a company having the liability of its members limited by the MOA to the amount unpaid on the shares respectively held by them.

Accordingly, no member of a company limited by shares can be called upon to pay more than the nominal amount of the shares held by him. If his shares are fully paid-up, he has nothing more to pay. But in the case of partly-paid shares, the unpaid portion is payable at any time during the existence of the company on a call being made.

**Que. 4] Write a short note on: Companies Limited by Guarantee**

**Ans.: Company Limited by guarantee [Section 2(21)]:** A company limited by guarantee is a registered company having liability of its members limited by its MOA to such amount as the member may **respectively undertake to contribute** to the assets of the company in **the event of its winding up**.

Clubs, trade associations and societies for promoting different objects are examples of such companies.

Some important points relating to company limited by guarantee are given below:

- (1) Liability:** Members of company limited by guarantee are required to pay their guaranteed amounts only when the company goes into liquidation and not when it is a going concern.
- (2) Share Capital:** A guarantee company may or may not have a share capital. As regards the funds, a guarantee company without share capital obtains working capital from other sources, e.g. fees or grants. 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, etc.
- (3) Undertaking:** The MOA of every guarantee company must state that every member of the company undertakes to contribute specified amount to assets of the company in the event of its being wound up.

The MOA of a company limited by guarantee must state the amount of guarantee. It may be of different denominations.

In case of a guarantee company having share capital, the shareholders have two-fold liability:

- ♦ To pay the amount which remains unpaid on their shares and
- ♦ To pay the amount under the guarantee when the company goes into liquidation.

**(4) Voting Power:** The voting power of a guarantee company having share capital is determined by the shareholding and not by the guarantee.

**(5) Name:** A guarantee company must include the word 'limited' or the words 'private limited' as part of its name.



**(6) Article:** A guarantee company must register its articles, and it shall adopt the provisions of the **Tables G & H of Schedule I**. It must also state the number of members with which it proposes to be registered.

**(7) Participation in the divisible profits [Section 4(7)]:** Any provision in the MOA of the company limited by guarantee and not having a share capital, purporting to give any person a right to participate in the divisible profits of the company otherwise than as a member shall be **void**.

**Que. 5] An unlimited company is a company not having any limit on the liability of its members. CS (Executive) - June 2009 (5 Marks)**

**It is always mandatory for an unlimited company to have share capital.**

**CS (Executive) - June 2012 (5 Marks)**

**Ans.: Unlimited Company [Section 2(92)]:** Unlimited company means a company not having any limit on the liability of its members. Thus, the maximum liability of the member of such a company, in the event of its being wound up, might stretch up to the full extent of their assets to meet the obligations of the company by contributing to its assets.

The members of an unlimited company are not liable directly to the creditors of the company. The liability of the members is only towards the company and in the event of its being wound up only the liquidator can ask the members to contribute to the assets of the company which will be used in the discharge of the debts of the company.

An unlimited company may or may not have share capital

**Conversion into Limited Company [Section 18]:** A company registered as an unlimited company may subsequently re-register itself as a limited company, by altering its memorandum and articles of the company in accordance with the provisions of **Chapter II** of the Companies Act, 2013. However, any debts, liabilities, obligations or contracts incurred or entered before conversion will not be affected by such changed registration.

**Que. No. 6] Mahesh is a creditor of an unlimited company. The company was wound-up. Mahesh, therefore, wants to sue the members of the company to recover the dues. Advise Mahesh regarding the remedy available to him. CS (Executive) - June 2015 (4 Marks)**

**Ans.:** As per **Section 2(92)** of the Companies Act, 2013, unlimited company means a company not having any limit on the liability of its members. Thus, the maximum liability of the member of such a company, in the event of its being wound up, might stretch up to the full extent of their assets to meet the obligations of the company by contributing to its assets.

The members of an unlimited company are not liable directly to the creditors of the company. The liability of the members is only towards the company and in the event of its being wound up only the liquidator can ask the members to contribute to the assets of the company which will be used in the discharge of the debts of the company.

Thus, Mahesh cannot directly sue the members of the company for recovery of his dues. He can file a claim to the liquidator of the company.

**Que. 7] Write a short note on: Small Company**

**Ans.: Small Company [Section 2(85)]:** Small company means a private company,

(i) **Paid-up share capital** of which does not exceed Rs. **50 lakh** or such higher amount as may be prescribed which shall not be more than **Rs. 10 Crore and**

(ii) **Turnover** of which as per profit and loss account for the immediately preceding financial year does not exceed **Rs. 2 Crore** or such higher amount as may be prescribed which shall not be more than **Rs. 100 Crore**.

Nothing in this definition shall apply to: (This means following companies cannot be small companies')

- (a) Holding or a subsidiary company
- (b) Company registered u/s 8 or
- (c) Company or body corporate governed by any Special Act.

**Que. 8] Write a short note on: Privileges of a Small Company**

**Ans.:**

| <b>Sections</b>           | <b>Nature of Exemption/Privileges</b>                                                                                                                                                                          |
|---------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Section 2(40)</b>      | The financial statement, with respect to Small Company may not include the cash flow statement.                                                                                                                |
| <b>Section 67(2)</b>      | Financial assistance can be given for purchase of or subscribing to its own shares or shares in its holding company                                                                                            |
| <b>Section 92(1)</b>      | The annual return shall be signed by the company secretary, or where there is no company secretary, by the director of the company. In other words it need not be signed by the company secretary in practice. |
| <b>Section 121(1)</b>     | Need not prepare a report on Annual General Meeting                                                                                                                                                            |
| <b>Section 134(3) (p)</b> | Need not prepare a statement indicating the manner in which formal annual evaluation has been made by the Board of its own performance and that of its committees and individual directors.                    |
| <b>Section 149(1)</b>     | Small company need not have more than two directors in its Board.                                                                                                                                              |
| <b>Section 149(4)</b>     | Need not appoint Independent directors on its Board.                                                                                                                                                           |
| <b>Section 152(6)</b>     | A proportion of directors need not to retire every year.                                                                                                                                                       |
| <b>Section 164(3)</b>     | Additional grounds for disqualification for appointment as a director may be specified in the articles.                                                                                                        |

**Que. No. 9] Distinguish between: Small Company and Inactive Company CS (Executive) - June 2016 (4 Marks)**

**Ans.: Small Company [Section 2(85)]:** Small company means a private company,

(i) Paid-up share capital of which does not exceed Rs. **50 lakh** or such higher amount as may be prescribed which shall not be more than **Rs. 10 Crore** and

(n) Turnover of which as per profit and loss account for the immediately preceding financial year does not exceed Rs. **2 Crore** or such higher amount as may be prescribed which shall not be more than Rs. **100 Crore**.

Nothing in this definition shall apply to: (This means following companies cannot be small companies')

- (a) Holding or a subsidiary company
- (b) Company registered u/s 8 or
- (c) Company or body corporate governed by any Special Act.

**Inactive Company** means a company:

- Which has not been carrying on any business or operation, or has not made any significant accounting transaction during the last 2 financial years or
- Which has not filed financial statements and annual returns during the last 2 financial years.

**Que. 10] Write a short note on: Holding and Subsidiary Companies**

**CS (Inter) - June 1994 (4 Marks)**

**It is necessary for a company to hold more than half of the nominal capital of another company to be called its holding company.**

**CS (Inter) - June 2001 (5 Marks)**

**Distinguish between: Holding and Subsidiary Companies****CS (Executive) - Dec 2010 (4 Marks)**

**Ans.:** Holding and Subsidiary companies are relative terms. A company is a holding company of another if the other is its subsidiary.

**Holding Company [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 [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 -

- (a) Controls the composition of the Board of Directors or
- (b) Exercises or controls more than 50% of the total voting power either at its own or together with one or more of its subsidiary companies

However, prescribed class or classes of holding companies shall not have layers of subsidiaries beyond the prescribed limit.

**Que. 11]** The paid-up share capital of AVS (P) Ltd. is Rs. 1 Crore, consisting of 8 lakhs equity shares of Rs. 10 each, fully paid-up and 2 lakhs cumulative preference shares of Rs. 10 each, fully paid-up. XYZ (P) Ltd. and BCL (P) Ltd. are holding 3 lakhs equity shares and 1,50,000 equity shares respectively in AVS (P) Ltd.

XYZ (P) Ltd. and BCL (P) Ltd. are the subsidiaries of TSR (P) Ltd. With reference to the provisions of the Companies Act, 2013, examines whether AVS (P) Ltd. is a subsidiary of TSR (P) Ltd.? Would your answer be different if TSR (P) Ltd. has 8 out of total 10 directors on the Board of Directors of AVS (P) Ltd.?

**Ans.:** Subsidiary company or subsidiary, in relation to any other company (that is to say the holding company), means a company in which the holding company—

- (a) Controls the composition of the Board of Directors or
- (b) Exercises or controls more than 50% of the total voting power either at its own or together with one or more of its subsidiary companies.

The first mentioned company is a subsidiary of any company which is the other's subsidiary.

AVS (P) Ltd. is not subsidiary of TSR (P) Ltd. within meaning of **Section 2(87)**, since that definition of 'subsidiary company' requires direct relationship between subsidiary and holding company.

However, if TSR Ltd. is in a position to control the composition of Board of Directors of AVS (P) Ltd. through its subsidiary, it will be subsidiary company as per **Section 2(87)** of the Companies Act, 2013.

**Que. 12]** You are the Company Secretary of Paragon Ltd. The chairman of the company seeks your views on the following.

Company XYZ Ltd. is a subsidiary of your company in which the holding of the your company is 8,50,000 equity shares of Rs. 10 each fully paid up which constitute 85% of its paid up capital. XYZ Ltd. desires to issue further 8,00,000 equity shares of Rs. 10 each on which initially a sum of Rs. 3 will be paid to ABC Ltd. to meet its long term capital requirement. On such issue of further capital XYZ Ltd., will XYZ Ltd. continue to be the subsidiary of your company? CS (Inter) - Dec 2001 (8 Marks)

**Ans.:** As per **Section 2(87)** of the Companies Act, 2013, a company shall be deemed to be subsidiary of another company, where the other company holds more than **51% nominal value** of its equity share capital.

Nominal capital of XYZ Ltd. =  $8,50,000 \times \frac{100}{85} = 10,00,000$  shares

The total nominal capital of XYZ Ltd. after further issue will be =  $10,00,000 + 8,00,000 = 18,00,000$ .

Percentage of holding in XYZ Ltd. after further issue =  $\frac{8,50,000}{18,00,000} \times 100 = 47.22\%$

As percentage of holding in XYZ Ltd. after further issue is less than 50%, XYZ Ltd. will be no more subsidiary company.

**Que. 13] Write a short note on: Associate Company**

**Ans.: Associate Company [Section 2(6)]:** 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.

**“Significant Influence”** means control of at least 20% of total share capital, or of business decisions under an agreement.

To add more governance and transparency in the working of the company, the concept of associate company has been introduced. It will provide a more rational and objective framework of associate relationship between the companies.

Further, as per **Section 2(76)**, Related party includes 'Associate Company'. Hence, contract with Associate Company will require disclosure/approval/ entry in statutory register as is applicable to contract with a related party.

**Que. No. 14] Distinguish between: Subsidiary company and Associate company**

**CS (Executive) - Dec 2016 (5 Marks)**

**Ans.:** Following are the main points of distinction between subsidiary & associate company:

| Points                  | Subsidiary Company                                                                                                                                                                                                                                                | Associate Company                                                                                                                                                                                                                           |
|-------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Meaning                 | Subsidiary' company means a company in which the holding company controls the composition of the Board of Directors or exercises or controls more than 50% of the total voting power either at its own or together with one or more of its subsidiary' companies. | 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. |
| Holding Paid up capital | Holding company holds more than 50% share capital in subsidiary' company.                                                                                                                                                                                         | In associate companies, one company field's more than 20% but less than 50% of share capital.                                                                                                                                               |
| Control                 | Holding company has major control in subsidiary company.                                                                                                                                                                                                          | In associate companies, one company has only significant influence over other company but not major control.                                                                                                                                |
| Section                 | The term 'subsidiary company' is defined in Section 2(6).                                                                                                                                                                                                         | The term 'associate company' is defined in Section 2(87).                                                                                                                                                                                   |

**Que. 15] Write a short note on: Government Companies**

**CS (Inter) - Dec 1995 (4 Marks), June 2008 (4 Marks)**

**Define government company and state the provisions of the Companies Act, 2013 relating to government companies. State four exemption granted to such companies. CS (Inter) - Dec 1998 (10 Marks)**

**Ans.: Government Company [Section 2(45)]:** Government Company means any company in which **not less than 51%** of the paid-up share capital is held 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, and includes a company which is a subsidiary company of such a Government company.

**Judicial Views:**

♦ Notwithstanding all the pervasive control of the Government, the Government company is neither a government department nor a government establishment. [Hindustan Steel Works Construction Co. Ltd. vs. State of Kerala (1998) 2 CLJ 383]

♦ Since employees of Government companies are not Government servants, they have no legal right to claim that the Government should pay their salary or that the additional expenditure incurred on account of revision of their pay scales should be met by the Government, it is the responsibility of the company to pay them the salaries. [A K. Bindal vs. Union of India (2003)

114 Com. Cases 590 (SC)]

**Que. 16] 43% of the paid-up share capital of V4C Ltd. is held by the Central Government and 8% is held by the Life Insurance Corporation of India and Unit Trust of India (Public Institutions). Analyze the definition of 'Government Company' under the provisions of the Companies Act, 2013 and decide whether V4C Ltd. is a Government Company.**

**CS (Executive) - Dec 2018 (5 Marks)**

**Ans.: Section 2(45)** of the Companies Act, 2013 defines a Government company as any company in which **not less than 51%** of the paid-up share capital is held 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. Thus, in determining whether a company is Government Company or not the holding by Central and State Government has to be considered and the shares held by public institution has to be ignored. Accordingly, V4C Ltd. cannot be treated as Government Company.

**Que. No. 17] Can employees of the 'Government Company' claim salary from the 'Government'? Discuss with reference to decided case law.**

**Ans.:** Employees of government companies are not government servants, they have no legal right to claim that the Government should pay their salary or that the additional expenditure incurred on account of revision of their pay scales should be met by the Government. It is the responsibility of the company to pay them the salaries. [A. A. Bindal v. Union of India (2003) 114 Com Cases 590 (SC)]

**Que. No. 18] Can 'Government Company' is treated as 'State or Central Government' for claiming exemption under the various statutes or Constitution of India?**

**Ans.:** In Andhra Pradesh Road Transport Corporation v. ITO AIR 1964 SC 1486, the Andhra Pradesh State Road Transport Corporation claimed exemption from taxation by invoking Articles 289 of the Constitution of India according to which the property and income of the State are exempted from the Union taxation. The Supreme Court, while rejecting the Corporation's claim, held that though it was wholly controlled by the State Government, it had a separate entity and its income was not the income of the State Government. The Court observed that the companies which are incorporated under the Companies Act have a corporate personality of their own, distinct from that of the Government of India. The land and buildings are vested in and owned by the companies, the Government of India only owns the share capital.

In Hindustan Steel Works Construction Ltd. v. State of Kerala 1998, 2 Comp LJ 383, it was held that in spite of all the control of the Government, the company is neither a Government department nor a Government establishment, it is just an agency of the Government, and hence not exempt from the purview of Kerala Construction Workers Welfare Funds Act. The employees of a Government Company are not the employees of the Central or State Government.

**Que. No. 19] ABC Ltd. is a company incorporated under the Companies Act, 2013. The paid-up share capital of the company is held as under :**

- Government of India 20%
- Government of Andhra Pradesh 20%
- Government of Tamil Nadu 10%
- Government of Maharashtra 10%

**Explaining the provisions of the Companies Act, 2013, state whether the said company be called a 'Government company' and also state whether the employees of a Government company can claim their salaries from the Government of India.** **CS (Executive) - Dec 2015 (4 Marks)**



**Ans.:** As per **Section 2(45)** of the Companies Act, 2013, government company means any company in which not less than 51% of the paid-up share capital is held 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, and includes a company which is a subsidiary company of such a Government company.

As per the facts given in case, more than 51% capital is held in ABC Ltd. by the Central Government and State Government; hence it is a government company.

Employees of government companies are not government servants, they have no legal right to claim that the Government should pay their salary or that the additional expenditure incurred on account of revision of their pay scales should be met by the Government. It is the responsibility of the company to pay them the salaries. [A.K. Bindal v. Union of India (2003) 114 Com Cases 590 (SC)]

**Que. 20] Write a short note on: An Investment Company**

**Ans.:** An investment company is a company, the principal business of which consists in acquiring, holding and dealing in shares and securities. The word 'investment', no doubt, suggests only the acquisition and holding of shares and securities and thereby earning income by way of interest or dividend etc. But investment companies in actual practice earn their income not only through the acquisition and holding but also by dealing in shares and securities i.e. to buy with a view to sell later on at higher prices and to sell with a view to buy later on at lower prices.

If a company is engaged in any other business to an appreciable extent, it will not be treated as an investment company.

**PRIVATE COMPANIES**

**Que. 21] Write a short note on: Private Company**

**A private company incorporated under the Companies Act, 2013 may issue debentures to any number of persons and can accept deposit from the public. Comment. CS (Executive) - Dec 2017 (5 Marks)**

**Ans.: Private Company [Section 2(68)]:** A private company means a company, which has a minimum paid-up capital as may be prescribed, **and by its articles:**

- (a) Restricts the right to transfer its shares
- (b) Limits the number of its members to 200 excluding past and present employee
- (c) Prohibits any invitation to the public to subscribe for any securities.

A private company may issue debentures to any number of persons. The only condition being that an invitation to the public to subscribe for debentures is prohibited.

The words 'Private Ltd.' must be added at the end of its name by a private limited company.

**Deposits:** A private company can only accept deposit from its members only and not from public.

**No. of Members [Section 3(1)]:** A private company may be formed for any lawful purpose by two or more persons, by subscribing their names to a memorandum and complying with the requirements in respect of registration.

**No. of Directors [Section 149(1)]:** A private company shall have a minimum 2 directors. The only 2 members may also be the 2 directors of the private company.

**Que. 22] A private limited company wants to increase its subscribed capital by offering further issue of shares to friends and relatives of directors by Board Resolution. Is it valid as per law?**

**CS (Inter) - Dec 2004 (5 Marks)**

**Ans.:** As per **Section 2(68)** of the Companies Act, 2013, a private company by its articles must prohibits any invitation to the public to subscribe for any securities. However, it can raise capital privately from selected people. So, further issue of shares to friends and relatives of directors by Board Resolution is valid as per law.

**Que. 23] Write a short note on: Special privileges and exemptions of private companies**

**Discuss the advantages of private limited company.**

**CS (Inter) - June 1995 (5 Marks)**



**Ans.:** The Companies Act, 2013 confers certain privileges on private companies. Such companies are also exempted from complying with quite a few provisions of the Act. The basic rationale behind this is that since the private limited companies are restrained from inviting capital from the public, not much public interest is involved in their affairs as compared to public limited companies. Some of the special privileges and exemptions of private companies are as follows:

| Sections                  | Nature of Exemption/Privileges                                                                                                                                                                                                           |
|---------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Section 67(2)</b>      | Financial assistance can be given to its employees for purchase of or subscribing to its own shares or shares in its holding company                                                                                                     |
| <b>Section 121(1)</b>     | Need not prepare a report on the Annual General Meeting.                                                                                                                                                                                 |
| <b>Section 134(3) (p)</b> | Need not prepare a statement indicating the manner in which formal annual evaluation has been made by the Board of its own performance and that of its committees and individual directors.                                              |
| <b>Section 149(1)</b>     | Private company need not have more than two directors.                                                                                                                                                                                   |
| <b>Section 149(4)</b>     | Need not appoint Independent directors on its Board.                                                                                                                                                                                     |
| <b>Section 152(6)</b>     | A proportion of directors need not retire every year.                                                                                                                                                                                    |
| <b>Section 164(3)</b>     | Additional grounds for disqualification for appointment as a director may be specified by the company in its articles.                                                                                                                   |
| <b>Section 165(1)</b>     | Restrictive provisions regarding total number of directorships which a person may hold in a public company do not include directorships held in a private company which is neither a holding nor subsidiary company of a public company. |
| <b>Section 167(4)</b>     | Additional grounds for vacation of office of a director may be provided in the Articles,                                                                                                                                                 |
| <b>Section 190 (4)</b>    | The provisions relating to contract of employment with managing or whole-time directors does not apply to a private company.                                                                                                             |
| <b>Section 197(1)</b>     | Total managerial remuneration payable by a private company, to its directors, including managing director and whole-time director, and its manager in respect of any financial year may exceed 11% of the net profits.                   |

**Que. 24] Write a short note on: Special obligations of a private company**

**Ans.:** A private company owes certain special obligations as compared to a public company, which are as follows:

- (1) Annual Return [Section 92]:** While filing its annual return with the ROC, a private company must also send a certificate stating that the company has not issued any invitation to the public to subscribe for its shares or debentures and that the number of members of the company does not exceeds 200, the excess comprises wholly of persons who are excluded while reckoning the number of 200.
- (2)** The Company continued to be a Private Company during the financial year.

**Que. 25] What will be the consequence in case a Private Company defaults in complying with conditions constituting Private Company in terms of Section 2(68) of the Companies Act, 2013.**

**Ans.:** As per **Proviso to Section 14(1)**, if a private company alters its articles in such a manner that they no longer include the restrictions and limitations which are required to be included in the articles of a private company, such company shall cease to be a private company. In such a case, it shall be treated as a public company from the date of alteration of its articles.

**Que. 26] Anuradha and Shilpa are interested to form a private company to start a business of cosmetic products. Advise them about the procedure to be adopted to form a private company under the Companies Act, 2013.**

**Ans.:** Following is the summarized procedure for incorporation of private limited company:

**STEP I: Apply for Name Approval:**

A. Login on MCA Website:

Applicant have to login into their account on MCA Website. After Login user have to click on the icon "RUN" in MCA Service. An online form shall be open. Applicants have to fill the information online.

**Note:** Since 26<sup>th</sup> January, 2018 e-form INC-1 has been omitted from the Companies Act, 2013.

B. Details required to be mentioned in online form:

(i) Entity type (i.e. Part-I, OPC, Section 8 etc.)

(ii) CIN (Corporate Identification Number and it has to be entered only when an existing company wishes to change its name and is using RUN to reserve a new name)

(iii) Proposed name (Auto Check Facility)

(iv) Comment (Mention Objects of the proposed Company and any other relevant information Like Trade Mark etc.)

(v) Choose File (Any attachment)

C. Choose File: This option is available to upload the PDF documents. If applicant want to attach any file, can be upload at this option.

D. Submission of Form on MCA Website: After completion of above steps user shall submit the Form with MCA website.

E. Payment of Fees: There is no option of pay later challan in RUN. Applicant has to pay fees immediately after submission of form. After payment challan shall be generated.

F. Validity of Reserved Name: Reserved name shall be valid for **20 days** from the date of approval of Name.

**STEP II: Preparation of Documents for Incorporation of Company:**

After approval of name or for Incorporation of Company applicant have to prepare the following below mentioned Documents:

- ◆ INC-9 Affidavit/declaration by first subscribers and directors on duly authorized Stamp Papers.
- ◆ DIR-2 declaration from first Directors along with Copy of Proof of Identity and residential address.
- ◆ NOC from the owner of the property.
- ◆ Proof of Office address (Conveyance/Lease deed/Rent Agreement etc. along with rent receipts).
- ◆ Copy of the utility bills (not older than two months).

In case of subscribers/Director does not have a DIN, it is mandatory to attach proof of identity and residential address of the subscribers All the subscribers should have Digital Signature.

**STEP III: Fill the Information in Form:**

Once all the above mentioned documents/information are available. Applicant has to fill the information in the e-form **SPICe INC-32**.

Features of SPICe (INC-32) form:

- ◆ Maximum details of subscribers are 7. In case of more subscribers, physically signed MOA & AOA shall be attaching in the Form.
- ◆ Maximum details of directors are 20.
- ◆ Maximum 3 directors are allowed for filing application of allotment of DIN while incorporating a Company.
- ◆ Person can apply the Name also in this form.

- ♦ By affixation of DSC of the subscriber on the INC-33 (e-moa) date of signing will be appear automatically by the form.
- ♦ Applying for PAN/TAN will be compulsory for all fresh incorporation applications filed in the new version of the SPICe Form,
- ♦ In case of companies incorporated, with effect from the 26<sup>th</sup> day of January, 2018, with a nominal capital of less than or equal to Rs. **10 lakhs** or in respect of companies not having a share capital whose number of members as stated in the articles of association does not exceed 20, fee on SPICe INC-32 shall not be applicable.

Single Window Form: Earlier if a person wants to incorporate Company then it has to apply for the DIN, Approval of the Name Availability, Separate form for first Director, Registered office address, PAN, TAN etc. But this form is a single window for incorporation of company.

This form can be used for the following purposes:

Application of DIN (up to 3 Directors)

Application for Availability of Name

No need to file separate form for first Director (i.e. Form No. DIR-12)

No need to file separate form for address of registered office (i.e. Form No. INC-22)

No need to file separate form for PAN & TAN

#### **STEP IV: Preparation of MOA & AOA:**

After proper filing of SPICe form applicant has to download the e-form INC-33 (MOA) and INC-34 (AOA) form the MCA site. After downloading of form fill all the information in the forms as per requirement of Tables A to J of Schedule I.

After completely filing of the form affix DSC of all the subscribers and professional on subscriber sheet of the MOA & AOA.

#### **STEP V: Fill details of PAN & TAN:**

It is mandatory to mention the details of PAN & TAN in the Incorporation Form No. INC-32. Link to find out of Area Code to file PAN & TAN are given in Help Kit of SPICE Form.

#### **STEP VI: Submission of INC-32, 33, 34 on MCA:**

Once all the 3 forms ready with the applicant, upload all three documents Linked form on MCA website and make the payment of the same.

#### **STEP VII: Certificate of Incorporation:**

Incorporation certificate shall be generating with CIN, PAN & TAN.

### **PUBLIC COMPANIES**

#### **Que. 27] Write a short note on: Public Company**

**Ans.: Public Company [Section 3(1)(iv)]:** A public company means a company which:

- (a) is not a private company and
- (b) has a minimum paid-up capital as may be prescribed.

However, a company which is a subsidiary of a company, not being a private company, shall be deemed to be public company even where such subsidiary company continues to be a private company in its articles. (This means, if private company is subsidiary of public company then it will be treated as public company)

A public company should have 7 members.

**Que. 28] Masons Pvt. Ltd. is a private limited company as per the Article of Association of the company. However, a public company acquired shares in Masons Pvt. Ltd. thereby making the Masons Pvt. Ltd., a subsidiary of that public company. State the impact of such acquisition of shares by the public company on Masons Pvt. Ltd.**

**CS (Executive) - June 2015 (4 Marks)**

**Ans.:** As per **Section 3(1)(iv)**, a company which is a subsidiary of a company, not being a private company, shall be deemed to be public company even where such subsidiary company continues to be a private company in its articles. This means, if private company is subsidiary of public company then it will be treated as public company.

Thus, if a public company acquires shares in Masons Pvt. Ltd making it subsidiary of that public company, the Masons Pvt. Ltd will be treated as public company under the Companies Act, 2013 even though Masons Pvt. Ltd. continues to be a private company in its articles.

**Que. 29] Distinction between: Public Company & Private Company**

**CS (Inter) - Dec 1999 (8 Marks)**

**Ans.:** Following are the main points of distinction between public and private company:

| Points                                         | Public Company                                                                                                                      | Private Company                                                                                       |
|------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------|
| <b>Meaning</b>                                 | The minimum number of persons required to form a public company is <b>7</b> and <b>no restriction on maximum</b> number of members. | The minimum requirement is only of <b>2 persons</b> and the maximum limit is of <b>200 persons</b> .  |
| <b>No. of directors</b>                        | It must have at least <b>3 directors</b> .                                                                                          | It must have at least <b>2</b> directors.                                                             |
| <b>Subscription for shares &amp; debenture</b> | A public company can invite the general public to subscribe the shares or debentures of the company.                                | A private company is prohibited by its Articles to subscribe the shares or debentures of the company. |
| <b>Transfer of shares</b>                      | Shares of public companies are freely transferable.                                                                                 | In a private company, transferability of shares is restricted by Articles.                            |
| <b>Special privileges</b>                      | There are no special privileges enjoyed by a public company.                                                                        | A private company enjoys some special privileges under the Companies Act, 2013.                       |
| <b>Managerial remuneration</b>                 | In case of public company total managerial remuneration cannot exceed 11% of the net profits.                                       | In case of private company, no such restriction on remuneration applies.                              |

**Que. 30] Enumerate the provisions and procedure for incorporation of public limited company.**

**Ans.:** Any 7 or more persons can incorporate a public limited company. The following steps are involved for registration and incorporation of the company.

**Prohibition of certain names [Section 4(2) & (3)]:** The name stated in the memorandum of association shall not:

- (a) be identical with or resemble too nearly to the name of an existing company registered under this Act or any previous company law or
- (b) be such that its use by the company -
  - (i) will constitute an offence under any law for the time being in force or
  - (ii) is undesirable in the opinion of the Central Government.

A company shall not be registered with a name which contains -

- (a) Any word or expression which is likely to give the impression that the company is in any way connected with, or having the patronage of, the Central or State Government, or any local authority, corporation or body constituted by the Central or State Government or
- (b) Such word or expression which requires previous approval of the Central Government.

**Application for availability of name of company [Section 4(4)]:** A person may make an application, in **Form RUN (Reserve Unique Name)** and accompanied by prescribed fee to the Registrar for the reservation of a name set out in the application as-

- (a) the name of the proposed company or
- (b) the name to which the company proposes to change its name. [Rule 9]

**Reservation of name by ROC [Section 4(5)(i)]:** Upon receipt of an application, the Registrar may, on the basis of information and documents furnished along with the application, reserve the name for a period of 20 days from the date of the approval or such other period as may be prescribed.

An application for registration of a company shall be filed, with the ROC within whose jurisdiction the registered office of the company is proposed to be situated, in **Form No. INC-32 (SPICe)** along with the fee as provided under the Companies (Registration Offices and Fees) Rules, 2014. [Rule 12 of the Companies (Incorporation) Rules, 2014]

**Preparation of MOA & AOA:** MOA & AOA are the two important documents which must be prepared by the promoters and are required to be filed with the ROC at the time of registration.

**Power of Attorney:** The promoters may appoint professional like Company Secretary to carry out the work of incorporation of company in such case promoter are required to execute a Power of Attorney on a non-judicial stamp paper authorizing CS to take all the necessary steps for the incorporation of company.

**Declaration from the professional [Section 7(1)(b)]:** A declaration by an advocate, a CA, CMA or CS and by a person named in the articles as a director, manager or secretary of the company is required to be filed in **Form No. INC-8** stating that all the requirements of the Act and the rules made there under in respect of registration and matters precedent or incidental thereto have been complied with. [Rule 14]

**Declaration from the subscribers to the Memorandum [Section 7(1)(c)]:** A declaration in **Form No. INC-9** is required to be filed by each of the subscribers to the memorandum and persons named as the first directors stating that:

- He is not convicted for any offence relating to promotion, formation or management of any company or
- He has not been found guilty of any fraud or misfeasance or of any breach of duty during the preceding 5 years.
- All the documents filed for registration of the company with the ROC contain information that is correct, complete and true. [Rule 15]

**Furnishing verification of Registered Office [Section 12]:** A company shall have registered office from the 30<sup>th</sup> day of its incorporation. The company can furnish to the Registrar verification of registered office within 30 days of incorporation in **Form No. INC-22**. [Rule 25]

**Particulars of subscribers [Section 7(1)(e)]:** The particulars of name, surname or family name, residential address, nationality and other particulars of every subscriber to the memorandum along with proof of identity has to be filed in **Form No. INC-10**. [Rule 16]

**Particulars of first directors along with their consent to act as directors [Section 7(1)(f)]:** The particulars of the first directors of the company, their names, surnames or family names, DIN, residential address, nationality and other particulars including proof of identity has to be filed in **Form No. DIR-12**. [Rule 17]

**Particulars of interests of first directors in other firms or bodies corporate [Section 7(1)(g)]:** The particulars of the interests of first directors in other firms or bodies corporate along with their consent to act as directors of the company has to be filed in **Form No. DIR 12**. [Rule 17]

**Issue of Certificate of Incorporation by Registrar [Section 7(2)]:** The Registrar on the basis of documents and information filed, shall register all the documents and information in the register and issue a certificate of incorporation in **Form No, INC 11** to the effect that the proposed company is incorporated under this Act. [Rule 18]

**Effect of Registration [Section 9]:** From the date of incorporation mentioned in the certificate of incorporation, subscribers to the memorandum become members of the company, shall be a body



corporate by the name contained in the memorandum, capable of exercising all the functions of an incorporated company and having perpetual succession "and a common seal with power to acquire, hold and dispose of property, both movable and immovable, tangible and intangible, to contract and to sue and be sued, by the said name.

\* Deleted by Companies (Amendment) Act, 2015.

### ONE PERSON COMPANY [OPC]

**Que. 31] Write a short note on: One Person Company**

**One person company shall be formed only as a company limited by shares. Comment. CS (Executive) - June 2015 (5 Marks)**

**Ans.: One Person Company [Section 2(62)]:** One Person Company means a company which has only one person as a member.

One Person Company has to be formed as a private company. **[Section 3(1)(c)]**

**Directors:** A One Person Company shall have a minimum of one director. Therefore, a One Person Company will be registered as a private company with one member and one director.

In case of OPC an individual being its member shall be deemed to be its first director until a director or directors are duly appointed by the member in accordance with the provisions of that section. **[Section 152(1)]**

**Type of OPC [Section 3(2)]:** An OPC may be formed either as a company limited by shares or a company limited by guarantee; or an unlimited liability company.

**Que. 32] Write a short note on: Benefits of One Person Company**

**Ans.:** The concept of One Person Company is quite revolutionary. It gives the individual entrepreneurs all the benefits of a company, which means they will get credit, bank loans, access to market, limited liability, and legal protection available to companies.

Prior to the new Companies Act, 2013 coming into effect, at least two shareholders were required to start a company. But now the concept of OPC would provide tremendous opportunities for small businessmen and traders, including those working in areas like handloom, handicrafts and pottery.

Earlier they were working as artisans and weavers on their own, so they did not have a legal entity of a company. But now the OPC would help them do business as an enterprise and give them an opportunity to start their own ventures with a formal business structure. Further, the amount of compliance by a one person company is much lesser in terms of filing returns, balance sheets, audit etc. Also, rather than the middlemen usurping profits, the one person company will have direct access to the market and the wholesale retailers. The new concept would also boost the confidence of small entrepreneurs.

**Que. 33] Jolly is interested to start a new business under company type of organization. Since Jolly is science graduate, he wants to know from you which type of companies can be formed in India under the Companies Act, 2013. He is particularly interested as to how one person company is formed and what are the basic requirements for forming such company? Advice him suitably.**

**Ans.: Formation of Company [Section 3(1)]:** A company may be formed for any lawful purpose by -

- (a) 7 or more persons, where the company to be formed is a public company;
- (b) 2 or more persons, where the company to be formed is a private company; or
- (c) 1 person, where the company to be formed is a One Person Company [OPC] that is to say, a private company,

by subscribing their names or his name to a memorandum and complying with the requirements of registration.

However, the memorandum of OPC shall indicate the name of the other person, with his prior written consent in the prescribed form, who shall, in the event of the subscriber's death or his incapacity to contract become the member of the company and the written consent of such person shall also be filed with the Registrar at the time of incorporation of the OPC along with its memorandum and articles. Such other person may withdraw his consent at any time.



The member of OPC may at any time change the name of such other person by giving notice in prescribed manner.

It shall be the duty of the member of OPC to intimate the company the change, if any, in the name of the other person nominated by him by indicating in the memorandum or otherwise within such time and in such manner as may be prescribed, and the company shall intimate the Registrar any such change within such time and in such manner as may be prescribed.

Any change in the name of the person shall not be deemed to be an alteration of the memorandum.

**The Companies (Incorporation) Rules, 2014 makes following special provisions relating to OPC:**

**One Person Company [Rule 3]:**

(1) Only a natural person who is an Indian citizen and resident in India-

- (a) shall be eligible to incorporate OPC;
- (b) shall be a nominee for the sole member of OPC.

**Explanation:** "Resident in India" means a person who has stayed in India for a period of not less than **182 days** during the immediately preceding financial year.

- (2) A natural person shall not be member of more than a One Person Company at any point of time and the said person shall not be a nominee of more than a One Person Company.
- (3) Where a natural person, being member in OPC becomes a member in another such Company by virtue of his being a nominee in that OPC, such person shall meet the eligibility criteria within a period of **180 days**.

- (4) No minor shall become member or nominee of the One Person Company or can hold share with beneficial interest.
- (5) Such Company cannot be incorporated or converted into a Section 8 company (non-profit making company).
- (6) Such Company cannot carry out Non-Banking Financial Investment activities including investment in securities of any body corporates.
- (7) No such company can convert voluntarily into any kind of company unless 2 years is expired from the date of incorporation of OPC, except where **paid-up share capital** is increased beyond Rs. **50 lakh** or its **average annual turnover** during the relevant period exceeds Rs. **2 Crore**.

**Nomination by the Subscriber or Member of One Person Company [Rule 4]:**

- (1) The subscriber to the memorandum of OPC shall nominate a person, after obtaining prior written consent of such person, who shall, in the event of the subscriber's death or his incapacity to contract, become the member of that One Person Company.
- (2) The name of the person nominated shall be mentioned in the memorandum of OPC and such nomination in **Form No. INC-32** along with consent of such nominee obtained in **Form No. INC-3** and fee as provided in the **Companies (Registration Offices & Fees) Rules, 2014** shall be filed with the ROC at the time of incorporation of the company along with its MOA and AOA.
- (3) The person nominated by the subscriber or member of OPC may, withdraw his consent by giving a notice in writing to such sole member and to the One Person Company. However, the sole member shall nominate another person as nominee within **15 days** of the receipt of the notice of withdrawal and shall send an intimation of such nomination in writing to the Company, along with the written consent of such other person so nominated in **Form No. INC-3**.
- (4) The company shall within **30 days** of receipt of the notice of withdrawal of consent file with the ROC, a notice of such withdrawal of consent and the intimation of the name of another person nominated by the sole member in **Form No. INC-4** and the written consent of such another person so nominated in **Form No. INC-3**.
- (5) The subscriber or member of OPC may, by intimation in writing to the company, change the name of the person nominated by him at any time for any reason including in case of death or incapacity to

contract of nominee and nominate another person after obtaining the prior consent of such another person in **Form No. INC-3**. However, the company shall, on the receipt of such intimation, file with the ROC, a notice of such change in **Form No. INC-4** and written consent of the new nominee in **Form No. INC-3** within 30 days of receipt of intimation of the change.

- (6) Where the sole member of OPC ceases to be the member in the event of death or incapacity to contract and his nominee becomes the member of such OPC, such new member shall nominate within **15 days** of becoming member, a person who shall in the event of his death or his incapacity to contract become the member of such company, and the company shall file with the Registrar an intimation of such cessation and nomination in Form No. INC-4 along with prescribed

fees within 30 days of the change in membership and written consent of the person so nominated in **Form No. INC-3**.

**Que. 34] Write a short note on: Contract by One Person Company**

**Ans.: Contract by One Person Company [Section 193]:** Where OPC enters into a contract with the sole member who is also the director, the company shall ensure that the terms of the contract or offer are recorded in a memorandum or are recorded in the minutes of the first meeting of the Board of Directors of the company held next after entering into contract. If the contract is in writing no recording is required.

However, above said provision shall not apply to contracts entered into by the OPC in the ordinary course of its business.

The company shall inform the ROC about every contract entered into by the company and recorded in the minutes of the meeting of its Board of Directors within a period of **15 days** of the date of approval by the Board of Directors.

**Que. 35] Write a short note on: Privileges of a One Person Company Discuss the advantage of a One Person Company.**

**Ans.:** The privileges and exemptions enjoyed by a one person company or its advantages over other companies are as follows:

| Sections              | Nature of Exemption/Privileges                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
|-----------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Section 2(40)</b>  | The financial statement, with respect to One Person Company, may not include the cash flow statement.                                                                                                                                                                                                                                                                                                                                                                                            |
| <b>Section 67(2)</b>  | Financial assistance can be taken by the member from the OPC for purchase of or subscribing to its own shares                                                                                                                                                                                                                                                                                                                                                                                    |
| <b>Section 92(1)</b>  | The annual return shall be signed by the company secretary, or where there is no company secretary, by the director of the company. In other words it need not be signed by a company secretary in practice.                                                                                                                                                                                                                                                                                     |
| <b>Section 96(1)</b>  | Need not hold annual general meeting.                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| <b>Section 121(1)</b> | Need not prepare a report on Annual General Meeting.                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| <b>Section 122(1)</b> | The provisions of Section 98 and Sections 100 to 117 shall not apply to a One Person Company.                                                                                                                                                                                                                                                                                                                                                                                                    |
| <b>Section 122(3)</b> | For 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 u/s 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 the Act. |
| <b>Section 122(4)</b> | Where there is only one director on the Board of Director of OPC and any business is required to be transacted at the meeting of the Board of Directors of the company, it                                                                                                                                                                                                                                                                                                                       |

|                                       |                                                                                                                                                                                                                                                                                                                                     |
|---------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|                                       | shall be sufficient if, in case of such OPC, the resolution by such director is entered in the minutes-book required to be maintained u/s 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 purposes under the Act.                           |
| <b>Section 134(1)</b>                 | Financial statement and Board's report can be signed only by one director                                                                                                                                                                                                                                                           |
| <b>Section 134(3) (p)</b>             | Need not prepare a statement indicating the manner in which formal annual evaluation has been made by the Board of its own performance and that of its committees and individual directors.                                                                                                                                         |
| <b>Section 134(4)</b>                 | In case of a One Person Company, Board's report shall mean only a report containing explanations or comments by the Board on every qualification, reservation or adverse remark or disclaimer made by the auditor in his report.                                                                                                    |
| <b>Section 137(1) (Third proviso)</b> | 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.                                                                                                            |
| <b>Section 149(1)</b>                 | One person company need not to have more than one director on its Board.                                                                                                                                                                                                                                                            |
| <b>Section 149(4)</b>                 | Need not to appoint Independent directors on its Board.                                                                                                                                                                                                                                                                             |
| <b>Section 152(6)</b>                 | Retirement by rotation is not applicable.                                                                                                                                                                                                                                                                                           |
| <b>Section 164(3)</b>                 | Additional grounds for disqualification for appointment as a director may be specified by way of articles.                                                                                                                                                                                                                          |
| <b>Section 165(1)</b>                 | Restrictive provisions regarding total number of directorships which a person may hold in a public company do not include directorships held in One Person company which are neither holding nor subsidiary company of a public company.                                                                                            |
| <b>Section 167(4)</b>                 | Additional grounds for vacation of office of a director may be provided in the Articles.                                                                                                                                                                                                                                            |
| <b>Section 173(5)</b>                 | It is required to hold at least one meeting of the Board of Directors in each half of a calendar year and the gap between the two meetings should not be less than ninety days. For an OPC having only 1 director, the provisions of section 173 (Meetings of board) and section 174 (Quorum for meetings of Board) will not apply. |
| <b>Section 190(4)</b>                 | The provisions relating to contract of employment with managing or whole-time directors does not apply to a One Person Company                                                                                                                                                                                                      |
| <b>Section 197(1)</b>                 | Total managerial remuneration payable by a one person company, to its directors, including managing director and whole-time director, and its manager in respect of any financial year may exceed 11% of the net profits.                                                                                                           |

**Power to exempt class or classes of companies from provisions of the Act [Section 462(1)]:** The Central Government may direct that any of the provisions of the Act, shall not apply to such classes of companies; or shall apply to the classes of companies with such exceptions, modifications and adaptations as may be specified in the notification. Therefore, the Central Government may grant further privileges/exemptions to OPC by issuing a notification.

#### **NIDHI COMPANIES**

**Nidhi Companies are discussed in detail in Chapter No. 8.**

#### **PRODUCER COMPANIES**

**Important Note: Section 465(1)** of the **Companies Act, 2013** provides that the provisions of Part IX A of the Companies Act, 1956 shall be applicable mutatis mutandis to a Producer Company in a manner as if the Companies Act, 1956 has not been repealed until a Special Act is enacted for Producer Companies.

The Companies Act, 2013 does not make any provisions in respect of producer companies. Any new producer company cannot be incorporated under the Companies Act, 2013.

The Companies Act, 1956 continues to be applicable to them, until a special Act, is enacted for the producer companies.

Hence, in this chapter all the provisions of the Companies Act, 1956 as applicable to producer companies has been discussed.

**Que. 36] Explain the concept of producer company.**

**CS (Inter) - June 2006 (4 Marks)**

**Ans.: Producer Company [Section 581A(I)]:** A producer company means a body corporate, having objects or activities specified in **Section 581B** and registered as producer company.

Hence, the objectives for which producer companies may be formed are laid down in **Section 581B**.

Every producer company shall deal primarily with the produce of its active members for carrying out any of its specified objects. This means there is an obligation on the producer company to deal primarily with the active members in conducting its activities.

**Que. 37] Directors of ABC Ltd. want to incorporate a producer company. ABC Ltd. itself is in the production and harvesting business. You are the company secretary of ABC Ltd. You are requested to advise the Board of ABC Ltd. about incorporation of such a producer company and set out its objectives as per relevant provisions of the Companies Act.**

**CS (Executive) - Dec 2017 (8 Marks)**

**Ans.: Objects of Producer Company [Section 581B(1) of the Companies Act, 1956]:** The objects of the Producer Company shall relate to all or any of the following matters, namely:

- (a) Production, harvesting, procurement, grading, pooling, handling, marketing, selling, export of primary produce of the Members or import of goods or services for their benefit. However, the Producer Company may carry on any of the specified activities either by itself or through other institution,
- (b) Processing including preserving, drying, distilling, brewing, vinting, canning and packaging of produce of its Members.
- (c) Manufacture, sale or supply of machinery, equipment or consumables mainly to its Members.
- (d) Providing education on the mutual assistance principles to its Members and others.
- (e) Rendering technical services, consultancy services, training, research and development and all other activities for the promotion of the interests of its Members.
- (f) Generation, transmission and distribution of power, revitalization of land and water resources, their use, conservation and communications relatable to primary produce.
- (g) Insurance of producers or their primary produce.
- (fz) Promoting techniques of mutuality and mutual assistance.
- (i) Welfare measures or facilities for the benefit of Members as may be decided by the Board.
- (;) Any other activity, ancillary or incidental to any of the activities referred to in clauses (a) to (i) or other activities which may promote the principles of mutuality and mutual assistance amongst the Members in any other manner.

**Formation of Producer Company & its registration [Section 581C(1)]:**

Specified number of persons desirous of forming a producer company having its objects specified in Section 581B and complying with the requirements in respect of registration, may form an incorporated company as a producer company.

Specified person are as follows:

- ♦ Any 10 or more individuals being a producer or

- ♦ Any 2 or more producer institutions, or
- ♦ A combination of 10 or more individuals and producer institutions

**Issue of certificate of registration [Section 581 C(2)]:** If the Registrar is satisfied that all the requirements with in respect of registration and matters precedent and incidental thereto have been complied with, he will issue within 30 days of the receipt of the documents required for registration, a certificate of incorporation.

**Liability of Members [Section 581 C(3)]:** A producer company so formed shall have the liability of its members limited by the memorandum to the amount, if any, unpaid on the shares respectively held by them and be termed a company limited by shares.

**Reimbursement of promotion cost to the promoters [Section 581C(4)]:**

The producer company may reimburse to its promoters all other direct costs associated with the promotion and registration of the company including registration, legal fees, printing of a memorandum and articles and the payment thereof shall be subject to the approval at its first general meeting of the Members.

**Producer Company shall be a private a company [Section 581C(5)]:** On registration, the Producer Company shall become a body corporate as if it is a private limited company. However, any limit to the number of members is not applicable. Thus, the producer company is a private company without any limit as to number of members.

**Que. 38] A group of 8 individuals together with a producer institution approached the Registrar for incorporation of a producer company under Section 581 of the Companies Act, 1956. Can the Registrar go ahead with the registration and incorporation? Discuss.**

**CA (Final) - Nov 2014 (4 Marks)**

**Ans.:** As per **Section 581 C(1)** of the Companies Act, 1956, specified number of person desirous of forming a producer company having its objects specified in Section 581B and complying with the requirements in respect of registration, may form an incorporated company as a producer company.

Specified person are as follows:

- ♦ Any 10 or more individuals being a producer or
- ♦ Any 2 or more producer institutions, or
- ♦ A combination of 10 or more individuals and Producer institutions.

Thus, group of 8 individuals together with a producer institution cannot be registered as producer company.

**Que. 39] Distinguish between: Limited liability partnership and producer company CS (Executive) - Dec 2010 (4 Marks)**

**Ans.:** Following are the main points of distinction between LLP and Producer Company:

| Points                      | Limited Liability Partnership                                                                                          | Producer Company                                                                                                                                                 |
|-----------------------------|------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Meaning</b>              | Limited liability partnership means a partnership formed and registered under Limited Liability Partnership Act, 2008. | A producer company means a body corporate, having objects or activities specified in Section 581B of the Companies Act, 1956 and registered as producer company. |
| <b>Governing</b>            | Limited liability partnerships are governed by the Limited Liability Partnership Act, 2008.                            | Companies are governed by the Companies Act, 1956.                                                                                                               |
| <b>Internal rules &amp;</b> | Internal rules and regulation of LLP's are                                                                             | Internal rules and regulation of the                                                                                                                             |

|                          |                                                                                                                                            |                                                                                                                                                                                      |
|--------------------------|--------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>regulation</b>        | governed by the LLP agreement.                                                                                                             | producer companies are governed by the MOA & AOA.                                                                                                                                    |
| <b>Meetings</b>          | hi the LLP Act, there is no stipulation for meeting of partners either periodically or compulsory at the year end.                         | Every producer company must hold AGM every year, A meeting of the board shall be held not less than once in every 3 months and at least 4 board meetings shall be held in every year |
| <b>Business</b>          | In an LLP, each partner has the authority to do so unless expressly prohibited by the partnership terms.                                   | In case of a producer company no individual director can conduct the business of the company.                                                                                        |
| <b>Remuneration</b>      | There are no provisions in the LLP Act, 2008 regulating the remuneration payable to designated partners.                                   | The Companies Act, 1956 regulates the remuneration payable to directors.                                                                                                             |
| <b>Points</b>            | <b>Limited Liability Partnership</b>                                                                                                       | <b>Producer Company</b>                                                                                                                                                              |
| <b>Borrowing power</b>   | There are no restrictions on the borrowing powers on the LLP.                                                                              | There are restrictions on borrowings power on the producer companies.                                                                                                                |
| <b>Accounts</b>          | The LLP can choose to maintain the accounts on cash basis/ accrual basis.                                                                  | Producer companies have to keep their accounts on accrual basis.                                                                                                                     |
| <b>Audit</b>             | The audit of LLP is not compulsory if the capital contributed does not exceed Rs. 25 lakh or if the turnover does not exceed Rs. 40 lakhs. | Audit of a producer company is compulsory.                                                                                                                                           |
| <b>Company Secretary</b> | The appointment of Company Secretaries is not provided in the LLP Act, 2008.                                                               | Every producer company having an average annual turnover exceeding Rs. 5 Crore in each of 3 consecutive financial years shall have a whole-time secretary.                           |

## FOREIGN COMPANIES

**Que. 40] Write a short note on: Foreign Companies**

**CS (Inter) - June 1994 (4 Marks), Dec 1997 (4 Marks)**

**Define 'foreign company'. State the provisions of the Companies Act, 2013 applicable to foreign companies.**

**Ans.: 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. **Sections 379 to 393** of the Act deal with foreign companies.

**Application of Act to foreign companies [Section 379]:** If 50% or more paid-up share capital of the foreign company is held by Indian citizens or bodies corporate incorporated in India, such company shall comply with prescribed provisions of the Act, as notified by the Central Government.

**Documents to be delivered to ROC by foreign companies [Section 380]:**

Every foreign company which establishes a place of business in India must within 30 days of the establishment of such place of business, file with the ROC for registration:

- (i) A certified copy of MOA and AOA of the company. (If it is not in the English language, a certified translation in the English language has to be filed)



- (ii) The full address of the registered or principal office of the company, (in) A list of the directors and secretary.
- (iv) The name and address of persons resident in India who are authorized to accept any notices or other documents required to be served on the company.
- (v) The full address of principal place of business in India.
- (vi) Particulars of opening and closing of a place of business in India on earlier occasions.
- (vii) Declaration that none of the directors of the company or the authorized representative in India has ever been convicted or debarred from formation of companies and management in India or abroad.
- (viii) Any other prescribed information.

**Accounts of foreign company [Section 381]:** Foreign Company has to maintain books of account and file a copy of balance sheet and profit and loss account in prescribed form with ROC every calendar year. These accounts should be accompanied by list of place of business established by the foreign company in India.

**Display of name of foreign company [Section 382]:** Every foreign company has to ensure that the name of the company, the country of incorporation, the fact of limited liability of members is exhibited in the specified places or documents.

**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 ROC u/s 380 and left at, or sent by post to, the address which has been so delivered to the ROC or by electronic mode.

**Debentures, Annual Return, Registration of Charges, Books of Account and Their Inspection [Section 384]:**

- (1) The provisions of Section 71 shall apply mutatis mutandis to a foreign company.
- (2) The provisions of Section 92 and Section 135 shall, subject to such exceptions, modifications and adaptations as may be made therein by rules made under the Act, apply to a foreign company as they apply to a company incorporated in India.
- (3) The provisions of Section 128 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.
- (4) The provisions of Chapter VI shall apply mutatis mutandis to charges on properties which are created or acquired by any foreign company.
- (5) The provisions of Chapter XIV shall apply mutatis mutandis to the Indian business of a foreign company as they apply to a company incorporated in India.

**Interpretation [Section 386]:** For the purposes of the foregoing provisions -

- (a) The expression "certified" means certified in the prescribed manner to be a true copy or a correct translation.
- (b) The expression "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.
- (c) The expression "place of business" includes a share transfer or registration office.

In *Tovarishstvo Manufacture Liudvig Rabenek, Re.* [1944] 2 All ER 556 it was held that where representatives of a company incorporated outside the country frequently stayed in a hotel in England for looking after matter of business, it was held that the company had a place of business in England.

In a certain case, it was held that mere holding of property cannot amount to having a place of business.

**Power to Wind-up Foreign Companies, Although Dissolved [Section 376]:**

Where a body corporate incorporated outside India which has been carrying on business in India, ceases to carry on business in India, it may be wound up as an unregistered company under this Part,

notwithstanding that the body corporate has been dissolved or otherwise ceased to exist as such under or by virtue of the laws of the country under which it was incorporated.

**Que. 41] State the provisions of the Companies Act, 2013 applicable to foreign companies with regard to establishment of place of business.**

**CS (Inter) - June 2001 (8 Marks)**

**To consider a body corporate as a foreign company, a place of business in India is to be established. State the activities that do not constitute carrying of business in India. CS (Executive) - June 2015 (4 Marks)**

**Ans.:** Foreign Company means a company which is incorporated outside India under the law of that other country and has a **place of business** in India.

The following activities are held as not constituting "carrying on of business":

- ♦ Carrying small transactions.
- ♦ Conducting meetings of shareholders or even directors.
- ♦ Operating bank accounts.
- ♦ Transferring of shares or other securities.
- ♦ Operating through independent contractors.
- ♦ Procuring orders.
- ♦ Creating or financing of debts, charges, etc. on property.
- ♦ Securing or collecting debts or enforcing claims to property of any kind.

In *Tbvarsthestvo Manufacture Liudvig Rabenek, Re.* [1944] 2 All ER 556 it was held that where representatives of a company incorporated outside the country frequently stayed in a hotel in England for looking after matter of business, it was held that the company had a place of business in England.

In a certain case, it was held that mere holding of property cannot amount to having a place of business.

**Que. 42] A representative of a foreign company in India was only receiving orders from customers. State whether the place where the orders so received be termed as a place of business.**

**CS (Inter) - June 2005 (4 Marks)**

**Ans.:** Foreign company means a company which is incorporated outside India under the law of that other country and has a **place of business** in India.

If a representative of a foreign company in India merely receives the orders from customers it cannot be said that it has 'place of business' in India. Hence, **Sections 379 to 393** of the Companies Act, 2013 are not applicable and need not be complied.

**Que. 43] Referring to the provisions of the Companies Act, 2013, state as to when shall a company incorporated outside India be considered as a 'foreign company' within the meaning of the Companies Act, 2013. Also examining the provisions of the Act, state whether in the following cases, the company shall be considered as a 'foreign company':**

**(i) A company incorporated outside India has a representative in India, who on behalf of the company merely receives orders from the customers.**

**(ii) Company incorporated outside India holds its Board meetings and general meetings in India. CS (Executive) - Dec 2015 (4 Marks)**

**Ans.:** As per **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.

In simple words, foreign company means a company which is incorporated outside India under the law of that other country and has a place of business in India. A foreign company has to comply the provisions of Sections 379 to 393 of the Companies Act, 2013.

If a representative of a foreign company in India merely receives the orders from customers it cannot be said that it has 'place of business' in India. Hence, Sections 379 to 393 of the Companies Act, 2013 relating to foreign companies are not applicable and need not be complied.

Similarly, conducting board meeting and general meeting in India by a foreign company has held to be not "carrying on of business".

**Que. 44] A French Manufacturing Company desirous of setting up its branch office at Pune, seeks your advice on the objects for which the company may be allowed to set up the desired branch office. Advise the company about the procedure as required under the Foreign Exchange Management Act, 1999 to be followed in this regard.**

**CA (Final) - May 2006 (7 Marks)**

**Ans.:** As per **Section 6(6)** of the Foreign Exchange Management Act, 1999, the RBI 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. In exercise of such power, the RBI has framed **FEM (Establishment in India of a Branch Office or a Liaison Office or a Project**

**Office or any other Place of Business) Regulations, 2016.** Provisions of this Regulation are explained below:

**Prohibition against opening a branch office or a liaison office or a project office or any other place of business in India [Regulation 3]:** No person resident outside India shall without prior approval of the RBI open in India a branch office or a liaison office or a project office or any other place of business by whatever name called except as laid down in these Regulations:

- (a) A banking company resident outside India shall not require any approval under these Regulations for establishing any office in India if such company has obtained necessary approval under the provisions of the **Banking Regulation Act, 1949**.
- (b) An insurance company resident outside India shall not require any approval under these Regulations for establishing any office in India if such company has obtained approval from the IRDA established u/s 3 of the **Insurance Regulatory & Development Authority Act, 1999**.
- (c) A company resident outside India shall not require any approval under these Regulations to establish a branch office in the SEZs to undertake manufacturing and service activities, subject to the conditions that:
  - (i) Such branch offices are functioning in those sectors where 100% FDI is permitted;
  - (ii) Such branch offices comply with Chapter XXII of the Companies Act, 2013; and
  - (iii) Such branch offices function on a stand-alone basis.

**Approval for opening a branch office or a liaison office or a project office or any other place of business in India [Regulation 4]:**

- (a) **Eligibility:** A person resident outside India can establish a branch office or a liaison office in India provided it meets the following criterion:
  - (i) For Branch Office: A profit making track record during the immediately preceding 5 financial years in the home country and net worth of not less than **US\$ 1,00,000** or its equivalent.
  - (ii) For Liaison Office: A profit making track record during the immediately preceding three financial years in the home country and net worth of not less than **US\$ 50,000** or its equivalent.

However, a person resident outside India that is not financially sound and are subsidiaries of other companies may submit a Letter of Comfort from their parent company subject to the condition that the parent company satisfies the prescribed criterion for net worth and profit.

- (b) **Permissible activities:** A person resident outside India permitted by the Reserve Bank under these Regulations to establish a branch or liaison office in India may undertake or carry on any activity spec-

ified in Schedule I or II (Annex B), as the case may be, but shall not undertake or carry on any other activity unless otherwise specifically permitted by the RBI.

- (c) **Application form:** A person resident outside India desiring to establish a branch office or a liaison office or a project office or any other place of business in India shall submit an application in Form FNC to an AD Category-I who may, subject to the provisions of Regulation 5, grant approval as per the directions and/or guidelines issued by the RBI in this regard. In case no office is opened by the person resident outside India within six months from the date of approval letter, the approval for establishing the office in India shall be cancelled. In cases where the person resident outside India is not able to open the office within the stipulated time frame due to reasons beyond their control, the AD Category-I may consider granting extension of time for setting up the office by a further period of 6 months. Any further extension of time shall require the prior approval of the RBI in this regard.

**(d) Extension of the validity period for liaison office:**

(I) A person resident outside India may establish in India under these Regulations a liaison office for a period of 3 years subject to the provisions of Regulation 4(zf)(IU). The non-resident entity may apply to the AD Category-I bank concerned for extension of the validity period of approval, and upon receipt of such an application, the AD Category-I bank concerned may extend the validity period of approval for a period of 3 years from the date of expiry of the original approval/extension granted, subject to such directions issued by the RBI in this regard.

(II) The application for extension of the validity period of the liaison office of banks and entities engaged in insurance business has to be directly submitted to the Department of Banking Regulation (DBR), RBI and the IRDA respectively.

(III) Entities engaged in construction and development sectors and which are Non-Banking Finance Companies are permitted to open a Liaison Office for **2 years** only. No further extension would be considered for liaison offices of entities which are Non-Banking Finance Companies and those engaged in construction and development sectors (excluding infrastructure development companies). Upon expiry of the validity period, the offices shall have to either close down or be converted into JV/WOS in conformity with the extant FDI policy.

- (e) **Additional offices:** A person resident outside India desiring to establish additional branch office or liaison office may submit to the AD Category-I a fresh FNC Form along with the justification for the need for additional offices.

- (f) **Project office:** A foreign company may open project office in India provided it has secured from an Indian company, a contract to execute a project in India, and

(i) the project is funded directly by inward remittance from abroad; or

(ii) the project is funded by a bilateral or multilateral International Financing Agency; or

(iii) the project has been cleared by an appropriate authority; or

(iv) a company or entity in India awarding the contract has been granted term loan by a Public Financial Institution or a bank in India for the Project.

- (g) **Registration with State Police Authorities:** A person from Bangladesh, Sri Lanka, Afghanistan, Iran, China, Hong Kong or Macau opening a branch office or a liaison office or a project office or any other place of business in India shall have to register with the concerned State Police Authorities. Copy of approval letter for 'persons' from these countries shall be marked by the AD Category-I bank to the Ministry of Home Affairs, Internal Security Division-I, Government of India, New Delhi.

- (h) **Fund/non-fund based facilities:** AD Category-I bank may extend fund and/or non-fund based facilities to branch office and project offices based on the guidelines issued by the RBI in this regard.

**(i) Remittance of profit or surplus:**

(I) Branch office may remit outside India profit of the branch net of applicable Indian taxes, on production of the following documents to the satisfaction of the AD Category-I bank through whom the remittance is effected:

- (a) A certified copy of the audited Balance Sheet and Profit and Loss account for the relevant year.
- (b) A Chartered Accountant's certificate certifying -

1. the manner of arriving at the remittable profit;
2. that the entire remittable profit has been earned by undertaking the permitted activities and
3. that the profit does not include any profit on revaluation of the assets of the branch.

(II) AD Category – I bank may permit intermittent remittances by project offices pending winding up/completion of the project subject to submission of the following:

1. certified copy of the final audited project accounts;
2. the statutory auditor's certificate showing the manner of arriving at the remittable surplus and confirming that sufficient provisions have been made to meet the liabilities in India including Income Tax, etc.; and
3. An undertaking from the project office that the remittance will not, in any way, affect the completion of the project in India and that any shortfall of funds for meeting any liability in India will be met by inward remittance from abroad.

**(j) Acquisition of property:** Acquisition of property by branch office/ project office shall be governed by the guidelines issued under Foreign Exchange Management (Acquisition and transfer of immovable property outside India) Regulations.

**(k) Transfer of assets:** A person resident outside India permitted to establish a branch office or liaison office or project office may apply to the concerned AD Category-I bank for transfer of its assets to JV/ WOS or any other entity in India. AD Category-I bank shall be guided by the instructions laid down by RBI in this regard.

**(l) Annual Activity Certificate (AAC):** The branch office/liaison office may submit the Annual Activity Certificate (Annex D) as at the end of March 31 along with the audited financial statements including receipt and payment account on or before September 30 of that year. In case the annual accounts of the office are finalized with reference to a date other than March 31, the AAC along with the audited financial statements may be submitted within 6 months from the due date of the Balance Sheets to the AD Category-I bank and the Director General of Income Tax (International Taxation), Drum Shape Building, I.P. Estate, New Delhi 110002. AAC from a Chartered Accountant showing the project status and certifying that the accounts of the project office have been audited and the activities undertaken are in conformity with the general/specific permission given by the RBI may be submitted by the project office to the designated AD Category-I bank.

**(m) Closure of office and remittance of winding up proceeds:** Requests for closure of the branch office/liaison office may be submitted to the AD Category-I bank along with the following documents:

(i) Copy of the RBTs/AD Category-I bank's approval for establishing the office.

(ii) Auditor's certificate:

1. indicating the manner in which the remittable amount has been arrived at and supported by a statement of assets and liabilities of the applicant, and indicating the manner of disposal of assets;
2. confirming that all liabilities in India including arrears of gratuity and other benefits to employees, etc. of the office have been either fully met or adequately provided for;
3. confirming that no income accruing from sources outside India (including proceeds of exports) has remained un-repatriated to India.

(iii) Confirmation from the applicant/parent company that no legal proceedings in any Court in India are pending against the office and there is no legal impediment to the remittance.

(iv) A report from the ROC regarding compliance with the provisions of the Companies Act, 2013, in case of winding up of the branch office/liaison in India.

(v) Any other document/s, specified by the RBI/AD Category-I bank while granting approval. Remittance of winding up proceeds of branch or liaison office established in India shall be governed by the guidelines issued under Foreign Exchange Management (Remittance of assets) Regulations.

**Approval of the RBI in certain cases for establishment of branch office, liaison office or project office or any other place of business in India [Regulation 5]:** Any application from a person resident



outside for opening of a branch office or a liaison office or a project office or any other place of business in India shall require prior approval of RBI in the following cases where -

- (a) The applicant is a citizen of or is registered/incorporated in Pakistan;
- (b) The applicant is a citizen of or is registered/incorporated in Bangladesh, Sri Lanka, Afghanistan, Iran, China, Hong Kong or Macau and the application is for opening a liaison, branch or project office in Jammu and Kashmir, North East region and Andaman and Nicobar Islands;
- (c) The principal business of the applicant falls in the four sectors namely Defence, Telecom, Private Security and Information and Broadcasting. In the case of proposal for opening a project office relating to defence sector, no separate reference or approval of Government of India shall be required if the said non-resident applicant has been awarded a contract by/entered into an agreement with the Ministry of Defence or Service Headquarters or Defence Public Sector Undertakings.
- (d) The applicant is a Non-Government Organization, Non-Profit Organization, Body/Agency/Department of a foreign government.

Such applications shall be forwarded to the RBI, Foreign Exchange Department, Central Office Cell, New Delhi by the AD Category-I bank and be considered in consultation with the Government of India.

**Que. 45] Indel Manufacturing Inc., a company incorporated outside India, engaged in software development, intends to open its branch in a Special Economic Zone (SEZ) in India. Advise with reference to FEMA.**

**CS (Executive) - Dec 2009 (1 Mark), Dec 2012 (1 Mark)**

**Ans.:** As per **Regulation 3 of the Foreign Exchange Management (Establishment in India of a Branch Office or a Liaison Office or a Project Office or any other Place of Business) Regulations, 2016**, no approval shall be necessary from RBI for a company to establish a branch or unit in SEZ to undertake manufacturing and service activities if conditions mentioned in that regulation are complied with.

Thus, Indel Manufacturing Inc. can open its branch in a SEZ in India subject to compliance of conditions mentioned Regulation 3.

**Que. 46] Which type of activities can be undertaken by the branch office set by the foreign companies in India?**

**Ans.: Permissible Activities:** Companies incorporated outside India and engaged in manufacturing or trading activities are allowed to set up Branch Offices in India with specific approval of the RBI. Such Branch Offices are permitted to represent the parent/group companies and undertake the following activities in India:

1. Export/Import of goods.
2. Rendering professional or consultancy services.
3. Carrying out research work, in areas in which the parent company is engaged.
4. Promoting technical or financial collaborations between Indian companies and parent or overseas group company.
5. Representing the parent company in India and acting as buying/ selling agent in India.
6. Rendering services in information technology and development of software in India.
7. Rendering technical support to the products supplied by parent/ group companies.
8. Foreign airline/shipping company.

Normally, the Branch Office should be engaged in the activity in which the parent company is engaged.

Retail trading activities of any nature is not allowed for a Branch Office in India.

A Branch Office is not allowed to carry out manufacturing or processing activities in India, directly or indirectly.

Profits earned by the Branch Offices are freely remittable from India, subject to payment of applicable taxes.



**Branch Office in Special Economic Zones (SEZs):** RBI has given general permission to foreign companies for establishing branch/unit in Special Economic Zones (SEZs) to undertake manufacturing and service activities. The general permission is subject to the following conditions:

- (a) such units are functioning in those sectors where 100% FDI is permitted;
- (b) such units comply with provisions of the Companies Act;
- (c) such units function on a stand-alone basis.

In the event of winding-up of business and for remittance of winding-up proceeds, the branch shall approach an AD Category-I bank with the documents as mentioned under “Closure of Liaison/Branch Office” except the copy of the letter granting approval by the RBI.

**Branches of Foreign Banks:** Foreign banks do not require separate approval under FEMA, for opening branch office in India. Such banks are, however, required to obtain necessary approval under the provisions of the Banking Regulation Act, 1949, from Department of Banking Regulation, Reserve Bank.

**Que. 47] Write a short note on: Funding of the Branch Office by the Foreign Company**

**Ans.: Equity Share Capital:** In the usual way Indian companies are financed.

**Preferred Share Capital:** Such convertible preference shares, compulsorily convertible into equity shares are regarded as Foreign Direct Investment (FDI).

**Debentures & Borrowings:** there can be redeemable, convertible or non-convertible. Companies can issue debentures, bonds and other debt securities. These also, when convertible into equity shares, are treated as FDI.

## CHAPTER 3 CHARTER DOCUMENTS OF COMPANIES

### MEMORANDUM OF ASSOCIATION

**Que. 1] Define the term 'memorandum' as per Companies Act, 2013**

**CS (Inter) - Dec 1999 (2 Marks)**

**Write a short note on: Memorandum of Association**

**Ans.: Memorandum [Section 2(56)]:** Memorandum means memorandum of association of a company as originally framed or altered from time to time in pursuance of any previous companies law or this Act.

Thus, MOA is a document which sets out the constitution of the company and is therefore the foundation on which the structure of the company is based. It defines the scope of the company's activities and its relations with the outside world. The first step in the formation of a company is to prepare a document called the Memorandum of Association.

In fact, memorandum is one of the most essential pre-requisites for incorporating any form of company under the Companies Act, 2013. This is evidenced in Section 3, which provides the mode of incorporation of a company and states that a company may be formed for any lawful purpose by seven or more persons, where the company to be formed is a public company; two or more persons, where the company to be formed is a private company; or one person, where the company to be formed is a One Person Company by subscribing their names or his name to a **memorandum** and complying with the requirements of the Act in respect of its registration.

To subscribe means to append one's signature or mark a document as an approval or attestation of its contents.

Section 4 of the Act specifies in clear terms the contents of this important document which is the charter of the company. The memorandum of association of a company contains the objects of the company which it shall pursue. It not only shows the objects of formation of the company but also determines the scope of its operations beyond which its actions cannot go. "THE MEMORANDUM OF ASSOCIATION", as observed by **Palmer**, "is a document of great importance in relation to the proposed company".

In the celebrated case of *Ashbury Railway Carriage & Iron Co. Ltd. v. Riche*, (1875) L.R. 7 H.L. 653, Lord Cairn observed: "The memorandum of association of a company is its charter and defines the limitations of the powers of the company. It contains the both which is affirmative and that which is negative. It states affirmatively the ambit and extent of vitality and powers which by law are given to the corporation, and it: states negatively, if it is necessary to state, that nothing shall be done beyond that ambit." [*Egyptian Salt and Soda Co. Ltd. v. Port Said Salt Association Ltd.* (1931) A.C. 677]

**One. 2] Write a short note on: Form of Memorandum of Association**

**Ans.: Form of MOA [Section 4(6)]:** The memorandum of association should be in any one of the Forms specified in **Tables A, B, C, D & E** of **Schedule I** to the Companies Act, 2013, as may be applicable in relation to the type of company proposed to be incorporated.

| Table   | Type of company                                       |
|---------|-------------------------------------------------------|
| Table A | Company limited by shares                             |
| Table B | Company limited by guarantee not having share capital |
| Table C | Company limited by guarantee having share capital     |
| Table D | Unlimited company not having share capital            |
| Table E | Unlimited company having share capital                |

A company may adopt the model memorandum applicable to such a company.

In case of any company, which is registered after the commencement of the Companies (Amendment) Act, 2016, in so far as the registered memorandum of such company does not exclude or modify the contents in the model memorandum applicable to such company, those contents shall, so far as applicable, be the contents of the Memorandum of that company in the same manner and to the extent as if that was contents of the duly registered memorandum of the company.

**Que. 3] Write a short note on: Contents of Memorandum**

**The name of the every company must end with the word 'Limited'. Comment. CS (Executive) - Dec 2012 (5 Marks)**

**Ans.: Requirements with respect to memorandums [Section 4(1)]:** MOA of a company have the following clauses:

**(1) Name Clause:** This clause states the name of the company which is approved by the ROC.

The memorandum of a company shall state the name of the company with the last word "Limited" in the case of a public limited company, or the last words "Private Limited" in the case of a private limited company. However, Section 8 companies are not required to state at the end of their name words 'Ltd.' or 'Private Ltd.'

Similarly, in case of government companies the name of the company need not be ended with the words "Ltd." or "Private Ltd.". This is as per the exemptions to Government Companies u/s 462 of Companies Act, 2013 vide notification dated June 5, 2015.

**(2) Situation Clause:** It states the name of the State in which the registered office of the company is to be situated.

**(3) Objects Clause:** It states the objects of which the company proposed to be incorporated and any matter considered necessary in furtherance thereof.

**(4) Liability Clause:** This clause states the nature of liability that the members of the company incur, whether the liability shall be limited by shares or by guarantee or unlimited.

**(5) Capital Clause:** It states the amount of capital with which the company is proposed to be registered, the number and value of shares into which the capital is to be divided.

**(6) Subscription Clause:** The memorandum at last contains a subscriber's declaration that they desire to be formed into a company and signed in the presence of at least one witness.

**Special requirement for OPC [Section 4(1)(f)]:** The memorandum shall state in the case of One Person Company, the name of the person who in the event of death of the subscriber shall become the member of the company.

**Right to participate in the divisible profits of the company otherwise than as a member, shall be void [Section 4(7)]:** Any provision in the memorandum or articles, in the case of a company limited by guarantee and not having a share capital, purporting to give any person a right to participate in the divisible profits of the company otherwise than as a member, shall be void.

**Act to override memorandum, articles, etc. [Section 6]:** Any provision contained in the memorandum, articles, agreement or resolution shall, to the extent to which it is repugnant to the provisions of the Act, become or be void, as the case may be.

The memorandum must be printed, divided into paragraphs, numbered consecutively.

**Que. 4] State the provision of Companies Act, 2013 relating "Name of Company".**

**Ans.:** A company being a legal entity must have a name of its own to establish its separate identity. The name of the company is a symbol of its independent corporate existence. The first clause in the memorandum of association of the company states the name by which a company is to be known. The company may adopt any suitable name provided it is not undesirable.

**Prohibition of certain names [Section 4(2) & (3)]:** The name stated in the memorandum of association shall not:

- (a) be identical with or resemble too nearly to the name of an existing company registered under this Act or any previous company law; or

- (b) be such that its use by the company -
- (i) will constitute an offence under any law for the time being in force; or
- (ii) is undesirable in the opinion of the Central Government.

A company shall not be registered with a name which contains -

- (a) Any word or expression which is likely to give the impression that the company is in any way connected with, or having the patronage of, the Central or State Government, or any local authority, corporation or body constituted by the Central or State Government or
- (b) Such word or expression which requires previous approval of the Central Government.

A company is not allowed to use a name which is prohibited under the **Emblems & Names (Prevention of Improper Use) Act, 1950**.

**Application for availability of name of company [Section 4(4)]:** A person may make an application, in such form and manner and accompanied by such fee, as may be prescribed, to the ROC for the reservation of a name set out in the application as -

- (a) the name of the proposed company or
- (b) the name to which the company proposes to change its name.

An application for reservation of name shall be made through the web service available at [www.mca.gov](http://www.mca.gov) in by using [Form RUN] (Reserve Unique Name) along with fee, which may either be approved or rejected, as the case may be, by the Registrar, Central Registration Centre after allowing re-submission of such application within 15 days for rectification of the defects, if any. **[Rule 9]**

**Reservation of name by ROC [Section 4(5)(i)]:** Upon receipt of an application for the reservation of a name, the Registrar may, on the basis of information and documents furnished along with the application, reserve the name for a period of **20 days** from the date of approval or such other period as may be prescribed.

However, 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.

The Registrar must make preliminary enquiries to ensure that the name allowed by him is not misleading or intended to deceive with reference to the Objects Clause of the memorandum [Methodist Church v. Union of India, (1985) 57 Com Cases 443 (Bombay)]. The Registrar is not, however, required to carry out any elaborate investigation at the time of registration of the company. Unless the purpose of the company appears to be unlawful ex-facie or is transparently illegal or prohibited by any statute, it cannot be regarded as an unlawful association [TV. Krishna v. Andhra Prabha (P) Ltd., (1960) 30 Com Cases 437 (AP)].

In Ewing v. Buttercup Margarine Co. Ltd. (1917) 2 Ch. 1, the plaintiff, who carried on business under the name of the Buttercup Dairy Co., obtained an injunction against the defendant (Buttercup Margarine Co. Ltd.), on the grounds that the public might think that the two businesses were connected, the word "Buttercup" being a fancy one.

The rule will apply also to foreign companies or traders, whose goods are imported into the country, as it was applied in the case of La Societe Anonyms Panchard at Levessor v. Panchard Levessor Motor Co. Ltd., (1901) 2 Ch. 513. The plaintiffs were a French company carrying on business in Paris as motor car manufacturers and were using the name "Panchard" in connection with motors of their manufacture. They objected to the use of the word "Panchard" in the name of the defendant company on the ground that the principal object of the defendants was to injure wrongfully and fraudulently the plaintiffs' business by-passing off their goods as those of the plaintiffs' manufacture and succeed even though they had no agencies in England but had a market for their goods there.

**Que. 5] State the provisions relating to rectification of name of company under the Companies Act, 2013.**

**Ans.: Rectification of name of company [Section 16(1)(a)]:** If by inadvertence or otherwise a name has been registered which is identical to or too nearly resembles the name of an existing company, the Central Government may on application of existing company direct the second company to change its name. The second company shall change its name within a period of **3 months** from the issue of the above direction by passing an **ordinary resolution**.

**Rectification of name in case of infringement of a registered trademark [Section 16(1)(b)]:** The Central Government has a power to order rectification of name where it constitutes an infringement of a registered trade mark.

Sometime a name of particular company may be similar or identical to a particular registered trademark. In such case the proprietor of the registered trademark may make an application to the Central Government for an order for rectification of name of a company whose name is similar or identical with proprietor of registered trademark. Such application must be made within **3 years** from the date on which the registration of the company with offensive name comes to the notice of the registered trademark owner. **Judicial Views:**

- ♦ In the case of *Atlas Cycles (Haryana) Ltd. v. Atlas Products Pvt. Ltd* [146 (2008) DLT 274 (DB)], use of the brand name as corporate name was settled. Both the plaintiff and the defendant companies belong to the same family. The Appellant-plaintiff was the proprietor of the trade mark in the name 'Atlas', The Respondent-defendant company containing the name 'Atlas' in its corporate name started dealing in bicycles. The plaintiff objected to the use of the name 'Atlas' by the defendant company. The Defendants were restrained from using the word 'Atlas' in their corporate/trade name in respect of bicycles and bicycle parts.
- ♦ Mere similarity of name is not in itself enough to give a right to an injunction. The law does not give a person a right to prevent the use of a name by another person. In the case of companies, however, registration will be refused only if there is likelihood of deception or confusion. [*W. Boulay vs. D.W. Boulay*, (1868) LR 2 (PC)]
- ♦ A person cannot be permitted to name a company even after his personal name if that name resembles the name of an existing company. [*KG. Khosla Compressors Ltd. vs. Khosla Extractions Ltd.*, (1986) 1 Comp LJ 211 : AIR 1986 Del 181]

**Que. 6] Abha Ltd. was incorporated on 15th March, 2012. A company with identical name and similar objects was incorporated on 5th August, 2013. On account of similarity of name, Abha Ltd., i.e., the company which was previously registered, filed a petition on 15th April, 2014 with the Central Government seeking issue of direction for change of name by the later company so that its business interest is protected. On 16th August, 2014, the Central Government sent an order to the later company to change its name. Examine the aforesaid case and the validity of the order of the Central Government. CS (Inter) - Dec 1998 (8 Marks)**

**CS (Executive) - Dec 2014 (4 Marks)**

**Ans.:** According to the **Section 16(1)(a)**, if by inadvertence or otherwise a name has been registered which is identical to or too nearly resembles the name of an existing company, the Central Government may direct the company to change its name. The company shall change its name within a period of **3 months** from the issue of the above direction after passing an **ordinary resolution**.

Thus, Abha Ltd. (first registered company) can make an application to Central Government to direct second company to change its name. Second company shall change its name within a period of **3 months** from the issue of the above direction by passing an **ordinary resolution**.

**Que. 7] Write a short note on: Publication of name of company**

**CS (Inter) - Dec 1998 (4 Marks)**

**Ans.: Publication of name of company [Section 12(3)]:** The name of the company and the address of its registered office must be painted or displayed outside every office or place at which its business is carried on, in a conspicuous position and in legible letters in English and in the language in general use in that locality.

The name must also be engraved on the company's common seal, if any.

Further, the name of the company and the address of the registered office and the Corporate Identity Number along with telephone number, fax number, if any, e-mail and website addresses, if any must be mentioned in legible characters in all business letters, in all its bill heads, letter papers and in all its notices and other official publications, as well as in all negotiable instruments and other prescribed documents



However, where a company has changed its name or names during the **last 2 years**, it shall paint or display or print, as the case may be, along with its name, the former name or names so changed during the last two years as required above.

Further, in case of One Person Company, the words "One Person Company" shall be mentioned in brackets below the name of such company, wherever its name is printed, affixed or engraved.

The MCA has also clarified that a share certificate is not an official publication of a company within the meaning of Section 12 of the Companies Act, 2013.

The words 'outside of every office' do not mean outside the premises in which the office is situated. [Dr H.L. Batliwalla Sons & Company Ltd. v. Emperor (1941) 11 Com Cases 154, AIR 1941 (Bom.) 97]

Where office is situated within a compound, the display outside the office room, though inside the building, is sufficient.

**Que. 8] XYZ Ltd. is listed on Bombay Stock Exchange and the board of directors of the company has decided to change name to PQR Ltd. State compliance to be made by the company under the SEBI (LODR) Regulations, 2015 for changing the name of company.**

**Can a listed company change its name as and when necessary? Give reasons in support of your answer.**

**CS (Executive) - Dec 2009 (4 Marks)**

**A listed entity shall not be allowed to change its name more than once. Comment. CS (Executive) - Dec 2017 (5 Marks)**

**Ans.: Change in name of the listed entity [Regulation 45 of the SEBI (LODR) Regulations, 2015]:** The listed entity shall be allowed to change its name subject to compliance with the following conditions:

- (a) A time period of at least one year has elapsed from the last name change.
- (b) At least 50% of the total revenue in the preceding one year period has been accounted for by the new activity suggested by the new name.
- (c) The amount invested in the new activity/project is at least 50% of the assets of the listed entity. However, if any listed entity has changed its activities which are not reflected in its name, it shall change its name in line with its activities within a period of 6 months from the change of activities in compliance of provisions as applicable to change of name prescribed under Companies Act, 2013.

On satisfaction of above conditions, the listed entity shall file an application for name availability with ROC.

On receipt of confirmation regarding name availability from ROC, before filing the request for change of name with the ROC, the listed entity shall seek approval from Stock Exchange by submitting a certificate from CA stating compliance with required conditions.

**Que. 9] Write a short note on: Registered office of the company**

**Ans.:** Registered office of company [Section 12(1)]: 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.

Within **30 days** of its incorporation, and at all times thereafter, the company must have a registered office to which all communications and notices may be sent.

The company must also furnish to the Registrar verification of its registered office within a period of **30 days** of its incorporation in Form No. INC-22.

**Que. 10] Write a short note on: Objects clause of MOA**

**CS (Inter) - Dec 2000 (5 Marks)**

**Ans.:** The third compulsory clause in the memorandum sets out the objects for which the company has been formed. As per **Section 4(1)(c)**, all companies must state in their MOA the objects for which the company is proposed to be incorporated and any matter considered necessary in furtherance thereof.

The objects clause is of great importance because 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. It states affirmatively the ambit and extent of powers of the company.

The purpose of the objects clause is to enable the persons dealing with the company to know its permitted range of activities. The acts beyond this ambit are ultra vires and hence void. Even the entire body of shareholders cannot ratify such acts.

**Que. 11] State any six powers which are prudent to be included in the objects clause of Memorandum of Association of a company as general and ancillary objects. CS (Executive) - Dec 2018 (4 Marks)**

**Ans.:** Object Clause should indicate objects for which the company is proposed to be incorporated and any matter considered necessary for furtherance of thereof.

A company can undertake only those objects which are specified in the 'Object Clause'.

**Acts beyond object clause are void:** Any act not specified in 'object clause' is ultra vires the company and is void.

**Incidental Powers:** As a general principle, a company has powers to do all that is necessary to attain the main object e.g. a company must be able to employ people, purchase or take on rent premises, borrow money, acquire machinery etc. These are 'implied powers' and need not be specified in Memorandum,

**Statutory powers need not be mentioned in object clause:** Powers given by statute need not be mentioned in Memorandum e.g. power to amalgamate is statutory power. Company can amalgamate even if this power is not specified in Memorandum in object clause.

**'Implied' powers of the company and powers which are not 'implied':**

'Implied powers' need not be specified in Memorandum. However, there are certain powers which cannot be taken as 'implied'. These should be specified in memorandum as 'matter necessary for furtherance of objects' (ancillary or incidental powers). These should be such that is should arise out of or directly connected to the main activity.

Generally, following powers are not treated as 'implied' and hence it is prudent to include such powers specifically in the Memorandum -

- ♦ Acquire any business similar to business of the company.
- ♦ Entering into agreement with others for joint ventures, partnership or sharing profits or other arrangements.
- ♦ Taking shares in other companies having similar objects.
- ♦ Taking shares in other companies where such investment amounts to doing indirectly that which is not permitted under the object clause.
- ♦ Promoting other companies and helping them financially.
- ♦ Power to use funds for political purpose.
- ♦ Power to give gifts, make donations or contributions to charities.
- ♦ Entering into contracts of surety ship or guarantee.

**Que. 12] Write a short note on: Liability clause in MOA**

**CS (Executive) - Dec 2010 (4 Marks)**

**Ans.:** Liability clause states the nature of liability that the members of the company incur, whether the liability shall be limited by shares or by guarantee or unlimited.

**Liability of members [Section 4(1)(</>)]:** The liability of members of the company is as follows:

- (a) Company limited by shares:** Liability of its members is limited to the amount unpaid on the shares held by them.
- (b) Company limited by guarantee:** Liability of its members limited by its MOA to such amount as the member may respectively undertake to contribute to the assets of the company in the event of its winding up.

**Que. 13] Write a short note on: Capital Clause in MOA**

**Ans.:** Fifth compulsory clause in MOA is 'capital clause', which must state the amount of the capital with which the company is registered.

The capital is variously described as "nominal", "authorized" or "registered". This amount lays down the maximum limit beyond which the company cannot issue shares without altering the memorandum as provided by Section 61 (1)(a) of the Companies Act, 2013.

If there are both equity and preference shares, then the division of the capital is to be shown under these two heads. A company is not authorized to issue capital beyond its authorized/nominal/registered capital. If it receives applications for shares beyond the shares covered by the authorized capital, the amount received on excess number of shares should be returned.

**Publication of authorized, subscribed & paid-up capital [Section 60]:** If the amount of the authorized capital of the company is stated in any notice, advertisement, official publication, business letter, bill head or letter paper, it shall also contain a statement in an equally prominent position and in equally conspicuous terms the amount of capital which has been subscribed and the amount paid-up.

**Que. 14] Write a short note on: Declaration for Subscription to MOA**

**Ans.:** The subscribers to the memorandum declare: "We, the several persons whose names and addresses are subscribed below, are desirous of being formed into a company in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names". Then follow the names, addresses, description, occupations of the subscribers, and the number of shares each subscriber has agreed to take and their signatures attested by a witness.

The statutory requirements regarding subscription of memorandum are that:

- ◆ Each subscriber must take at least one share;
- ◆ Each subscriber must write opposite his name the number of shares which he agrees to take. **[Section 4(1)(e)]**

**Judicial View:**

A subscriber to the memorandum cannot, after the issue of the certificate of incorporation, repudiate his subscription on the ground that he was induced to sign by misrepresentation. [Re Metal Constituents Ltd., Lord Lurgan's case - Re, (1902) 1 Ch 707]

**Que. 15] Write a short note on: Alteration of Memorandum of Association**

**Ans.: Alteration of Memorandum [Section 13(1)]:** A company may, by a **special resolution** and after complying with the specified procedure, alter the provisions of its memorandum. Failure to comply with the express provisions made under the Act for the purpose of alteration of the provisions or conditions contained in the memorandum will be deemed as a **nullity**.

The memorandum of association of a company may be altered in the following respects:

- ◆ By changing its name
- ◆ By altering it in regard to the State in which the registered office is to be situated
- ◆ By altering its objects
- ◆ By altering its share capital
- ◆ By reorganizing its share capital
- ◆ By reducing its capital

**Filing of resolution in relation to alteration of memorandum [Section 13(6)]:** A company shall, in relation to any alteration of its memorandum, file with the Registrar -

- (a) The special resolution passed by the company. [In Form No. **MGT-14** within **30 days** of passing resolution]
- (b) The approval of the Central Government, if the alteration involves any change in the name of the company.

**Alteration become effective only on registration [Section 13(10)]:** No alteration made u/s 13 shall have any effect until it has been registered.

**Que. 16] State the provision of the Companies Act, 2013 relating to “alteration of name clause”.  
CS (Inter) - Dec 2005 (4 Marks)**

**Ans.: Alteration of name [Section 13(2)]:** The name of the company can be altered by Passing a **special resolution** and with the **approval of the Central Government** in writing.

Approval of the Central Government is not necessary if the change relates to the addition or deletion of the word 'Private' to the name of the company consequent to the conversion of a private company into a public company and vice versa.

**Registration of new name [Section 13(3)]:** When any change in the name of a company is made, 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. The change in the name shall be complete and effective only on the issue of such a certificate.

**Alteration of Memorandum by change of name [Rule 29 of Companies (Incorporation) Rules, 2014]:**

- (1) The change of name shall not be allowed to a company which has not filed annual returns or financial statements due for filing with the Registrar or which has failed to pay or repay matured deposits or debentures or interest thereon. However, the change of name shall be allowed upon filing necessary documents or payment or repayment of matured deposits or debentures or interest thereon as the case may be,
- (2) An application shall be filed in **Form No. INC-24** along with the fee for change in the name of the company and a new certificate of incorporation in **Form No. INC-25** shall be issued to the company consequent upon change of name.

**Effect of Change:** The change of name shall not affect any rights or obligations of the company, or render defective any legal proceedings by or against it, and any legal proceedings which might have been continued or commenced by or against the company in its former name may be continued by or against the company in its new name.

After incorporation, a company can change their name through following methods:

- (a) Conversion of private limited company into public limited company and thereby change in the name from private to public, or
- (b) Conversion of public limited company into private limited company and thereby change in the name from public to private, or
- (c) Change of name from ABC Ltd. to XYZ Ltd.

As per Section 13, the name of the company can be changed by passing a Special Resolution by the members of the company in their general meeting and with the approval of the Central Government. But on the other hand, if the change relates to the addition/deletion of the words “private” to the name, then approval of Central Government is not required.

**Que. 17] Board of directors of the Seema Chemical Ltd. have decided to change the name of the company to Reema Chemical Ltd. As a Company Secretary of the company advice the Board of Directors regarding various provisions applicable for such change in name and procedure to be followed in this regard. Your answer should contain the list of various documents required to attached for seeking approval, if any and resolutions required to be filed with the relevant authority under the Companies Act, 2013.**

**Ans.: Procedure for Alteration in Name Clause of Memorandum is given below:**

**(1) Calling of Board Meeting:** Issue notice in accordance with the provisions of Section 173(3) for convening a meeting of the Board of Directors to consider the reason for changing name of the company and get its approval for change in name of the Company. Pass a Board resolution authorizing the Company Secretary/Director to make the required application to the Registrar of Companies.

**(2) Seeking name availability for proposed new name from the ROC:**

As per Section 4(4) read with Rule 9 of Companies (Incorporation) Rules, 2014, application for the reservation /availability of name shall be in RUN shall be made through the web service available at [www.mca.gov.in](http://www.mca.gov.in) by using [Form RUN] (Reserve Unique Name) along with prescribed fee of Rs. 1,000. In

selection of a Company name, it should be in accordance with name guidelines given in Rule 8 of Companies (Incorporation) Rules, 2014, which may either be approved or rejected, as the case may be, by the Registrar, Central Registration Centre.

The application in Form-RUN, to the ROC should have the following documents as attachment:

| <b>Nature of Application</b>                                                                                                                                      | <b>Attachment</b>                                                                                                                                                                                                                      |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| In case of change of name of an existing company.                                                                                                                 | A copy of Board resolution.                                                                                                                                                                                                            |
| If change of name is due to direction received from the Central Government.                                                                                       | A copy of such direction                                                                                                                                                                                                               |
| In case the proposed names are based on a registered trademark or is a subject matter of an application pending for registration under the Trade Marks Act, 1999. | Approval of the owner of the trademark or the applicant of such application for registration of Trademark.                                                                                                                             |
| In case the proposed name contains such words or expressions for which the approval of Central Government is required.                                            | Copy of Central Government's approval.                                                                                                                                                                                                 |
| In principle approval from the concerned regulator                                                                                                                | Approval from IRDA, RBI, SEBI, MCA or any other needs to be attached in case proposed name includes the word such as Insurance, Bank, Stock Exchange, Venture Capital, Asset Management, Nidhi, or Mutual Fund etc.                    |
| NOC from the sole proprietor/ partners/other associates                                                                                                           | No objection certificate from the sole proprietor/partners/other associates needs to be attached if the promoters are carrying on any partnership firm, sole proprietary or unregistered entity in the name as applied for.            |
| NOC from existing company                                                                                                                                         | In case the name is similar to any existing company or to the foreign holding company; then, a certified true copy of no objection certificate by way of Board resolution needs to be attached                                         |
| Affidavit                                                                                                                                                         | Copy of affidavit executed on non-judicial stamp paper to the effect that the name to be obtained shall be only for the purpose of registration of companies under Electoral Trusts Scheme, 2013                                       |
| Resolution of unregistered companies in case of Chapter XXI (Part I) companies                                                                                    | Such resolution is mandatory to be attached in case of Part I companies.                                                                                                                                                               |
| Order of competent authority                                                                                                                                      | Order of Tribunal in course of compromise, arrangement and amalgamation is required to be attached in case proposed name is the name released on change of name.                                                                       |
| Resolution passed by foreign company                                                                                                                              | No Objection Certificate by way of resolution passed by the Board of the Foreign holding company or group companies is mandatory to be attached in case the proposed name is of the foreign holding Company or of the group companies. |
| Optional attachments                                                                                                                                              | Any other information can be provided as an                                                                                                                                                                                            |



|                      |
|----------------------|
| optional attachment. |
|----------------------|

- (3) Obtaining ROC Approval and Name Availability Letter:** After approval of name, ROC will issue a name availability letter which will be valid for a period of 20 days from the date on which the application for reservation was made. However, the said period of reservation of name by the Registrar for the change of the name of an existing company may be for the period of 60 days from the date of approval.

On receipt of approval of name, the Company Secretary shall convene another Board meeting:

- (a) To take note of the name approval received from ROC.
- (b) To fix date, time and place for holding Extra-ordinary General Meeting (EGM) to get approval of shareholders, by way of Special Resolution, for amendment in Name Clause of Memorandum.

This amendment in name clause of memorandum shall be in accordance with the requirement of Section 13 of the Companies Act, 2013.

- (c) To approve notice of EGM along with agenda and explanatory statement to be annexed to the notice of EGM.
- (d) To authorize the Director or Company Secretary to issue Notice of the EGM as approved by the board.

**(4) Issue of notice of EGM:**

- (a) Issue Notice of the EGM to all the Members, Legal Representatives of any deceased member or assignee of an insolvent member, Directors and the Auditors of the company.
- (b) In the case of listed companies, the provisions of SEBI (LODR) Regulations shall be complied with.
- (c) A general notice of the proposed general meeting may also be published in newspapers.

- (5) Holding of Extra ordinary General Meeting:** Hold the Extra-ordinary General meeting on the fixed date and pass the necessary Special Resolution under section 13 (1) of the Companies Act, 2013, for change in the Name clause of Memorandum.

- (6) ROC filings:** As per Section 13(6), the Company is required to file Special Resolution passed by shareholders for alteration of memorandum with concerned ROC and file Form No. **MGT-14** (certified by a Practicing Professional ie. CS/CA/CWA) within 30 days of passing the resolution with prescribed fees and along with following attachments:

- ◆ Certified True copy of Special Resolution along with explanatory statement.
- ◆ Altered Memorandum of Association.
- ◆ Certified True copy of Special Resolution along with explanatory statement for the Alteration of Articles pursuant to alteration in the name clause of the Memorandum of Association of the company.
- ◆ Altered Articles of Association.

The application for the fresh certificate of incorporation in the new name of the company be made in **Form No. INC-24** to the Registrar within the 30 days along with the prescribed fees and the following document should be attached along with such application:

- ◆ Minutes of the member's meeting.
- ◆ The copy of the Certificate of Incorporation along with the copy of the Altered MOA and AOA of the company may be attached to the **Form No. INC-24** as an optional attachment.

- (7) Issue of certificate of incorporation:** After scrutiny of the documents filed, the ROC shall issue a fresh certificate of incorporation digitally signed in **Form No. INC-25**.

- (8) Intimation to various authorities:** Intimate all concerned persons/ authorities about the changed name of the Company, particularly the Stock Exchanges, National Securities Depository Ltd., Central Depository Services (India) Ltd., statutory and other authorities like Inspector of Factories, Regional Provident Fund Commissioner, suppliers of raw materials, customers, banks etc.

- (9) New Common Seal:** Arrange for a new Common Seal and have the same adopted at a meeting of the Board of directors and keep it under safe custody and get stationery printed with the new name

and/or affix rubber stamp of the new name on all the existing documents. However, it is also to be noted that having the common seal is no longer mandatory requirement.

- (10) Get the new name of the Company painted on all the signboards or name boards wherever they are displayed.
- (11) Correct all records, registers including the Register of Members, every copy of Memorandum and Articles of Association, other books and documents pertaining to the company's business and affairs to display the new name.
- (12) It is also to be noted that in every document the company shall paint, affix or print as the case may be the former name or names so changed during the period of last 2 years. **[First proviso to Section 12(3)]**

**Que. 18] ABC Ltd. has altered its name from BCD Ltd. to ABC Ltd. However, the fact of alteration of name of the company was not brought to the notice of NCLT. Please advise the company ABC Ltd. whether it has a right to execute a decree in its new name after the change of name.**

**CS (Executive) - Dec 2017 (5 Marks)**

**Ans.: Effect of change in name of the company:** The change of name shall not affect any rights or obligations of the company, or render defective any legal proceedings by or against it, and any legal proceedings which might have been continued or commenced by or against the company in its former name may be continued by or against the company in its new name.

However, where a company changes its name and the new name has been registered by the ROC, the commencing of legal proceedings in the former name is not valid. [Malhati Tea Syndicate Ltd. v. Revenue Officer, (1973) 43 Com Cases 337]

In spite of a change in name the entity of the company continues. The company is not dissolved nor does any new company come into existence. If any legal proceeding is commenced, after change in the name, against the company in its old name, the company should be treated as if it is not in existence. It is not an incurable defect and the plaint can be amended to substitute the new name. [Pioneer Protective Glass Fibre (P) Ltd. v. Fibre Glass Pilkington Ltd., (1986) 60 Com Cases 707 (Cal.)]

The Courts have held that proceedings commenced by the company in its former name can be continued under its new name. [Solvex Oils and Fertilizers v. Bhandari Cross-Fields(P) Ltd, (1978) 48 Com Cases 260 (P&H)]

By change of name, the constitution of the company is not changed, only the name changes. It is not similar to the reconstitution of a partnership which means creation of a new legal entity altogether. [Economic Investment Corporation Ltd v. CIT (WB) AIR (1970) 40 Com Cases I (Cal.)]

If a company has power to execute a decree in its old name, it has right to execute the decree in its new name, even if fact of change of name was not brought to notice of court, [h Srinivasaiah v. Vellore Varulakshmi Bank (1954) 24 Comp Cas 55, Madras HC]

**Que. 19] In relation to change in registered office state -**

- (a) Various situations of change in registered office
- (b) Applicable section & Rule
- (c) Nature of resolution required to be passed for each situation
- (d) Name of the approving authority.

**Ans.:** Following are the various situations in relation to change in registered office of the company:

|                                                                              |                                                                                                                                                                                                                                                                |
|------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Change of registered office within the local limits of same town/city</b> | <p>Applicable Section: Section 12(4)</p> <p>Nature of resolution: Board Resolution</p> <p>Alternation in MOA: Not required</p> <p>Form to be filed: <b>Form No. INC-22</b> is required to be filed with ROC within 30 days of change in registered office.</p> |
| <b>Change of registered</b>                                                  | Applicable Section: Section 12(5)                                                                                                                                                                                                                              |

|                                                                                                                       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
|-----------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| office from one city to another city within the same State                                                            | <p>Nature of resolution: Special Resolution</p> <p>Alternation in MOA; Not required</p> <p>Forms to be filed: <b>Form No. INC-22</b>(for change in registered office) &amp; <b>Form No. MGT-14</b> (for passing special resolution) are required to be filed with ROC within 30 days of change in registered office.</p>                                                                                                                                                 |
| Change of registered office within the same State from the jurisdiction of one ROC to the jurisdiction of another ROC | <p>Applicable Section: Section 12(5) &amp; 12(6)</p> <p>Nature of resolution: Special Resolution</p> <p>Alternation in MOA; Not required</p> <p>Approval-Regional Director's approval is required. Application has to be made in Form No. INC-23.</p> <p>Form to be filed: Form No. INC-22 (for change in registered office) &amp; Form No. MGT-14 (for passing special resolution) are required to be filed with ROC within 30 days of change in registered office.</p> |
| Change of registered office from one State to another State                                                           | <p>Applicable Section: Section 13</p> <p>Nature of resolution: Special Resolution</p> <p>Alternation in MOA: Yes required.</p> <p>Approval' Approval of Central Government is required.</p> <p>Form to be filed: <b>Form No. INC-22</b> (for change in registered office) &amp; <b>Form No. MGT-14</b> (for passing special resolution) are required to be filed with ROC within 30 days of change in registered office.</p>                                             |

**Que. 20] State the provisions and procedure of the Companies Act, 2013 relating to change of registered office within the local limits of same town.**

**Ans.:** 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 a **board resolution**. A notice of the change is required to be given to the Registrar in **Form No. INC-22** within **30 days** of such change. This does not involve alteration of memorandum.

**Que. 21] State the provisions of the Companies Act, 2013 relating to change of registered office from one city to another city within the same State.**

**Ans.: Change of registered office from one city to another city within the same State [Section 12(5)]:** If the registered office is to be shifted from one city, town or village to another city, town or village within the same State, a **special resolution** has to be passed in the general meeting of the company.

A notice of the change is required to be given to the Registrar in **Form No. INC-22**, within **30 days** of such change along with **Form No. MGT-14** for special resolution passed. This does not involve alteration of memorandum.

In case the company is eligible for conducting business through postal ballot any change in place of registered office outside the local limits of any city, town or village the same shall be transacted only by means of voting through a Postal Ballot. **[Rule 22 of Companies (Management & Administration) Rules, 2014.**

**Que. 22] State the provisions of the Companies Act, 2013 relating to change of registered office within the same State from the jurisdiction of one ROC to the jurisdiction of another ROC.**

**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 (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.

**Ans.: Change of registered office within the same State from the jurisdiction of one ROC to the jurisdiction of another ROC [Proviso to Section 12(5)]:**

For changing registered office from one city to another city within the same State but located in the jurisdiction of another ROC, confirmation by the **Regional Director** will be necessary.

The Regional Director, after hearing the parties shall pass necessary orders within a period of **30 days** from the receipt of the application. Thereafter, the company concerned shall file a copy of the said order with the ROC within a period of **60 days** from the date of the confirmation order by Regional Director. The said ROC shall record the ordered changes in its records. The ROC of the state where the registered office of the company was previously situated, shall transfer all the documents and papers to the new ROC. **[Section 12(6)]**

**Procedure for shifting of registered office within the same State [Rule 28 of Companies (Incorporation) Rules, 2014]:**

An application seeking confirmation from the Regional Director for shifting the registered office within the same State from the jurisdiction of one ROC to the jurisdiction of another ROC, shall be filed by the company with the Regional Director in **Form No. INC-23** along with the fee and following documents -

- (a) Board Resolution for shifting of registered office.
- (b) Special Resolution of the members of the company approving the shifting of registered office.
- (c) A declaration given by the KMP or any 2 directors authorized by the Board, that the company has not defaulted in payment of dues to its workmen and has either the consent of its creditors for the proposed shifting or has made necessary provision for the payment thereof.
- (d) A declaration not to seek change in the jurisdiction of the Court where cases for prosecution are pending.
- (e) Acknowledged copy of intimation to the Chief Secretary of the State as to the proposed shifting and that the employees interest is not adversely affected consequent to proposed shifting.

Additionally, **Form No. MGT-14** is to be filed with the ROC towards special resolution.

**Que. 23] What are the provisions relating to shifting of the registered office from one State to another State. CS (Inter) - Dec 2004 (5 Marks)**

**Ans.: Change of Registered office from one State to another State [Section 13(4)]:** The change of registered office from one State to another State involves alteration of memorandum and the change can be effected by a **special resolution** of the company which must be **confirmed** by the **Central Government** on an application made to it.

**Conditions for approval by the Central Government [Section 13(5)]:** The Central Government shall dispose of the application within a period of **60 days**. Before passing order the Central Government may satisfy itself that the alteration has the consent of the creditors, debenture holders and other persons concerned with the company or that a sufficient provision has been made by the company either for the due discharge of all its debts and obligations or that adequate security has been provided for such discharge.

**Filing of documents:** When registered office is shifted from one state to another State following documents are required to be filed with ROC:

- ◆ A copy of special resolution;
- ◆ Order passed by the Central Government.

The Registrar of the State where the registered office is being shifted will issue a fresh certificate of incorporation indicating the alteration.

**Procedure for shifting of Registered office from one State or Union Territory to another state [Rule 30 of the Companies (Incorporation) Rules, 2014]:**

- (1) An application u/s 13(4), for the purpose of seeking approval for alteration of memorandum with regard to the change of place of the registered office from one State Government or Union territory to another, shall be filed with the Central Government in **Form No. INC-23** along with the fee and shall be accompanied by the following documents, namely:

- (a) A copy of Memorandum of Association, with proposed alterations.
  - (b) A copy of the minutes of the general meeting at which the resolution authorizing such alteration was passed, giving details of the number of votes cast in favour or against the resolution.
  - (c) A copy of Board Resolution or Power of Attorney or the executed vakalatnama, as the case may be.
- (2) There shall be attached to the application, a list of creditors and debenture holders, drawn up to the latest practicable date preceding the date of filing of application by not more than 1 month, setting forth the following details, namely:
- (a) The names and address of every creditor and debenture holder of the company.
  - (b) The nature and respective amounts due to them in respect of debts, claims or liabilities. However, the list of creditors and debenture holders, accompanied by declaration signed by the Company Secretary of the company, if any, and not less than 2 directors of the company, one of whom shall be a managing director, where there is one, stating that -
    - (i) They have made a full enquiry into the affairs of the company and, having done so, have concluded that the list of creditors are correct, and that the estimated value as given in the list of the debts or claims payable on a contingency or not ascertained are proper estimates of the values of such debts and claims and that there are no other debts of or claims against the company to their knowledge, and
    - (ii) No employee shall be retrenched as a consequence of shifting of the registered office from one state to another state and also there shall be an application filed by the company to the Chief Secretary of the concerned State Government or the Union territory.
  - (3) A duly authenticated copy of the list of creditors shall be kept at the registered office of the company and any person desirous of inspecting the same may, at any time during the ordinary hours of business, inspect and take extracts from the same on payment of a sum not exceeding Rs. 10 per page to the company.
  - (4) There shall also be attached to the application a copy of the acknowledgement of service of a copy of the application with complete annexures to the Registrar and Chief Secretary of the State Government or Union territory where the registered office is situated at the time of filing the application.
  - (5) The company shall, not more than 30 days before the date of filing the application in Form No. INC-23 -
  - (a) Advertise in the **Form No. INC-26** in the vernacular newspaper in the principal vernacular language in the district and in English language in an English newspaper with the widest circulation in the State in which the registered office of the company is situated. A copy of advertisement shall be served on the Central Government immediately on its publication.
  - (b) Serve, by registered post with acknowledgement due, individual notice on each debenture-holder and creditor of the company.
  - (c) Serve, by registered post with acknowledgement due, a notice together with the copy of the application to the Registrar and to the SEBI, in the case of listed companies and to the regulatory body, if the company is regulated under any special Act or law for the time being in force.
  - (6) There shall be attached to the application a duly authenticated copy of the advertisement and notices, a copy each of the objection received by the applicant, and tabulated details of responses along with the counter response from the company received either in the electronic mode or in physical mode in response to the advertisements and notices issued.
  - (7) Where no objection has been received from any person in response to the advertisement or notice or otherwise, the application may be put up for orders without hearing and the order either approving or rejecting the application shall be passed within 15 days of the receipt of the application.
  - (8) Where an objection has been received -
    - (i) The Central Government shall hold a hearing or hearings, as required and direct the company to file an affidavit to record the consensus reached at the hearing, upon executing which, the Central Government shall pass an order approving the shifting, within sixty days of filing the application.



(ii) Where no consensus is reached at the hearings the company shall file an affidavit specifying the manner in which objection is to be resolved within a definite time frame, duly reserving the original jurisdiction to the objector for pursuing its legal remedies, even after the registered office is shifted, upon execution of which the Central Government shall pass an order confirming or rejecting the alteration within 60 days of the filing of application.

(9) The order passed by the Central Government confirming the alteration may be on such terms and conditions, if any, as it thinks fit, and may include such order as to costs as it thinks proper. However, the shifting of registered office shall not be allowed if any inquiry, inspection or investigation has been initiated against the company or any prosecution is pending against the company under the Act.

(10) On completion of such inquiry, inspection or investigation as a consequence of which no prosecution is envisaged or no prosecution is pending, shifting of registered office shall be allowed.

**Certified Copy of Central Government's Order [Rule 31]:** The certified copy of the order of the Central Government, approving the alteration of the memorandum for transfer of registered office of the company from one State to another, shall be filed in **Form No. INC-28** along with the fee as with the Registrar of the State within 30 days from the date of receipt of certified copy of the order.

**Que. 24] Shifting of the registered office from one State to another State requires approval of the Central Government. Prepare a list of documents required to attached with Form No. INC-23 and other documents required to be submitted for seeking such approval from the Central Government.**

**Ans.:**

An application u/s 13(4), for the purpose of seeking approval for alteration of memorandum with regard to the change of place of the registered office from one State Government or Union territory to another, shall be filed with the Central Government in Form No. INC-23 along with the fee and shall be accompanied by the following documents, namely:

- (a) A copy of the MOA & AOA.
- (b) A copy of the notice convening the general meeting along with relevant Explanatory Statement.
- (c) A copy of the special resolution sanctioning the alteration by the members of the company.
- (d) A copy of the minutes of the general meeting at which the resolution authorizing such alteration was passed, giving details of the number of votes cast in favour or against the resolution.
- (e) An affidavit verifying the application.
- (f) The list of creditors and debenture holders entitled to object to the application.
- (g) An affidavit verifying the list of creditors.
- (h) The document relating to payment of application fee.
- (i) A copy of board resolution or Power of Attorney or the executed Vakalatnama, as the case may be.
- (j) A copy of the No Objection Certificate from the RBI where the applicant is a registered Non-Banking Financial Company.

**List of creditors and debenture holders:** There shall be attached to the application, a list of creditors and debenture holders, drawn up to the latest practicable date preceding the date of filing of application by not more than one month, setting forth the following details, namely:

- (a) The names and address of every creditor and debenture holder of the company.
- (b) The nature and respective amounts due to them in respect of debts, claims or liabilities.

**Affidavit:** The applicant company shall file an affidavit, signed by the **Company Secretary** of the company, if any and **not less than 2 directors** of the company, one of whom shall be a **managing director**, where there is one, to the effect that they have made a full enquiry into the affairs of the company and, having done so, have formed an opinion that the list of creditors is correct, and that the estimated value as given in the list of the debts or claims payable on a contingency or not ascertained are proper estimates of the values of such debts and claims and that there are no other debts or claims against the company to their knowledge.

There shall also be attached to the application an affidavit from the directors of the company that no employee shall be retrenched as a consequence of shifting of the registered office from one state to another

state and also there shall be an application filed by the company to the Chief Secretary of the concerned State Government or the Union territory

**Que. 25] For administrative convenience Big Deal Ltd. is shifting its registered office from city Ahmedabad (located in Gujarat) to Pune (located in Maharashtra). As a Company Secretary of the Company prepare a detailed note for the Board of Directors of your company stating procedure to be followed for shifting registered office from one State to another State.**

**Ans.: Procedure to be followed for shifting registered office from one State to another State as laid down in Rule 30 of the Companies (Incorporation) Rules, 2014 are enumerated below:**

- (1) Send notice of Board Meeting at least 7 days before the date of Board Meeting for:
  - ◆ Shifting of Registered office form one state to another state.
  - ◆ Approval of Notice for calling of EGM for passing special resolution for altering the memorandum,
  - ◆ Authorization to Director/Company Secretary to sign the documents.
  - ◆ Engagement of Company Secretary to represent the company before the Central Government.
- (2) In case of Listed Company, at least 7 days before of the board meeting, publish notice of the board meeting in the newspaper. Simultaneously, send the copies of said publication to the Stock Exchanges where the company's shares are listed.
- (3) Hold the Board Meeting and approve the:
  - ◆ Resolution shifting of registered office from one state to another state.
  - ◆ Notice for calling of EGM for passing special resolution for shifting of registered office.
  - ◆ Authorization to Director/Company Secretary to sign the documents.
  - ◆ Engagement of Company Secretary to represent the company before the Central Government.
- (4) Intimate the Stock Exchanges about passing of resolution in the board meeting at the earliest within 24 hours of the occurrence of such event or information and in case of any delay the disclosure should be made along with an explanation for such delay. [Regulation 30(6) of SEBI (LODR) Regulations, 2015]
- (5) Send Notice of the EGM to at least 21 days clear days before the members of the company. Send copies of the notice to the stock exchanges simultaneously. Also, an intimation to be sent to the concerned stock exchanges that the notice of the extraordinary general meeting was sent to the shareholders of the company at the earliest within 24 hours of the occurrence of such event or information and in case of any delay the disclosure should be made along with an explanation for such delay. [Regulation 30(6) of the SEBI (LODR) Regulations, 2015]
- (6) Publish the notice of EGM in newspaper and send the copy of such publication to the stock exchanges.
- (7) Hold EGM of the company and pass the special resolution for shifting of registered office from one state to another state and authorize Director/Company Secretary to sign/file/deal with department.
- (8) Intimate about the proceedings of the EGM and the amendments to the MOA and AOA to the stock exchanges at the earliest within 24 hours of the conclusion of such extraordinary general meeting and in case of any delay the disclosure should be made along with an explanation for such delay. [Regulation 30(6) of the SEBI (LODR) Regulations, 2015]
- (9) File **Form No. MGT-14** with ROC for registering special resolution passed in the EGM within 30 days from the date of passing such resolution.
- (10) Prepare the application for shifting of registered office. File a copy of the application along with all annexure to ROC in **Form No. INC-23** along with annexure/attachments. [Documents to be attached with application are given in answer to earlier question]
- (11) The company shall, not more than 30 days before the date of filing the application in Form No. INC-23
  -
- (a) Advertise in the **Form No. INC-26** in the vernacular newspaper in the principal vernacular language in the district and in English language in an English newspaper with the widest circulation in the State in

which the registered office of the company is situated. However, a copy of advertisement shall be served on the Central Government immediately on its publication.

- (b) Serve, by registered post with acknowledgement due, individual notice on each debenture-holder and creditor of the company.
- (c) Serve, by registered post with acknowledgement due, a notice together with the copy of the application to the Registrar and to the SEBI, in the case of listed companies and to the regulatory body, if the company is regulated under any special Act or law for the time being in force.
- (12) There shall be attached to the application a duly authenticated copy of the advertisement and notices issued, a copy each of the objection received by the applicant, and tabulated details of responses along with the counter response from the company received either in the electronic mode or in physical mode in response to the advertisements and notices issued.
- (13) If no objection has been received from any person in response to the advertisement or notice or otherwise, the application may be put up for orders without hearing and the order either approving or rejecting the application shall be passed within 15 days of the receipt of the application.
- (14) If an objection has been received -
  - (i) The Central Government shall hold a hearing or hearings, as required and direct the company to file an affidavit to record the consensus reached at the hearing, upon executing which, the Central Government shall pass an order approving the shifting, within 60 days of filing the application.
  - (ii) Where no consensus is reached at the hearings the company shall file an affidavit specifying the manner in which objection is to be resolved within a definite time frame, duly reserving the original jurisdiction to the objector for pursuing its legal remedies, even after the registered office is shifted, upon execution of which the Central Government shall pass an order confirming or rejecting the alteration within sixty days of the filing of application.
- (15) The order passed by the Central Government confirming the alteration may be on such terms and conditions, if any, as it thinks fit, and may include such order as to costs as it thinks proper. However, shifting of registered office shall not be allowed if any inquiry, inspection or investigation has been initiated against the company or any prosecution is pending against the company under the Act.
- (16) On completion of such inquiry, inspection or investigation as a consequence of which no prosecution is envisaged or no prosecution is pending, shifting of registered office shall be allowed.
- (17) The change of address of the registered office shall be effective from the date of issue of registration certificate by the ROC of the State to which the registered office is shifted.
- (18) Once the order is passed by the Central Government, approving shifting of the registered office, file **Form No. INC-22** with the ROC along with supportive documents. If the documents are in order, Registrars of both States will approve the forms and the change in registered office will be updated in register of companies with the Registrar and new Certificate of Incorporation will be issued by the Registrar of the State within 30 days, where the company's registered office is going to be shifted.
- (19) The certified copy of the order of the Central Government, approving the alteration of the memorandum for transfer of registered office of the company from one State to another, shall be filed in **Form No. INC-28** along with the fee as with the Registrar of the State within 30 days from the date of receipt of certified copy of the order.

**Que. 26] Can the State Government opposes shifting of the registered office contending that they would be deprived of the revenue? Decide with case law. CS (Inter) - June 1999 (6 Marks), Dec 2006 (2 Marks)**

**Registered office of the company can be shifted from one state to another without the approval of the State Government. Comment.**

**CS (Inter) - June 2008 (5 Marks)**

**Ans.:** Central Government may direct notice to be served on the State if it is of the view that the interest of the State will be affected by the alteration. Where the alteration is affected by changing the registered office from one State to another State, the loss of revenue in one State would be accompanied by increase in revenue in the other and in such a case the interest of a particular State ought not to be considered but it is the interest of the country as a whole which should be considered.

The decision to shift the registered office of the company to another state being a domestic matter rests with shareholders and the company is the best judge of how to run its business more economically, efficiently or conveniently, even though it would result in loss of revenue to the State. [Satyashree Balaji Wires & Cables (P) Ltd. Re. (2006) 71 CLA 231 (CLB)]

A company was allowed to shift its registered office from Bihar to West Bengal in spite of the fact that Bihar Government had granted lease of land for the company's factory on the condition that it would not shift its registered office. The CLB also held that interest free loans, sales tax, electricity and other subsidies would have no bearing on the shifting. [Usha Beltron Re, (2000) 27 SCL 124]

**Que. 27] Can employee have right to object in case of shifting of registered office from one state to another? Decide with case law.**

**CS (Inter) - Dec 2006 (2 Marks) CS (Executive) - June 2013 (4 Marks)**

**Ans.:** It was held that employees union, which was a registered body, would have the legal standing to appear before the Court and oppose the application on the ground that their interests would be likely to be prejudicially affected if the resolution for shifting the registered office of the company from one state to another is confirmed by the Court. However, the employees union cannot oppose on the ground that there would be loss of revenue or unemployment in the State or that the meeting at which the special resolution was passed was not itself valid. [Bharat Commerce & Industries Ltd. Re, (1973) 43 Com Cases 162 (Cal.)]

If the shifting of the registered office was in accordance with a scheme approved by the BIFR, it was held that the workers had no right of objection because their continuation in the company's employment was ensured unless, of course, a worker preferred voluntary retirement. [Metal Box India Ltd Re. (2000) 37 CLA 15]

A different dimension to the employees right can be seen in the case of Kwaliti Ice Creams (India) P Ltd. Re. (2009) 91 SCL 231. In that case, the company's petition for carrying its registered office from West Bengal to Delhi was opposed by two employees of the head office on the ground that their action against the company would be prejudiced. The CLB said that the facility for litigation is not a valid ground to stall shifting. There was no restraint order from any Court against the proposed shifting. The CLB allowed shifting subject to the condition that the interest of none of the employees at the registered office would be prejudiced by retrenchment or otherwise.

**Que. 28] What are the provisions a company has to comply to effect change of object clause under the Companies Act, 2013?**

**Ans.:** According to **Section 13(1)**, a company can change its objects by passing a **special resolution**. The Registrar shall register any alteration of the memorandum with respect to the objects of the company and certify the registration within a period of **30 days** from the date of filing of the special resolution.

**Restriction on change of object clause [Section 13(8)]:** A company is prohibited from changing object clause if it has any unutilized amount raised through issue of prospectus. However, it can change the object clause if it pass special resolution and comply with the following conditions:

(i) The prescribed details in respect of such resolution shall be published in the newspapers (one in English and one in vernacular language) where the registered office of the company is situated and shall also be placed on the website of the company.

(ii) The dissenting shareholders shall be given an opportunity to exit by the promoters and shareholders in accordance with regulations specified by the SEBI.

A company may wish to alter its objects stated in its memorandum due to various reasons e.g. if a company wishes to cut-back i.e. where it feels it has diversified in various directions and that management of the company has become difficult or uneconomical, it may alter its objects to sell or dispose of whole or part of its undertaking(s):

- ♦ Object Clause of Memorandum of Association of a Company can be altered by passing special resolution and complying with other prescribed conditions.
- ♦ Following companies are required to pass special resolution for alteration of Object clause of Memorandum of Association by means of Postal Ballot only:

- (1) All Companies having more than **200 members**. [Section 110 read with Rule 22 of Companies (Management & Administration) Rules, 2014]
- (2) Company which has raised money from public through prospectus and still has any unutilized amount out of the money so raised. [Section 13(8) read with Rule 32 of the Companies (Incorporation) Rules, 2014]

**Que. 29] Fast & Furious Ltd. is expanding its business rapidly and Board of Directors of the company are interested to know the procedure required to be adopted for alteration of object clause of memorandum of association. As a Company Secretary of the company advice the board of directors of your company detailed procedure to be adopted under the Companies Act, 2013 and rules made thereunder.**

**Ans.: Procedure is to be followed for alteration of objects clause of MOA u/s 13 read with Rule 32 of the Companies (Incorporation) Rules, 2014 and Rule 22 (Postal Ballot, if applicable) of the Companies (Management & Administration) Rules, 2014:**

(1) Issue not less than 7 days notice and agenda of Board meeting, or a shorter notice in case of urgent business, in writing to every director of the company at his address registered with the company and call a Board Meeting to consider the proposal of alteration of objects clause of memorandum of association of company.

(2) Hold a meeting of Board of Directors -

- ◆ To pass the Board Resolution for approving the proposed amendments to the objects clause of MOA of the company subject to the approval of shareholders in General meeting.
- ◆ To delegate authority to any one director of the company to sign, certify and file the requisite forms with ROC and to do all such acts and deeds as may be necessary to give effect to the proposed alteration.
- ◆ To fix day, date, time and venue for holding the general meeting of the Company for passing a special resolution as required by Section 13.
- ◆ To approve the draft notice of general meeting along with explanatory statement annexed to the notice as per requirement of the Section 102.
- ◆ To authorize the Director or Company Secretary to sign and issue notice of the general meeting.

(3) If the company has raised money from public through prospectus and has any unutilized amount out of the money so raised, it shall follow the following additional steps for altering the objects clause of MOA of the Company:

(a) Pass special resolution for alteration of Object clause of Memorandum of Association by means of Postal Ballot only.

(b) Notice of the resolution for altering the objects shall contain the following particulars:

- ◆ Total money received;
- ◆ Total money utilized for the objects stated in the prospectus;
- ◆ Unutilized amount out of the money so raised through prospectus;
- ◆ Particulars of proposed alteration/change in the objects;
- ◆ Justification for the alteration/change;
- ◆ Amount proposed to be utilized for the new objects;
- ◆ Estimated financial impact of the proposed alteration on the earnings and cash flow of the company;
- ◆ Other relevant information which is necessary for the members to take an informed decision on the proposed resolution;
- ◆ Place from where any interested person may obtain a copy of the notice of the resolution to be passed.

(c) Publish an advertisement, giving abovementioned details of special resolution to be passed, which shall be published simultaneously with the dispatch of postal ballot notices to shareholder at least once in a vernacular newspaper in the principal vernacular language and in English language in an



English newspaper circulating at the place where the registered office of the company is situated and place it on the website of the Company if any, along with the justification for such change.

- (d) Give an opportunity to the dissenting shareholders to exit by the promoters and shareholders having control in accordance with regulations to be specified by the SEBI.
- (4) Send notice of the General meeting proposing the aforementioned special resolution to all the shareholders, directors, auditors and other persons entitled to receive it, by giving not less than clear 21 days notice or shorter notice, if consent for shorter notice is given by at least 95% of members entitled to vote at such meeting, either in writing or through electronic mode in accordance with Section 101.
- (5) Hold shareholders meeting and pass the Special Resolution for altering the object clause of Memorandum of Association. Special Resolution shall be passed by means of Postal ballot, if company has more than 200 members or the company has raised money from public through prospectus and still has any unutilized amount out of the money so raised.
- (6) Follow the procedure prescribed for preparing, signing and compiling of minutes of General Meeting.
- (7) After passing special resolution, file a certified copy of special resolution with the Registrar in **Form No. MGT-14** within 30 days of passing Special Resolution in general meeting along with the following attachments:
  - (a) Copy of special resolution passed along with explanatory statement.
  - (b) Notice for convening the General Meeting of the Company.
  - (c) Altered Memorandum of Association.
  - (d) Shorter Notice Consent Letters from the members in case the General Meeting was convened and held at a shorter notice.
  - (e) Any other attachment as may be considered as necessary in this regard.
- (8) The Registrar shall register the alteration of objects in Memorandum and certify the registration within a period of 30 days from the date of filing of the special resolution. **[Section 13(9)]**
- (9) Every Alteration made in the memorandum of the company shall be noted in every copy of the Memorandum of Association. [Section 15(1)]**

#### Notes:

1. No alteration of object clause of Memorandum of Association shall have any effect until it has been registered in accordance with the provisions of this section. **[Section 13(10)]**
2. Any alteration of the memorandum, in the case of a company limited by guarantee and not having a share capital, purporting to give any person a right to participate in the divisible profits of the company otherwise than as a member, shall be void. **[Section 13(11)]**

#### Que. 30] Write a short note on: Alteration of Liability Clause

**Ans.:** According to **Section 13(1)**, a company may, by a **special resolution** and after complying with the procedure specified, alter the provisions of its memorandum. It means that a company can change the liability clause of its MOA by passing a special resolution. A company shall, in relation to any alteration of its memorandum, file with the Registrar the special resolution passed by the company.

#### Que. 31] Write a short note on: Alteration of Capital Clause

**Ans.:** **Power of limited company to alter its share capital [Section 61]:** A limited company having a share capital may make the following types of alterations in its memorandum by an **ordinary resolution**, if so authorized by its articles, at its general meeting to:

- (i) Increase its authorized share capital.
- (ii) Consolidate existing shares into shares of larger denomination.
- (iii) Convert its fully paid-up shares into stock, and reconvert that stock into fully paid-up shares of any denomination.

(iv) Sub-divide its shares into shares of smaller amount.

(v) Cancel shares which have not been taken or agreed to be taken by any person.

All the above alterations do not require the confirmation by the Tribunal except that alteration relating to consolidation and division which results in changes in the voting percentage of shareholders.

**Notice to be given to Registrar for alteration of share capital [Section 64]:**

These alterations are, however, required to be notified and a copy of the resolution should be filed with the Registrar within **30 days** of the passing of the resolution along with an altered memorandum. The Registrar shall record the notice and make any alteration which may be necessary in the company's memorandum or articles or both. It must be noted that cancellation of shares in does not amount to reduction of share capital.

Where a company alters its share capital as per Section 61, the notice of such alteration, increase shall be filed by the company with the Registrar in

**Form No. SH-7. [Rule 16 of the Companies (Share Capital & Debentures) Rules, 2014]**

**Que. 32] Currently the Authorized and paid-up capital of Lucky Ltd. is Rs. 200 Crore. Due to expansion the company wants to increase its authorized capital from Rs. 200 Crore to Rs. 450 Crore. As specialist in company law you have been called in Board meeting to explain the procedure to be followed for increase in authorized capital of the company.**

**Ans.: Procedure for altering the MOA for increasing the authorized capital of the company under Sections 61 & 64 of the Companies Act, 2013 read with Rule 15 of the Companies (Share Capital & Debentures) Rules, 2014:**

- (1) Check for Authorization in Articles:** Section 61 of the Companies Act, 2013, mandates that for increasing the Authorised share capital, authorization in Articles of Association is a pre-condition. If there is no such provision then the company has to take steps for alteration of its Articles of Association in accordance with the provision of Section 14, so as to insert the clause enabling increase in the authorized share capital.
- (2) Calling of Board Meeting:** Issue notice in accordance with the provisions of Section 173 for convening a meeting of the Board of Directors. Main agenda for this Board meeting would be:
  - (a) To get in-principal approval of Directors for Increase in authorized share Capital.
  - (b) To fix date, time and place for holding EGM to get approval of shareholders, by way of Ordinary Resolution, for amendment in authorized share Capital clause of MOA.
  - (c) To approve notice of EGM along with Agenda and Explanatory Statement pursuant to be annexed to the notice of EGM as per Section 102.
  - (d) To authorize the Director or Company Secretary to issue notice of the EGM as approved by the board of directors.
- (3) Issuing the notice of the EGM:** Issue notice of the EGM to all members, legal representative of deceased member, assignee of an insolvent member, if any, directors and the auditors of the company in accordance with the provisions of Section 101.
- (4) Holding of general meeting:** Hold the EGM on fixed date and pass the necessary ordinary resolution u/s 61(1)(a) for increase in the authorized share capital.
- (5) ROC filing:** File **Form No. SH-7** within **30 days** of passing of Ordinary Resolution with the concerned ROC, with prescribed fees and along with following attachments as desired by Section 64 read with Rule 15 of the Companies (Share Capital & Debentures) Rules, 2014:
  - ◆ Notice of EGM.
  - ◆ Certified True copy of Ordinary Resolution along with the explanatory statement pursuant to Section 102 of the Act.
  - ◆ Altered Memorandum of Association.
- (6) Approval by ROC:** Concerned ROC will check the e-form and attached documents and will approve the increase in authorize share capital.

- (7) **Notice of Alteration of Share Capital to ROC:** File a notice in **Form No. SH-7** with the Registrar within a period of 30 days of alteration to its share capital along with a copy of altered Memorandum.
- (8) **Filing copy of special resolution:** For alteration of capital clause of the MOA, the special resolution shall be passed and **Form No. MGT-14** should be filed with the concerned ROC within 30 days along with the prescribed fees.

## ARTICLE OF ASSOCIATION

### Que. 33] Define: Article of Association

**What do you understand by article of association? Whether its registration is compulsory under the provisions of the Companies Act, 2013?**

**Ans.: Article [Section 2(5)]:** Article means the articles of association of a company as originally framed or as altered from time to time or applied in pursuance of any previous company law or of this Act.

In terms of **Section 5(1)**, the articles of a company shall contain the regulations for management of the company. The articles of association of a company are its bye-laws or rules and regulations that govern the management of its internal affairs and the conduct of its business. The articles play a very important role in the affairs of a company. It deals with the rights of the members of the company inter se. They are subordinate 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 and can be framed and altered by the members. But they must keep within the limits marked out by the memorandum and the Companies Act.

The articles regulate the internal management of the affairs of the company by way of defining the powers of its officers and establishing a contract between the company and the members and between the members inter se. This contract governs the ordinary rights and obligations incidental to membership in the company [Naresh Chandra Sanyal v. The Calcutta Stock Exchange Association Ltd, AIR 1971, SC 422, (1971) 41 Com Cases 51], But the Articles of Association of a company are not 'law' and do not have the force of law.

In Kinetic Engineering Ltd v. Sadhana Gadia (1992) 74 Com Cases 82: (1992) 1 Comp LJ 62 (CLB), the CLB held that if any provision of the articles or the memorandum is contrary to any provisions of any law, it will be invalid in toto.

AOA also includes the regulations contained in **Table F** in **Schedule I** of the Act, in so far as they apply to the company.

The article of association should be in any one of the forms specified in **Tables F, G, H, I & J** of **Schedule I** to the Companies Act, 2013, as may be applicable in relation to the type of company proposed to be incorporated or in a Form as near thereto as the circumstances admit.

| Table   | Type of company                                       |
|---------|-------------------------------------------------------|
| Table F | Company limited by shares                             |
| Table G | Company limited by guarantee having share capital     |
| Table H | Company limited by guarantee not having share capital |
| Table I | Unlimited company having share capital                |
| Table J | Unlimited company not having share capital            |

The articles must be printed, divided into paragraphs, numbered consecutively, stamped adequately, signed by each subscriber to the memorandum and duly witnessed and filed along with the memorandum.

The articles must not contain anything illegal or ultra vires the memorandum, nor should it be contrary to the provisions of the Companies Act, 2013.

**Contents of Articles:** The articles set out the rules and regulations framed by the company for its own working. The articles should contain generally the following matters:

- Exclusion wholly or in part of Table F.

- Adoption of preliminary' contracts.
- Number and value of shares.
- Issue of preference shares.
- Allotment of shares.
- Calls on shares.
- Lien on shares.
- Transfer and transmission of shares.
- Nomination.
- Forfeiture of shares.
- Alteration of capital.
- Buy back.
- Share certificates.
- Dematerialization.
- Voting rights and proxies.
- Meetings and rules regarding committees.
- Directors, their appointment and delegations of powers.
- Nominee directors.
- Issue of Debentures and stocks.
- Audit committee.
- Managing director, Whole-time director, Manager, Secretary.
- Additional directors.
- Seal.
- Remuneration of directors.
- General meetings.
- Directors meetings.
- Borrowing powers.
- Dividends and reserves.
- Accounts and audit.
- Winding up.
- Indemnity.
- Capitalization of reserves.

**Registration of articles:** Section 7(1) provides that at the time of incorporation of a company the company shall file with the Registrar within whose jurisdiction the registered office of a company is proposed to be situated, the memorandum and articles of the company duly signed by all the subscribers to the memorandum in the prescribed manner.

Every type of company whether public or private and whether limited by shares or limited by guarantee having a share capital or not having a share capital or an unlimited liability company must register their articles of association.

Section 5(2) provides that the articles shall also contain such matters, as prescribed in Rule 11 of the Companies (Incorporation) Rules, 2014. However, nothing contained in section 5(2) shall be deemed to prevent a company from including such additional matters in its articles as may be considered necessary for its management. The articles of a company shall be in respective forms specified in Tables, F, G, H, I and J in Schedule I as may be applicable to such company either in totality or otherwise. **[Section 5(6)]**

A company may adopt all or any of the regulations contained in the model articles applicable to such company. **[Section 5(7)]**

**Section 5(8)** provides that in case of any company, which is registered after the commencement of Companies Act, 2013, in so far as the registered articles of such company do not exclude or modify the regulations contained in the model articles applicable to such company, those regulations shall, so far as applicable, be the regulations of that company in the same manner and to the extent as if they were contained in the duly registered articles of the company.

Therefore, in terms of Section 5, a public company limited by shares may at its option register its articles of association signed by the same subscribers as to the memorandum, or alternatively it may adopt all or any of the regulations contained in Table F of First Schedule of the Act. If articles are not registered, automatically Table F in Schedule I would apply, and if registered, Table F in Schedule I would apply except in so far as it is excluded or modified by the articles. To avoid any confusion, normally every public company delivers its articles along with the memorandum for registration. Further, it will be specifically stated therein that Table 'F' will not apply.

The articles of a private company must contain the three restrictions as contained in Section 2(68).

A company limited by guarantee having a share capital or a company limited by guarantee not having a share capital or an unlimited company having a share capital or an unlimited company not having a share capital might adopt any of the appropriate regulations of Tables G, H, I and J respectively in Schedule I. **[Section 5(6)]**

However, nothing in Section 5 shall apply to the articles of a company registered under any previous company law unless amended under the Companies Act, 2013. **[Section 5(9)]**

**Que. 34] "The article of association play a subordinate role to the memorandum of association".  
Comment. CS (Inter) - June 2000 (5 Marks)**

**Ans.:** The articles of association 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 play a very important role in the affairs of a company.

It deals with the rights of the members of the company inter se. They are subordinate to and are controlled by the memorandum of association.

The articles play a part subsidiary to the MOA. They accept the MOA as the charter of incorporation of the company, and so accepting it, the articles proceed to define the duties, rights and powers of governing body as between themselves and the company at large, and the mode and form in which business of the company is to be carried on, and the mode and form in which changes in the internal regulations of the company may from time to time be made.

Thus, 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 and can be framed and altered by the members. But they must keep within the limits marked out by the memorandum and the Companies Act.

The articles regulate the internal management of the affairs of the company by way of defining the powers of its officers and establishing a contract between the company and the members and between the members inter se. This contract governs the ordinary rights and obligations incidental to membership in the company. But the Articles of Association of a company are not law and do not have the force of law. Any provision of the articles or the memorandum is contrary to any provisions of any law, it will be invalid in toto.

**Que. 35] Distinguish between: Memorandum of Association & Articles of Association CS (Inter) - June 2006 (5 Marks)**

**Ans.:** The following are the main points of distinction between MOA & AOA:

| Points | Memorandum of Association | Articles of Association |
|--------|---------------------------|-------------------------|
|--------|---------------------------|-------------------------|



|                     |                                                                                                                                                                                                                                     |                                                                                                                                                                                                                       |
|---------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Meaning</b>      | MOA is the charter of the company and defines the fundamental conditions and objects for which the company is granted incorporation.                                                                                                | AOA are the rules and regulations framed to govern the internal management of the company.                                                                                                                            |
| <b>Scope</b>        | MOA cannot include any clause contrary to the provisions of the Companies Act.                                                                                                                                                      | The AOA are subsidiary both to the Companies Act and the MOA.                                                                                                                                                         |
| <b>Relation</b>     | The MOA generally defines the relation between the company and the outsiders.                                                                                                                                                       | The AOA regulate the relationship between the company and its members and between the members inter se.                                                                                                               |
| <b>Alteration</b>   | Clauses of the memorandum cannot be easily altered. They can only be altered in accordance with the mode prescribed by the Act. In some of the cases, alteration requires the permission of the Central Government or the Tribunal. | In the case of AOA, members have a right to alter the articles by a special resolution. Generally there is no need to obtain the permission of the Tribunal or the Central Government for alteration of the articles. |
| <b>Ratification</b> | Acts done by a company beyond the scope of the MOA are absolutely void and ultra vires and cannot be ratified even by unanimous vote of all the shareholders.                                                                       | The acts of the directors beyond the articles can be ratified by the shareholders.                                                                                                                                    |

### Que. 36] Write a short note on: Entrenchment Provisions

**Ans.:** The Companies Act, 2013 recognizes an interesting concept of entrenchment. The entrenchment provisions allow for certain clauses in the articles to be amended upon satisfaction of greater conditions or restrictions than those prescribed under the Act (such as obtaining a 100% consent).

This provision acts as a protection to the minority shareholders. This shall empower the enforcement of any pre-agreed rights and provide greater certainty to investors, especially in joint ventures.

Thus, by making entrenchment provisions the article may be altered only if conditions or procedures that are more restrictive than those applicable in the case of a special resolution, are met or complied with. **[Section 5(3)]**

The provisions for entrenchment shall 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. **[Section 5(4)]**

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 form. **[Section 5(5)]**

Where the articles contain the provisions for entrenchment, the company shall give notice to the Registrar of such provisions in **Form No. INC-2** or **Form No. INC-32** (SPICe) as the case may be, along with prescribed fee at the time of incorporation of the company or in case of existing companies, the same shall be filed in **Form No. MGT-14** within 30 days from the date of entrenchment of the articles, as the case may be, along with prescribed fee. **[Rule 10 of the Companies (Incorporation) Rules, 2014]**

### Que. 37] Can company insert provision in articles as regards expulsion of a member?

**Ans.:** If there is a provision in the Articles empowering the directors of the company to expel any member of the company under any of the given conditions, then such a provision shall be totally inconsistent with

the provisions of **Section 6** of the Act. It is opposed to the fundamental principles of the company's jurisprudence and is ultra vires of the company. [Circular No. 32 of 1975] dated 01.11.1975]

But the Stock exchanges, registered under the provisions of the Companies Act, can carry such a provision in its Articles. The regulation of stock exchanges is mainly governed by **Securities Contracts (Regulation) Act, 1956** and **SEBI Act, 1992** which are Special Acts. Hence, the Articles of Stock Exchange may provide for additional matters as per SCR Act, which may not be possible for inclusion in the Articles of a company, as per the provisions of the Companies Act. [Madras Stock Exchange Ltd. v. S.S.R. Raj kumar (2003) 116 Com Cases 214 (Mad.)]

**Que. 38] A company has a statutory right to alter its articles of association.**

**CS (Executive) - June 2010 (5 Marks)**

**A Company does not have unlimited powers to alter its articles of association. Comment.**

**CS (Inter) - Dec 2000 (5 Marks), June 2005 (4 Marks) CS (Inter) - June 2007 (5 Marks)**

**Ans.: Alternation of Articles [Section 14]:** Subject to the provisions of the Act and the conditions contained in its memorandum, a company may alter its articles by passing a **special resolution**.

Every alteration of the articles shall be filed with the ROC, together with a printed copy of the altered articles, within a period of 15 days who shall register the same. **[Section 14(2)]**

Any alteration of the articles shall subject to the provisions of the Act, be valid as if it were originally in the articles. **[Section 14(3)]**

**Limitation on alternation of articles:** The right to alter the articles is so important that a company cannot alter it in any manner. A company can exercise the power to alter the article subject to certain limitations. These are:

- (1) The alteration must not exceed the powers given by the memorandum. In the event of conflict between the memorandum and the articles, it is the memorandum that will prevail.
- (2) The alteration must not be inconsistent with any provisions of the Companies Act, 2013 or any other statute.
- (3) The Articles must not include anything which is illegal or opposed to public policy.
- (4) The alteration must be bona fide for the benefit of the company as a whole.
- (5) The alteration must not constitute a fraud on the minority by a majority.
- (6) Articles cannot be altered so as to compel an existing member to take or subscribe for more shares or in any way increase his liability to contribute to the share capital, unless he gives his consent in writing.
- (7) By effecting alteration in its articles, a company cannot defeat escape from its contractual obligation with any person.
- (8) The Article cannot be altered so as to have retrospective effects.

**Que. 39] Discuss briefly procedure for alteration of Article of Association of the Company.**

**Ans.:** Following is the summary of the procedure required to be adopted for the alteration in Article of Association of the company:

- (1) Issue not less than 7 days notice and agenda of Board meeting, or a shorter notice in case of urgent business, in writing to every director of the company at his address registered with the company and call a Board Meeting to consider the proposal of alteration of articles of association of a company. **[Section 173]**
- (2) Hold a meeting of Board of Directors -
  - ♦ To consider and decide the articles required to be changed/ altered.
  - ♦ To pass the necessary Board Resolution for approving proposal of alteration of articles of association of a company subject to the approval of Shareholders.

- ◆ To delegate authority to any one director of the company to sign, certify and file the requisite forms with Registrar of Companies or any statutory authority to do all such acts, deeds as may be necessary to give effect to the proposed alteration.
  - ◆ To fix day, date, time and venue for holding general meeting of the Company for passing a special resolution as required by Section 14(1).
  - ◆ To approve the draft notice of general meeting along with Explanatory Statement.
  - ◆ To authorize the Director or Company Secretary to sign and issue notice of the general meeting.
- (3) Prepare and circulate draft minutes within 15 days from the date of the conclusion of the Board Meeting, by hand/speed post/registered post/courier/e-mail to all the Directors for their comments. Follow the procedure prescribed for preparing, circulation, signing and compiling of Board Minutes. [Secretarial Standards-1]
- (4) Send notice of the General meeting proposing the aforementioned special resolution to all the shareholders, directors, auditors and other persons entitled to receive it, by giving not less than clear 21 days notice or shorter notice, if consent for shorter notice is given by at least 95% of members entitled to vote at such meeting, either in writing or through electronic mode. Also follow the procedure prescribed for issuing and signing of notice and convening of General Meeting. [Secretarial Standards-2]
- (5) Hold a shareholder's meeting on the date fixed for the meeting and pass the Special Resolution for altering the Articles of Association or unanimously, in case of insertion of provisions of entrenchment by a private company.
- (6) After passing special resolution, file a certified copy of special resolution with the Registrar in Form No. MGT-14 within 30 days of passing special resolution in general meeting along with the following attachments:
- ◆ Copy of Special Resolution passed along with explanatory statement.
  - ◆ Notice for convening the General Meeting of the Company along with explanatory statement as an optional attachment.
  - ◆ Certified True copy of the Altered Articles including the provisions of entrenchment inserted in the articles, if any.
  - ◆ Shorter Notice Consent Letters from at least 95% of the members in case the General Meeting was convened at a shorter notice.
  - ◆ Any other attachment as may be required/applicable.
  - ◆ Follow the procedure prescribed for preparing, signing and compiling of minutes of General Meeting. [Secretarial Standards-2]
- (7) Make necessary amendments in all the copies of Articles of association of the Company. **[Section 15(1)]**

**Que. 40] The alteration of article of association must not constitute a fraud on the minority by a majority. Comment.**

**CS (Executive) - June 2013 (5 Marks)**

**Ans.:** The alteration must not constitute a fraud on the minority by a majority. If the alteration is not for the benefit of the company as a whole, but for majority of shareholders, then the alteration would be bad. In other words, an alteration to the articles must not discriminate between the majority shareholders and the minority shareholders so as to give the former an advantage over the latter. [All India Railway Mens Benefit Fund vs. lamadar Baheshwarnath Bali (1945) 15 Com Cases 142 (Nag.)]

**Que. 41] Can company registered u/s 8 of the Companies Act, 2013 i.e. companies with charitable objects alter the provisions of its memorandum or articles?**

**Ans.:** Section 8(4)(t) provides that a company registered u/s 8 i.e. companies with charitable objects shall not alter the provisions of its memorandum or articles except with the previous approval of the Central Government.

**Que. 42] Memorandum and articles bind the individual member inter se and the company to the members. CS (Inter) - Dec 2006 (4 Marks)**

Navneet, a retired bureaucrat, has been appointed as a chairman of the Healty Life Ltd., engaged in the Medicare business. As he has no background of corporate affairs, he asks you as the Company Secretary of a company to provide him with self explanatory note on the following:

- (i) **Relevance of the memorandum of association and the article of association to the company.**
- (ii) **Relevance of the memorandum of association and the article of association to the members.**

**CS (Inter) - Dec 2002 (5 + 5 = 10 Marks)**

**Ans.:** The memorandum and articles, when registered, bind the company and its members to the same extent as if they have been signed by the company and by each member to observe and be bound by all the provisions of the memorandum and of the articles. We shall examine the extent to which the memorandum and articles bind:

- (a) Members bound to the company:** The memorandum and articles constitute a contract binding the members of the company. The members, as members, are bound to the company. Each member must, therefore, observe the provisions of the memorandum and articles. Each member is bound by the covenants of the memorandum as originally made and as altered from time to time.

In *Boreland's Trustee v. Steel Brother and Co. Ltd.* (1901) 1 Ch. 279, the articles of a company contained a clause that on the bankruptcy of a member his shares would be sold to other persons and at a price fixed by the directors. B, a shareholder was adjudicated bankrupt. His trustee in bankruptcy claimed that he was not bound by these provisions and should be at liberty to sell the shares at their true value. It was held that the trustee was bound by the articles, as the shares were purchased by B in terms of the articles.

- (b) Company bound to the members:** Since the articles constitute a contract binding the company to its members in their capacity as members, a member can bring an action against the company for infringement by it of the memorandum or articles. Further, the company is bound to individual members in respect of their ordinary rights as members, e.g. the right to receive share certificate or to receive notice of general meeting, etc.
- (c) Member bound to member:** As between the members inter se each member is bound by the articles to the other members but that does not mean the memorandum and articles create an express contract among the members of the company. Thus, a member of a company has no right to bring a suit to enforce the articles in his own name against any other member or members. It is the company alone which can sue the offender so as to protect the aggrieved member. It is in this way that the rights of members inter se are regulated. A shareholder may, however, sue in his own name to restrain another, or others from doing fraudulent or ultra vires acts.
- (d) Company not bound to outsiders:** The term outsider signifies a person who is not a member of the company even if he is a director of or solicitor to the company. As between outsiders and the company, neither the memorandum nor the articles would give any contractual rights to outsiders against the company.

**Que. 43] The Articles of a public company clearly stated that Mr. A will be the solicitor of the company. The Company in its general meeting of the shareholders resolved unanimously to appoint Mr. B in place of A as the solicitor of the company by altering the articles of association. Examine, whether the company can do so? State the reasons clearly.**

**Ans.:** The memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed by the company and by each member.

The company may by special resolution alter its articles. In the given problem the company has changed its articles by passing resolution unanimously and therefore the company can change its articles. The provision of memorandum and articles will bind the members but in the capacity of a member only and even a member may be treated as an outsider. Therefore a member cannot enforce the provisions of articles for his benefit in some other capacity than that of a member. In the given case A will not succeed and the company is empowered to appoint B as a solicitor of the company and may change the articles accordingly.

**Que. 44]** The articles of a X Ltd. contained a clause that on the bankruptcy of a member his shares would be sold to other persons and at a price fixed by the directors. Bikram, a shareholder was adjudicated bankrupt. His trustee in bankruptcy claimed that he was not bound by these provisions and should be at liberty to sell the shares at their true value. Decide by quoting relevant case law whether contention of trustee is tenable under the law.

**Ans.:** The facts of the given case are similar to *Borland's Trustee v. Steel Brother and Co. Ltd* (1901) 1 Ch, 279, in which the articles of a company contained a clause that on the bankruptcy of a member his shares would be sold to other persons and at a price fixed by the directors. B, a shareholder was adjudicated bankrupt. His trustee in bankruptcy claimed that he was not bound by these provisions and should be at liberty to sell the shares at their true value. It was held that the trustee was bound by the articles, as the shares were purchased by B in terms of the articles.

Keeping in view the above discussion it can be concluded that contention of trustee is not tenable under the law.

### **DOCTRINE OF ULTRA VIRES, CONSTRUCTIVE NOTICE, INDOOR MANAGEMENT & ALTER EGO**

**Que. 45]** Write a short note on: Doctrine of Ultra Vires

**CS (Executive) - June 2009 (4 Marks), Dec 2009 (4 Marks) CS (Executive) - Dec 2010 (4 Marks), Dec 2014 (5 Marks)**

**Discuss the importance of the case law "Ashbury Railway Carriage & Iron Co. Ltd. vs. Riche". CS (Inter) - June 1999 (8 Marks)**

**In the case of a company whatever is not stated in the memorandum of association as objects of the company is prohibited by the doctrine of ultra vires. Discuss with relevant case law.**

**CS (Executive) - June 2014 (8 Marks)**

**Ans.:** The doctrine of ultra vires was first enunciated by the House of Lords in a classic case, *Ashbury Railway Carriage & Iron Co. Ltd. vs. Riche* (1875) LR 7 HL 653.

The general rule is that an act which is ultra vires the company is incapable of ratification. An act which is intra vires the company may be ratified by the company in proper form. The rule is meant to protect shareholders and the creditors of the company.

#### **Effects of ultra vires transactions:**

**(i) Void ab initio:** The ultra vires acts are null and void ab initio. The company is not bound by these acts. Even the company cannot sue or be sued upon. Ultra vires contracts are void ab initio and hence cannot become intra vires by reason of estoppel or ratification.

**(ii) Injunction:** The members can get an injunction to restrain the company wherein ultra vires act has been or is about to be undertake.

**(iii) Personal liability of directors:** It is one of the duties of directors to ensure that the corporate capital is used only for the legitimate business of the company and hence if such capital is diverted to purposes foreign to company's memorandum, the director will be personally liable to replace it. [*Jehangir R. Modi vs Shamji Ladha* 1866-67 4 Bom. HCR (1855)]

**(iv)** Where a company's money has been used ultra vires to acquire some property, the company's right over such property is held secure and the company will be the right party to protect the property. This is because, though the property has been acquired for some ultra vires object it represents the money of the company.

**(v)** Ultra vires borrowing does not create the relationship of creditor and debtor.

**Ashbury Carriage Co. v. Riche (1875) LR 7 HL 653:** In this case, the objects of the company as stated in the objects clause of its memorandum, were "to make and sell, or lend on hire railway carriages and wagons, and all kinds of railway plant, fittings, machinery and rolling stock to carry on the business of mechanical engineers and general contractors to purchase and sell as merchants timber, coal, metal or other materials; and to buy and sell any materials on commissions or as agents." The directors of the company entered into a contract with Riche for financing a construction of a railway line in Belgium. The contract was ratified by all the members of the company, but later on it was repudiated by the company. Riche sued the company for breach of contract.



**Issue:** Whether the contract was valid and if not, whether it could be ratified by the members of the company?

**Decision:** The House of Lords has held that an ultra virus act or contract is void in its inception because the company had not the capacity to make it and since the company lacks the capacity to make such contract, how it can have capacity to ratify it. If the shareholders are permitted to ratify an ultra virus act or contract, it will be nothing but permitting them to do the very thing which they are prohibited from doing. The House of Lords has expressed the view that a company incorporated under the Companies Act has power to do only those things which are authorized by its objects clause of its memorandum and anything not so authorized (expressly or impliedly) is ultra vires the company and cannot be ratified or made effective even by the unanimous agreement of the members.

**A. Lakshmanaswami Mudaliar v. LIC (1963) 33 Com Cases 420, 430 (SC):** The doctrine of ultra vires was upheld. In this case, the directors of the company were authorized to make payments towards any charitable or any benevolent object, or for any general public or useful object. In accordance with shareholders resolution the directors paid Rs. 2 lakhs to a trust formed for the purpose of promoting technical and business knowledge.

The company's business having been taken over by LIC, it had no business left of its own. The SC held that the payment was ultra vires the company. Directors could not spend company's money on any charitable or general objects. They could spend for the promotion of only such charitable objects as would be useful for the attainment of the company's own objects. It is pertinent to add that the powers vested in the Board of directors, e.g., power to borrow money, is not an object of company. The powers must be exercised to promote the company's objects. Charity is allowed only to the extent to which it is necessary in the reasonable management of the affairs of the company.

It was held that there must be proximate connection between the gift and the company's business interest. Thus, gifts to foster research relevant to the company's activities and payments to widows of ex-employees on the footing that such payments encourage persons to enter the employment of the company have been upheld as valid and intra vires.

**Que. 46] With the approval of the Board, an amount of Rs. 50 Crore was spent by Speed Jet Ltd., in producing a commercial film, not covered under its objects clause. The film was a complete flop and the company lost an amount of Rs. 40 Crore. Some of the members of the company objected to such investments not covered by the objects clause of the company. They filed a suit making the directors personally responsible and to make good the loss. Will they succeed? Support your answer with reasons.**

**CS (Executive) - Dec 2009 (6 Marks)**

**Ans.:** An act which is ultra vires is void, and does not bind the company. Neither the company nor the other contracting party can sue on it. The company cannot make it valid, even if every member assents to it.

It is one of the duties of directors to ensure that the corporate capital is used only for the legitimate business of the company and hence if such capital is diverted to purposes foreign to company's memorandum, the director will be personally liable to replace it. In *Jehangir R. Modi v. Shamji Ladha* (1867) 4 Bom OC185, the Bombay High Court held that a shareholder can maintain an action against the directors to compel them to restore to the company's funds that have by them been employed in transactions that directors have no authority to enter into.

Thus, members of the Speed Jet Ltd. will succeed in their claim making directors personally responsible and to make good the loss.

**Que. 47] The object clause of the Memorandum of Association of RST Ltd. authorizes it to publish and sell text-books for students. The company, however, entered into an agreement with Q to supply 100 laptops worth Rs. 5 lakhs for resale purposes. Subsequently, the company refused to make payment on the ground that the transaction was ultra vires the company. Examine the validity of the company's refusal of payment to Q under the provisions of the Companies Act, 2013.**

**Ans.:** The ultra vires acts are null and void ab initio. The company is not bound by these acts. Even the company cannot sue or be sued upon. Ultra vires contracts are void ab initio and hence not enforceable or capable of ratification. Thus, the acts beyond the powers of a company are ultra vires and void and cannot

be ratified even though every member of the company may give his consent. The objects clause therefore is of fundamental importance to the shareholder, creditors and others.

In the given problem RST Ltd. is authorized to publish and sell textbooks for students. It has no power to enter into an agreement with Q to supply 100 laptops. Such act can never be treated as express or implied power of the company. Q is deemed to be aware of the lack of powers of RST Ltd. In the light of above, Q cannot enforce the agreement or liability against RST Ltd.

**Que. 48] Surprise Ltd. was incorporated under the Companies Act, 2013. The memorandum of association of the company in its objects clause stated that the company was established to make and sell or to carry on the business of mechanical engineers and general contractors. The company entered into a contract with Prominent Ltd., a firm of railway contractors to finance the construction of a railway line in Mumbai. The contract was ratified by the shareholders in general meeting. Subsequently, the contract was repudiated by the company on the ground that the contract was ultra vires the objects clause. Prominent Ltd. filed a suit claiming damages for the breach of contract. Explaining the meaning of doctrine of ultra vires, decide whether Prominent Ltd. will succeed.**

**CS (Executive) - Dec 2015 (4 Marks)**

**Ans.:** The general rule is that an act which is ultra vires the company is incapable of ratification.

The rule is meant to protect shareholders and the creditors of the company.

The ultra vires acts are null and void ab initio. The company is not bound by these acts. Even the company cannot sue or be sued upon.

The facts of the given case are similar to *Ashbury Railway Carriage & Iron Co. Ltd. v. Riche* (1875) LR 7 HL 653 in which doctrine of ultra vires was first enunciated by the House of Lords. The House of Lords has held that an ultra vires act or contract is void in its inception because the company had not the capacity to make it and since the company lacks the capacity to make such contract, how it can have capacity to ratify it. If the shareholders are permitted to ratify an ultra vires act or contract, it will be nothing but permitting them to do the very thing which they are prohibited from doing. The House of Lords has expressed the view that a company incorporated under the Companies Act has power to do only those things which are authorized by its objects clause of its memorandum and anything not so authorized (expressly or impliedly) is ultra vires the company and cannot be ratified or made effective even by the unanimous agreement of the members.

Thus, considering views in above case, Surprise Ltd. can repudiate the contract and Prominent Ltd. cannot claim the damages.

**Que. 49] Write a short note on: Loans, Borrowings, Guarantees and Ultra Vires Rule**

**Ans.:** An ultra vires borrowing does not create a relationship of a debtor and creditor. In a case, a company had accepted deposits from outsiders which was outside the scope of the Memorandum. When the company was ordered to be wound up, a question was raised whether the depositors were creditors of the company and whether the contributories could be asked to contribute towards payment of deposits. The Court held that the relationship between the company and the depositors was not that of debtor and creditor. But if the lender had lent the amount for discharging lawful expenses, he may recover the amount.

Whether a transaction is ultra vires the company can be decided on the basis of the following:

- (1) If a transaction entered into by a company falls within the objects, it is not ultra vires and hence not void.
- (2) If a transaction is outside the capacity (objects) of the company, it is ultra vires.
- (3) If a transaction is in excess or abuse of the company's powers, it is ultra vires and such transaction will be set aside by the shareholders or even ratification by the shareholders would not validate the acts done beyond the authority of the company itself.

Where a company borrows without the authority conferred on it by the articles it is an ultra vires borrowing. Any act which is ultra vires the company is **void**. In such a case the contract is void and the lender cannot sue the company for the return of the loan. The securities given for such ultra vires borrowing are also void and inoperative.

Ultra vires borrowings **cannot** even be **ratified** by a resolution passed by the company in general meeting. However, equity assists the lender where the common law fails to do so. If the lender has parted with his money to the company under an ultra vires borrowing, he has, in equity, the following remedies:

- (1) **Injunction & Recovery:** Under the equitable doctrine of restitution he can obtain an injunction provided he can trace and identify the money lent, and any property which the company has bought with it. Even if the monies advanced by the lender cannot be traced, the lender can claim repayment if it can be proved that the company has been benefited thereby,
- (2) **Subrogation:** Where the money of an ultra vires borrowing has been used to pay off lawful debts of the company, he would be subrogated to the position of the creditor paid off and to that extent would have the right to recover his loan from the company.
- (3) **Suit against directors:** In case of ultra vires borrowing, the lender may be able to sue the directors for breach of warranty of authority, especially if the directors deliberately misrepresented their authority.

**Que. 50] Write a short note on: Intra vires borrowing**

**Ans.:** Where the directors borrowed money beyond their authority and the borrowing is not ultra vires the company, such borrowing is called **Intra vires borrowing** but outside the scope of agents authority. The company will be liable to such borrowing if the borrowing is within the directors ostensible authority and the lender acted in good faith or if the transaction was ratified by the company.

Where the borrowing is intra vires the company but outside the authority of the directors e.g. where the articles provide that the directors shall have the power only up to Rs. 500 lakhs and prior approved of the shareholders would be required to borrow beyond Rs. 500 lakhs; any borrowing beyond Rs. 500 lakhs without shareholders approval i.e. ultra vires the directors can be ratified by the company and become binding on the company. The company would be liable, particularly if the money has been used for the benefit of the company.

Here the legal position is quite clear. The company has power or capacity to borrow, but the authority of the directors is restricted either by the articles of the company or by the statute, and they have exceeded it. The company may, if it wishes, ratify the agent's act in which case the loan binds the company and the lender as if it had been made with company's authority in the first place.

**Judicial Views:**

- ♦ Where the directors mortgaged the company's property exceeding the limits of their authority, it was held that the lending bank was entitled to retain possession and to claim institution before it could be compelled to surrender possession [Deonarayan Prasad Bhadani vs. Bank of Baroda Ltd. (1957) 27 Com Cases 223,239 Bom.]
- ♦ If the borrowing is unauthorized, the company will be liable to repay, if it is shown that the money had gone into the company's coffers. [Lakshmi Ratan Cotton Mills Co. Ltd. vs. IK. Jute Mills Co. Ltd. (1957) 27 Com Cases 660: AIR 1957 All 311]

**Que. 51] Gomez, the Chairman of a company, borrowed Rs. 5 lakh from the State Bank of India, Patna under a promissory note. A suit was filed for the recovery of debts on the basis of the pro-note executed by the chairman. The company refused to accept the liability on the plea that the Chairman had borrowed funds without authorization from the company. Will the company succeed? Explain. CS (Inter) - June 2007 (5 Marks)**

**Ans.:** The facts of the given case are similar to Krishnan Kumar Rohatgi & Others vs. State Bank of India & Others (1980) 50 Com Cases 722. In this case the company borrowed an amount of Rs. 5 lakhs from the Bank under a Promissory Note. The repayment was guaranteed by a person by executing a guarantee in favour of the company. The company used to make payments towards loan and the promissory note used to be renewed from time to time. In the suit for recovery, the company contended that the pro-note was executed by the Chairman without there being a resolution of the Board of directors authorizing the Chairman to execute the pro-note. Rejecting these contentions the High Court held that in cases where the directors borrow funds without their having authorization from the company and if the money has been used for the benefit of the company, the company cannot repudiate its liability to repay. Under the general principles of law, when an agent borrows money for a principal without the authority of the principal but

the principal takes the benefit of the money so borrowed or when the money so borrowed has gone into the coffers of the principal, the law implies a promise to be paid by the principal.

Thus, company will be held liable to repay the amount because the company, being principle had taken benefit of the amount borrowed.

**Que. 52] Alok, the Managing Director of Yellow Ltd., borrowed a large sum of money and misappropriated the same. Later, when the lender demanded his money, the company refused to repay, contending that the money borrowed by Managing Director was misappropriated by him and the company is not liable for repayment. Decide, giving reasons, whether the lender would succeed in recovering the money from the company.**

**CS (Executive) - June 2015 (4 Marks)**

**Ans.:** The facts of given case are similar to V.K.R.S.T. Firm vs. Oriental Investment Trust Ltd., AIR 1944 Mad 532 wherein it was held that under the authority of the company, its managing director borrowed large sums of money and misappropriated it. The company was held liable stating that where the borrowing is within the powers of the company, the lender will not be prejudiced simply because its officer have applied the loan to unauthorized activities provided the lender had no knowledge of the intended misuse. Thus, lender would succeed in recovering the money from the company.

**Que. 53] Every company may necessarily possess certain powers which are implied, such as, a power to appoint and act through agents, and where it is a trading company, a power to borrow and give security for the purposes of its business, and also a power to sell. Such powers are incidental and can be inferred from the powers Charter Documents of Companies expressed in the memorandum. Discuss.**

**Ans.:** The powers exercisable by a company are to be confined to the objects specified in the memorandum. While the objects are to be specified, the powers exercisable in respect of them may be express or implied and need not be specified.

Every company may necessarily possess certain powers which are implied, such as, a power to appoint and act through agents, and where it is a trading company, a power to borrow and give security for the purposes of its business, and also a power to sell. Such powers are incidental and can be inferred from the powers expressed in the memorandum. [Oakbank Oil Co. v. Crum (1882) 8 App Cas 65]. The principle underlying the exercise of such powers is that a company, in carrying on the business for which it is constituted, must be able to pursue those things which may be regarded as incidental to or consequential upon that business.

**Powers which are not implied:** The following powers have been held not to be implied and it is, therefore, prudent to include them expressly in the objects clauses:

- (1) Acquiring any business similar to the company's own business. [Ernest v. Nzcoiii (1857) 6 HLC 40],
- (2) Entering into an agreement with other persons or companies for carrying on business in partnership or for sharing profit, joint venture or other arrangements. Very clear powers are necessary to justify such transactions [Be European Society Arbitration Act (1878) 8 Ch 679],
- (3) Taking shares in other companies having similar objects. [Be. Barned's Banking Co., ex parte and The Contract Corporation (1867) 3 Ch. App. 105. Re William Thomas & Co. Ltd. (1915) 1 Ch 325]
- (4) Taking shares of other companies where such investment authorizes the doing indirectly that which will not be intra vires if done directly.
- (5) Promoting other companies or helping them financially. [Joint Stock Discount Co. v. Brown (1869) LR 8 EQ 381]
- (6) A power to sell and dispose of the whole of a company's undertaking.
- (7) A power to use funds for political purposes.
- (8) A power to give gifts and make donations or contribution for charities not relating to the objects stated in the memorandum.
- (9) Acting as a surety or as a guarantor.

**Que. 54] Write a short note on: Doctrine of Constructive Notice**

**CS (Inter) - Dec 2003 (4 Marks)**

**CS (Executive) - June 2009 (4 Marks), Dec 2011 (5 Marks)**

**Ans.:** The memorandum and articles, when registered, become **public documents** and can be inspected by anyone on payment of nominal fee. Therefore, every person who contemplates entering into a contract with a company has the means of ascertaining and is consequently presumed to know, not only the exact powers of the company but also the extent to which these powers have been delegated to the directors, and of any limitations placed upon the exercise of these powers.

In other words, every person dealing with the company is deemed to have a "constructive notice" of the contents of its memorandum and articles. In fact, he is regarded not only as having read those documents but also as having understood them according to their proper meaning. Consequently, if a person enters into a contract which is beyond the powers of the company,

as defined in the memorandum, or outside the limits set on the authority of the directors, he cannot, as a general rule, acquire any rights under the contract against the company.

**Example:** If the articles provide that a bill of exchange to be effective must be signed by two directors, a person dealing with the company must see that it is so signed; otherwise he cannot claim under it.

**Que. 55] Write a short note on: Doctrine of Indoor Management**

**The benefit of doctrine of indoor management is not available in certain circumstances. Comment.**

**CS (Inter) - Dec 1998 (5 Marks), Dec 2006 (5 Marks)**

**While the doctrine of constructive notice seeks to protect the company against the outsider, the doctrine of indoor management operates to protect the outsiders against the company. Elucidate.**

**CS (Inter) - June 2001 (8 Marks) CS (Executive) - June 2012 (8 Marks), June 2014 (4 Marks)**

**Ans.:** The principal of indoor management operates to protect the outsiders against the company. According to this doctrine, as laid down in *Royal British Bank vs. Turquand* (1856) 119 E.R. 886, persons contracting with a company are entitled to assume that the provisions of the articles have been observed by the officers of the company. It is no part of the duty of an outsider to see that the company carries out its own internal regulations.

In *Royal British Bank v. Turquand*, the directors of a banking company were authorized by the articles to borrow on bonds such sums of money as should from time to time, by resolution of the company in general meeting, be authorized to borrow. The directors gave a bond to Turquand without the authority of any such resolution. It was held that Turquand could sue the company on the strength of the bond, as he was entitled to assume that the necessary resolution had been passed. Lord Hatherly observed: "Outsiders are bound to know the external position of the company but are not bound to know its indoor management".

**Exceptions to the doctrine of indoor management:** The doctrine of indoor management is subject to certain exceptions. In other words, relief on the ground of "indoor management" cannot be claimed by an outsider dealing with the company in the following circumstances:

**(1) Where the outsider had knowledge of irregularity:** The rule does not protect any person who has actual or even an implied notice of the lack of authority of the person acting on behalf of the company. Thus, a person knowing that the directors do not have the authority to make the transaction but still enters into it, cannot seek protection under the rule of indoor management.

The articles of a company empowered the directors to borrow up to £ 1,000 only. They could, however, exceed the limit of £ 1,000 with the consent of the company in general meeting. Without such consent having been obtained, they borrowed £ 3,500 from one of the directors who took debentures. The company refused to pay the amount. Held that, the debentures were good to the extent of £ 1,000 only because the director had notice or was deemed to have the notice of the internal irregularity. [*Howard vs. Pate*, *nl Ivory Co.* (38 Ch. D 156)]

**(2) No knowledge of memorandum & articles:** The doctrine of indoor management cannot be invoked in favour of a person who did not consult the memorandum and articles and thus did not rely on them.

T was a director in the company. He, purporting to act on behalf of the company, entered into a contract with the Rama Corporation and took a cheque from the latter. The articles of the company did provide that the directors could delegate their powers to one of them. But Rama Corporation people had never read the



articles. Later, it was found that the directors of the company did not delegate their powers to T. The Plaintiff relied on the rule of indoor management. Held, they could not because they even did not know that power could be delegated. [Rama Corporation vs. Proved Tin & General Investment Co. (1952) 1 All. ER 554]

- (3) **Forgery:** The rule of indoor management does not extend to transactions involving forgery or to transactions which are otherwise void or illegal ab initio. In the case of forgery it is not that there is absence of free consent but there is no consent at all. The person whose signatures have been forged is not even aware of the transaction and the question of his consent being free or otherwise does not arise. Consequently, it is not that the title of the person is defective but there is no title at all.

Where the secretary of a company forged signatures of two of the directors required under the articles on a share certificate and issued certificate without authority, the applicants were refused registration as members of the company. The certificate was held to be nullity and the holder of the certificate was not allowed to take advantage of the doctrine of indoor management. [Rouben vs. Great Fingal Consolidated (1906) AC 439]

- (4) **Negligence:** The doctrine of indoor management does not reward those who behave negligently. Thus, where an officer of a company does something which shall not ordinarily be within his powers, the person dealing with him must make proper enquiries and satisfy himself as to the officer's authority. If he fails to make an enquiry, he is estopped from relying on the Rule.

A person who was a sole director and principal shareholder of a company paid into his own account cheques drawn in favour of the company- Held, that, the bank should have made inquiries as to the power of the director. The bank was put upon an enquiry and was accordingly not entitled to rely upon the ostensible authority of director. [AZ Underwood vs. Benkof Liverpool (1924) 1 KB 775]

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An accountant of a company transferred some property of a company in favour of Anand Behari. On an action brought by him for breach of contract, the Court held the transfer to be void. It was observed that the power of transferring immovable property of the company could not be considered within the apparent authority of an accountant. [5. Anand Behari Lal vs. Dinshaw & Co. (Bankers) Ltd. AIR 1942 Oudh 417]

**Que. 56] Doctrine of indoor management and provisions of Section 176 of the Companies Act, 2013 are closely related to each other. Discuss I with the help of decided case law, if any.**

**Ans.: Section 176** provides for the Validity of Acts of Directors - No act done by a person as a director shall be deemed to be invalid, notwithstanding that it was subsequently noticed that his appointment was invalid by reason of any defect or disqualification or had terminated by virtue of any provision contained in the Act or in the articles of the company. However, nothing in this section shall be deemed to give validity to any act done by the director after his appointment has been noticed by the company to be invalid or have been terminated.

The object of the section is to protect persons dealing with the company - outsiders as well as members by providing that the acts of a person acting as director will be treated as valid although it may afterwards be discovered that his appointment was invalid or that it had terminated under any provision of the Act or the Articles of the company. [Ram Raghubir Lal v. United Refineries (Burma) Ltd. (1932) 2 Com Cases 359; AIR 1931 Rang 139]

**Relation of company with members and outsiders:** The validation of the acts of unqualified directors may apply to circumstances from two different angles: (1) as between outsiders, strangers and the company as in Royal British Bank v. Turquand and (2) in relation to the internal affairs of the company as in Dawson v. African Consolidated Land & Trading Co., where calls made by unqualified directors were held valid. Even if the public documents of the company, and the facts which are apparent, would make it clear that a director was not duly qualified to act, this will not oust the effect of the Section 176. Similarly in Boschoek Proprietary Co. Ltd. v. Puke (1906) 1 Ch 148, a resolution of a general meeting convened by de facto directors was upheld.

**Forgery and incompetent acts:** This section does not apply where the act itself is not in the competence of the Board of directors e.g. compromising unpaid calls under the guise of forfeiture, the transaction being ultra vires and invalid. [Bhagirath Spinning & Wvg. Co. v. Balaji Bhavani Pawar, AIR 1930 Bom. 267]

**Directors not aware of their disqualification:** The allotment and forfeiture of shares made by the directors who continued to act even after they were disqualified but were not aware of it, were saved by the Section 176. [Shiromani Sugar Mills Ltd, v. Debi Prasad (1950) 20 Com Cases 296: AIR 1950 All 508], Where this section does not save the situation, the company may in general meeting ratify allotment of shares even if made by de facto directors with mala fide intentions \Bamford v. Bamford (1969) 39 Com Cases 838: (1969) 2 WLR (1107) (CA) and an appeal (1969), All ER 969],

Where the directors in question were not aware of the fact that by virtue of certain provisions in the articles, they had vacated their office, their acts in passing resolutions for starting certain business transactions were held to be valid. [Seth Mohan Lal v. Grain Chambers Ltd. (1968) 38 Com Cases 543: AIR 1968 SC 772; Shiromani Sugar Mills Ltd. v. Debi Prasad, (Supra).]

It is important to remember that the doctrine of “constructive notice”, can be invoked by the company and it does not operate against the company. It operates against the person who has failed to inquire but does not operate in his favour. But the doctrine of “indoor management” can be invoked by the person dealing with the company and cannot be invoked by the company.

An outsider is entitled to act on a certified copy of the resolution of the Board of directors delegating the powers of borrowing money to the managing director subject to the limitation mentioned therein [C.K. Siva Sankara Pan- ickerv. Kerala State Financial Corporation (1980) 50 Com Cases 817 (Ker.)].

**Que. 57] Distinguish between: Doctrine of constructive notice & doctrine of indoor management CS (Executive) - June 2011 (4 Marks)**

**Ans.:** The following are the main points of distinction between doctrine of constructive notice & doctrine of indoor management:

| Points                  | Doctrine of Constructive Notice                                                                                                                                             | Doctrine of Indoor Management                                                                                                                                                      |
|-------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Meaning</b>          | According to this doctrine, every person dealing with the company is deemed to have a “constructive notice” of the contents of its memorandum and articles.                 | According to this doctrine, persons dealing with the company are entitled to presume that internal requirements prescribed in memorandum and articles have been properly observed. |
| <b>To whom protects</b> | It protects the company against the outsider.                                                                                                                               | It protects outsider against the company.                                                                                                                                          |
| <b>Affairs</b>          | It is confined to the external position and affairs of the company.                                                                                                         | It is confined to the internal position and affairs of the company.                                                                                                                |
| <b>Reason</b>           | The memorandum and articles of association of the company are public documents. They must be registered with the ROC. These are open to public and third parties to access. | The internal affairs need not be registered. They are not open to public and third parties.                                                                                        |
| <b>Effect</b>           | It operates as an estoppel against the outsider.                                                                                                                            | It mitigates the effects of the “Doctrine of Constructive Notice”.                                                                                                                 |

**Que. 58] Write a short note on: Interpretation of memorandum and articles**

**Ans.:** Articles should be construed as a business document so as to give business efficacy preference to a construction which will prove unworkable. [Holmes v. Adyes (Lord) (1958) 2 All ER 129 (CA)] Where the conduct of the parties reveals that there has been some practice in vogue for several years which was accepted by everyone concerned without any challenge or question, then that practice in the course of long years in itself becomes an indication that the rules or articles which are framed by way of internal management were understood in that sense [Krishnaswamy (S) v. South India film Chamber of Commerce, AIR 1969 Mad 42,(1968) 1 Comp LJ 75]

## CHAPTER 4 – SHARES AND SHARE CAPITAL

### 1. Question

Premium Ltd. is considering buy-back of its shares without using any proceeds of shares or other specified securities. The balance sheet of Premium Ltd. shows the following status as on 31st March, 2018 :

| Asset/Liabilities                               | Amount     |
|-------------------------------------------------|------------|
| Share Capital :                                 |            |
| 1,00,000 Equity shares of `10 each (fully paid) | `10,00,000 |
| Free reserves                                   | `5,00,000  |
| Unsecured debt                                  | `7,00,000  |
| Secured debt                                    | `15,00,000 |

Determine the maximum quantum of buy-back of shares with the shareholders' approval as on 1st April, 2018.

### Answer

The maximum quantum of buy- back that Premium Ltd. can make as on 1st April, 2018, in pursuance to section 68 of Companies Act, 2013 is 25% of aggregate of paid- up capital and free reserves of the company. Further provided that the reference to twenty-five per cent shall be construed with respect to its total paidup equity capital in that financial year and the ratio of the aggregate of secured and unsecured debts owed by the company after buy-back should not be more than twice the paid-up capital and its free reserves.

Accordingly, in the present case we have, Free Reserves - `5,00,000

Securities premium Account – Nil

Proceeds of other specified securities- Nil

Total Debt i.e.(7,00,000+ 15,00,000) - `22,00,000

Sum of paid up Equity capital + free reserves - `15,00,000

Hence, the maximum fund available for buy-back (in absence of securities premium account and proceeds of issue of any other specified securities) is `5,00,000

Amount that must be maintained as sum total of free reserves and paid up equity capital is half of total debt i.e. half of `22,00,000 i.e. `11,00,000

Buy back can be made upto 25% of Paid up capital and free reserves i.e. `10,00,000 + `5,00,000 i.e. `15,00,000 \*25% = `3,75,000.

Further debt equity ratio is Debt:

Secured and unsecured debt= 15,00,000+ 7,00,000= 22,00,000 Capital after Buy Back:

Total Capital= 10,00,000-3,75,000= 6,25,000

Free reserve= 5,00,000-3,75,000= 1,25,000

Total Capital+ free reserve= 6,25,000+ 1,25,000=7,50,000 Debt equity ratio= 22,00,000/7,50,000= 2.93

The ratio being more than twice the paid-up capital and its free reserves the maximum quantum of `3,75,000 is not advisable.

As stated above post buyback debt equity ratio must not be more than 2. Accordingly, post buyback total capital and free reserve must be half of debts i.e (15,00,000 + 7,00,000) /2

= 11,00,000. The maximum buyback of equity may be {(10,00,000 +5,00,000) -11,00,000}/2 = `2,00,000.

Therefore, in the given case, maximum possible buyback is of `2,00,000 amounting to 20,000 equity shares of `10 each.

## 2. Question

“If a company does not receive minimum subscription, it should refund money received from applicants within such time as may be prescribed”. Explain the above statement with suitable comments.

Answer

According to section 39 of the Companies Act, 2013 allotment of any securities of a company offered to the public for subscription shall be made only when 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 of India (SEBI) by making regulations in this behalf.

Refund of money

In cases where the stated minimum amount has not been subscribed and the sum payable on application is not received within a period of thirty days from the date of issue of the prospectus, or such other period as may be specified by SEBI, the amount received as above shall be returned. 'The application money shall be repaid within a period of fifteen days from the closure of the issue and if any such money is not so repaid within such period, the directors of the company who are officers in default shall jointly and severally be liable to repay that money with interest at the rate of fifteen percent per annum.

The application money to be refunded shall be credited only to the bank account from which the subscription was remitted.

### 3. Question

State the time limit within which certificate of securities as provided in Companies Act, 2013 to be issued in case of :

- (i) Any allotment of shares.
- (ii) Any allotment of debentures.

What is the punishment in case of default committed in the above cases ?

### Answer

Under section 56(4) of the Companies Act, 2013, every company, unless prohibited by any provision of law or any order of any Court Tribunal or other authority must deliver the certificates of all securities allotted, transferred or transmitted :- .

(i) Within a period of two months from the date of incorporation, in the case of subscribers to the Memorandum and within a period of two months from the date of allotment in the case of any allotment of any of its shares;

(ii) Within a period of six months from the date of allotment in the case of any allotment of debenture  
However, as per the proviso to sub section 4 of section 56, where the securities are dealt with in a depository, the company shall intimate the details of allotment of securities to depository immediately on allotment of such securities.

Where any default is made in complying with the above provisions, Section 56(6) states the company shall be punishable with fine which shall not be less than Rs. 25,000 but which may extend to Rs 5 Lakh and every officer of the company who is in default shall be punishable with fine Which shall not be less than Rs 10,000 but which may extend to Rs.1, 00,000.



#### 4. Question

The Companies Act, 2013 does not provide statutory recognition to the doctrine of lifting of corporate veil. Only judicial interpretations disregard the concept of separate personality.

#### Answer

It is not correct to state that the Companies Act, 2013 does not provide statutory recognition to the doctrine of lifting of corporate veil and only judicial interpretation disregard the concept of separate personality. The Companies Act, 2013 itself contains some provisions in Sections 7(7), 251(1) and 339 which lift the corporate veil to reach the real forces of action. Section 7(7) of Companies Act, 2013 deals with punishment for incorporation of company by furnishing false information; Section 251(1) of Companies Act, 2013 deals with liability for making fraudulent application for removal of name of company from the register of companies and Section 339 of Companies Act, 2013 deals with liability for fraudulent conduct of business during the course of winding up.

Ever since the decision in *Salomon v. Salomon & Co. Ltd.*, normally Courts are reluctant or at least very cautious to lift the veil of corporate personality to see the real persons behind it. Nevertheless, Courts have found it necessary to disregard the separate personality of a company in the following situations:

- 1) Where the corporate veil has been used for commission of fraud or improper conduct. In such a situation, Courts have lifted the veil and looked at the realities of the situation. (Case Law : *Jones vs. Lipman*)
- 2) Where a corporate facade is really only an agency instrumentality. (Case Law: *R.G. Films Ltd*)
- 3) Where the conduct conflicts with public policy, courts lifted the corporate veil for protecting the public policy. (Case Law: *Connors Bros. v. Connors*)
- 4) A company will be regarded as having enemy character, if the persons having de facto control of its affairs are resident in an enemy country or, wherever they may be, are acting under instructions from or on behalf of the enemy. (Case Law: *Daimler Co. Ltd. v. Continental Tyre & Rubber Co.*)
- 5) Where it was found that the sole purpose for which the company was formed was to evade taxes the Court will ignore the concept of separate entity and make the individuals concerned liable to pay the taxes which they would have paid but for the formation of the company. (Case Law : *Sir Dinshaw Maneckjee Petit*, *Vodafone case*)

- 6) Avoidance of welfare legislation is as common as avoidance of taxation and the approach in considering problems arising out of such avoidance has necessarily to be the same and, therefore, where it was found that the sole purpose for the formation of the new company was to use it as a device to reduce the amount to be paid by way of bonus to workmen, the Supreme Court upheld the piercing of the veil to look at the real transaction. (Case Law: *The Workmen Employed in Associated Rubber Industries Limited, Bhavnagar v. The Associated Rubber Industries Ltd., Bhavnagar and another*)
- 7) Another instance of corporate veil arrived at by the Court arose in *Kapila Hingorani v. State of Bihar*.
- 8) Where it is found that a company has abused its corporate personality for an unjust and inequitable purpose, the court would not hesitate to lift the corporate veil. Further, the corporate veil could be lifted when acts of a corporation are allegedly opposed to justice, convenience and interests of revenue or workmen or are against public interest.

## 5. Question

Certain members of a company are allowed to offer for sale their shareholding in the company to the public, such offer document is deemed to be a prospectus issued by the company.

## Answer

Section 28 of the Companies Act, 2013 permits certain members of a company, in consultation with Board of directors, to offer the whole or a part of their holdings of shares to the public. The 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. Since public offer is not same as offer for sale. Though many provisions relating to issue of prospectus does apply to such an offer, yet many provisions including requirement of minimum subscription does not apply to the same.

All laws and rules made hereunder as to the contents of the prospectus and as to liability in respect of misstatements in and omission from prospectus or otherwise relating to prospectus shall apply as if this offer document is a prospectus issued by the company.

The section provides that the members, whether individuals or bodies corporate or both, whose shares are proposed to be offered to the public, shall collectively authorize the company, whose share were 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.

Rule 8 of The Companies (Prospectus and Allotment of Securities) Rules, 2014 in this context provide that the provisions of Part I of Chapter III namely “Prospectus and Allotment of Securities” and rules made there under shall be applicable to an offer of sale referred to in section 28 of Companies Act, 2013 except for the following, namely:-

- (a) the provisions relating to minimum subscription;
- (b) the provisions for minimum application value;
- (c) the provisions requiring any statement to be made by the Board of directors in respect of the utilization of money; and
- (d) any other provision or information which cannot be compiled or gathered by the offer or, with detailed justifications for not being able to comply with such provisions.

Further the rules provide that such offer document or prospectus issued under the section shall disclose the name of the entity bearing the cost of making the offer for sale along with reasons.

#### 6. Question

Green Commercial Ltd., an unlisted company, has made a preferential offer of shares for consideration other than cash. A question has been raised by the accounts department as to the valuation of consideration at allotment and the manner of treatment of noncash consideration in books of account. As a practising company secretary advise the company with reference to the provisions of the Companies Act, 2013.

#### Answer

Pursuant to Section 62 read with rule 13(2) of Companies (Share Capital and Debentures) Rules 2014, where shares or other securities are to be allotted for consideration other than cash, the valuation of such consideration shall be done by a registered valuer who shall submit a valuation report to the company for justification of valuation.

Where the preferential offer of shares is made for a non-cash consideration, such non-cash consideration shall be treated in the following manner in the books of account of the company-

- (a) where the non-cash consideration takes the form of a depreciable or amortizable asset, it shall be carried to the balance sheet of the company in accordance with the accounting standards; or
- (b) where above clause is not applicable, it shall be expensed as provided in the accounting standards.

The Practising Company Secretary can advised the Green Commercial Ltd. accordingly.

**7. Question**

The share capital of Raney Ltd. is `30 crore. 'Russel' is appointed as the managing director of the company, the company wants to compensate him by issue of shares for supplying technical know-how without any cost. In this context, answer the following :

- (i) Whether the company is allowed to allot such shares ?
- (ii) Is approval of shareholders required for issuing such shares ?
- (iii) If found eligible to allot such shares, what will be the quantum (value) of shares that can be allotted ?
- (iv) Can Russel sell such allotted shares in the market ?

Will the amount that he receives on sale of his shares be considered a part of his remuneration ?

**Answer**

- (i) Yes, Section 54 of Companies Act, 2013 permits issue of sweat equity shares to employees or directors in recognition of their contribution for providing know- how etc. as aforesaid. As the contribution made by employees/directors results in increased profits to the company for a number of years, sweat equity shares provide a new form of adequate return.
- (ii) Yes, Rule 8(1) of Companies (Share capital and Debentures) Rules, 2014 states the special resolution shall be passed authorizing the issue of sweat equity shares and shall be valid for making the allotment within a period of not more than twelve months from the date of passing of the special resolution.
- (iii) Rule 8(4) of Companies (Share capital and Debentures) Rules, 2014 states that 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 crore, whichever is higher, 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.

As the paid-up capital of the company is Rs.30 crore. Hence he can be allotted with 15% of existing equity i.e. (15% of 30 crore up to Rs. 4.5 Crore) value of shares or Rs. 5 crore whichever is higher.

- (iv) Rule 8(5) of Companies (Share capital and Debentures) Rules, 2014 says that the sweat equity shares issued to directors or employees shall be locked/non- transferrable 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. And hence the

sweat equity shares allotted to Russel can be sold in the market only after the expiry of the lock-in period of three years from the date of allotment.

- (v) Yes, Rule 8(10) of Companies (Share capital and Debentures) Rules, 2014 states that the amount of sweat equity shares issued shall be treated as part of managerial remuneration for the purposes of sections 197 and 198 of the Act, if the following conditions are fulfilled namely-
- (a) the sweat equity shares are issued to any director or manager; and
  - (b) they are issued for consideration other than cash, which does not take the form of an asset which can be carried to the balance sheet of the company in accordance with the applicable accounting standards.

### 8. Question

Reduction of share capital and Diminution of share capital mean the same.

Answer

Section 66(1) of the Companies Act, 2013 states 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 passing 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; or

(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, alter its memorandum by reducing the amount of its share capital and of its shares accordingly.

While, Section 61(1)(e) of the Companies Act, 2013 provides that, a limited company having share capital, if authorised by its Articles, may cancel shares, by passing an ordinary resolution in that behalf, which 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. Diminution needs no confirmation by the Tribunal.

Further, Section 61(2) of the Companies Act, 2013 specifically states that the cancellation of shares under section 61(1) of the Companies Act, 2013 shall not be deemed to be reduction of share capital.

Thus, Reduction of Share Capital and Diminution of Share Capital is not the same.



**9. Question**

P Realtors Ltd., A Construction Ltd. and five other individuals have incorporated XYZ Builders Ltd. to construct a commercial complex. P Realtors Ltd. and A Construction Ltd. have executed an agreement according to which none of these companies can sell their shares in the new company before completion of construction of the commercial complex. Due to financial crunch, P Realtors decides to sell its shares in XYZ Builders Ltd. to PQR Builders Ltd. Can A Construction Ltd. restrain the transfer of shares before completion of construction of the commercial complex ?

**Answer**

With reference to the definition of a private company as provided under Section 2 (68) of the Companies Act, 2013, a private company is only authorised to exercise restriction by its Articles on the transfer of shares of the company held by its members.

In other words, in public companies the shares are freely transferable and no restrictions can be imposed on the members right regarding transfer of their shares.

In the instant case the agreement between P Realtors Ltd. and A Construction Ltd restricting their rights to transfer their shares till completion of the project will be held subservient to the provision contained in the Companies Act, 2013, which provide for free transferability of shares. Therefore, A Construction Ltd. will not be able to restrain P Realtors from transferring their shares in XYZ Builders Ltd. to PQR Builders Ltd.

**10. Question**

Amount lying in the securities premium account belongs to the shareholders and can be used freely for their benefit.

**Answer**

In accordance with the provisions of Section 52(2) of the Companies Act, 2013, the securities premium can be utilised only:

- (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 of the Companies Act, 2013. Accordingly, the amount available in the securities premium is restrictive in nature and can only be used for specified purposes.

### 11. Question

Santosh, CEO of the company, has advised the Board of directors of an unlisted company that in order to market the public issue and generate interest and awareness amongst the public a prospectus can be issued without giving details of number of shares and the issue price. Examine the correctness of the advice in light of the provisions of the Companies Act, 2013.

### Answer

As per Explanation appended to Section 32 of the Companies Act, 2013, Red herring Prospectus means “a prospectus which does not include complete particulars of the quantum or price of the securities included therein.” In simple terms, a Red herring Prospectus is a prospectus, which does not include details of either price or number of securities being offered, or the amount of issue.

According to section 32(1) of the Companies Act, 2013, a company proposing to make an offer of securities may issue a Red herring Prospectus prior to the issue of a prospectus. Such company proposing to issue a Red herring

Prospectus shall file it with the Registrar of Companies at least 3 days prior to the opening of the subscription list and the offer.

Therefore, the advice given by CEO Santosh is correct.

**12. Question**

Monika Ltd. wants to purchase its own 5,00,000 equity shares @ `10/- each out of the following :

`lakh

- |                                |    |
|--------------------------------|----|
| (a) Unsecured Loans            | 25 |
| (b) Balance of Free Reserves   | 15 |
| (c) Securities Premium Account | 10 |

Examine the legality of the above transactions for the buy-back of securities of the company under the provisions of the Companies Act, 2013.

**Answer**

According to Section 68(1) of the Companies Act, 2013 a company may purchase its own shares or other specified securities (known as "buy-back") 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, no buy-back of any kind of shares or other specified securities shall be made out of the proceeds of an earlier issue of the same kind of shares or same kind of other specified securities.

Thus, in given case Monika Ltd. can purchase its own 5,00,000 equity shares @10 each out of free reserves and from the securities premium account in accordance with the provisions of the Companies Act, 2013. But it cannot do buy-back from the amount of Unsecured Loan as it will be contravention of the provisions of Section 68 of the Companies Act, 2013.

**13. Question**

The Board of Directors of Aakash Ltd., a listed company, in its meeting held on 1st April, 2021 announced a proposal for issue of bonus shares to all equity shareholders of the company in the ratio of 1 : 1. On 1st May, 2021, the directors at another meeting passed a resolution to reverse the proposal of bonus issue announced on 1st April, 2021. Discuss the validity of the resolutions.

**Answer**

A listed company is required to comply with the requirements of the Companies Act, 2013, rules made thereunder and SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 for issue of bonus shares.

In terms of section 63(2) of the Companies Act, 2013, no company shall capitalise its profits or reserves for the purpose of issuing fully paid-up bonus shares, unless it has, on the recommendation of the Board, been authorised in the general meeting of the company.

Further, as per Rule 14 of the Companies (Share Capital and Debentures) Rules, 2014, a company which has once announced the decision of its Board recommending a bonus issue, shall not subsequently withdraw the same.

Also, the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 provides that a bonus issue, once announced, shall not be withdrawn.

In view of the above provisions, the Board of Directors of Aakash Limited once announced the issue of bonus share on 1st April 2021 to all equity shareholders of the company in the ratio of 1:1 cannot subsequently reverse the proposal of such issue in another board meeting. Hence, the first board resolution proposing the bonus share is valid but second board resolution for reversal is not valid.

**14. Question**

Santosh Kumar, an employee of a listed company purchased certain shares of his company through a member of a stock exchange and lodged with the company for transfer of shares in his (employee's) name. The company refused to execute the transfer on the suspicion that the employee, if admitted as a member of the company, will create nuisance in general meetings and seek access to the records of the company. Decide giving reasons :

- (a) Whether the company's contention shall be tenable; and
- (b) What is the remedy available to the employee in the given case ?

**Answer**

The securities or other interest of any member in a public company are freely transferable. Refusal to register share transfer on suspicion that the employee if admitted as a member will attend general meetings of the

company and may create nuisance by raising irrelevant issues and also obtain access to the records to the company as a shareholder is not a valid reason.

(Appeal to the CLB No. 27, of 1975 dated 17th August, 1976, Shri Nirmal Kumar v. Jaipur Metal and Electrical Limited.)

Accordingly, as per 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 30 days from the date on which the instrument of transfer is delivered to the company, the transferee may, within period of 60 days of such refusal or where no intimation has been received from the company, within 90 days of the delivery of the instrument of transfer, can appeal to the Tribunal.

Hence taking into account the above-

- (a) The refusal by the company to register the transfer shares in the name of the employee is not tenable.
- (b) Employee in this case can go for appeal to the Tribunal against the company's refusal.

### 15. Question

Sita Ltd. intends to issue sweat equity shares to its employees for a non-cash consideration. Managing Director believes that the sweat equity shares can only be issued for consideration received in cash. Do you agree ?

Answer

According to Section 2(88) of Companies Act, 2013 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 permits issue of sweat equity shares to employees or directors of company in recognition for providing know-how etc. Company may issue sweat equity shares at a discount or for consideration other than cash for providing know-how or making available any Intellectual Property Rights or value additions. Company should get consent of its member at General Meeting.

Further, as per Rule 8(9) of the Companies (Share Capital and Debentures) Rules, 2014, company can issue sweat equity shares for non-cash consideration on the basis of valuation report in respect thereof obtained from a

registered valuer. Based on above provisions, we can conclude that the view of the Managing Director is not correct.

### 16. Question

Which of the following companies is eligible to issue shares with Differential Voting Rights (DVRs) during the financial year 2022-23 ?

| Type of company           | Nature of default                                                                                                                                     | Whether Articles of Association of the company authorised to issue shares with DVR? |
|---------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------|
| A Ltd. – Unlisted company | Company has made default in filing annual return for the financial years 2018-19 & 2019-20. Default was made good during the financial year 20202021. | Yes                                                                                 |
| B Pvt. Ltd.               | .....                                                                                                                                                 | No                                                                                  |

### Answer

Section 43 of the Companies Act, 2013 read with Rule 4 of Companies (Share Capital and Debentures) Rules, 2014 provides that company can issue shares with Differential Voting Rights (DVRs) if company's Articles authorise it to issue differential voting right shares. Shares with DVRs can be issued by company limited by shares only.

Company cannot issue shares with DVRs if company has 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. The provisions of section 43 of the Companies Act, 2013 are applicable to public as well as private company.

In light of the above provisions:

- A Ltd. can issue shares with DVRs. Company would be ineligible to issue shares with s if it has defaulted in filing financial statements and annual returns for three financial years immediately preceding the financial year which it is proposed to be issued. A Ltd. has made default during financial year 2018-19 &

2019- 20 only in respect of filing annual return, which was made good during the financial year 20202021. Articles of Association of A Ltd. also authorise the company to issue shares with DVRs.



- B Pvt. Ltd. cannot issue shares with DVRs unless it alter its Articles of Association in such a manner so as to authorise it to issue shares with DVRs.

### 17. Question

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.

Answer

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 *Rex. V. Kysant*.

### 18. Question

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.

Answer

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.

### 19. Question

Peek Ltd. Co. issued and published its prospectus to invite the investors to purchase its shares. The said prospectus contained false statement. Mr. X purchased some partly paid shares of the company in good faith

on the Stock Exchange. Subsequently, the company was wound up and the name of Mr. X is liable to pay the unpaid amount?

1. Whether Mr. X is liable to pay the unpaid amount?
2. Can Mr. X sue the directors of the company to recover damages?

Answer

Mr. X is not an original allottee of shares since he purchased shares from the secondary market, viz. stock exchange

Mr. X is liable to pay the unpaid calls since Mr. X holds partly paid shares; since he is liable as a contributory. Mr X cannot sue the directors to recover damages since Mr. X has no cause of action against the company or the directors as he did not subscribe for shares on the faith of a misleading prospectus

## 20. Question

M applies for share on the basis of a prospectus which contains mis-statement. The shares are allotted to him, who afterwards transfers them to N. Can N bring an action for a rescission on the ground of misstatement?

Decide under the provisions of the Companies Act.

Answer

Mr. N cannot claim damages from the company since Mr. N is not an original allottee of shares; since Mr. N did not subscribe for shares on the faith of a misleading prospectus

## 21. Question

Modern Furnitures Limited was willing to purchase teakwood estate in Chhattisgarh State. Its prospectus contained some important extracts from an expert report giving the number of teakwood trees and other relevant information in the estate in Chhattisgarh State. The report was found inaccurate. Mr. 'X' purchased the shares of Modern Furnitures Limited on the basis of the above statement in the prospectus. Will Mr. 'X' have any remedy against the company? When an expert will not be liable? State the provisions of the Companies Act, in this respect.

**Answer**

Mr. X is entitled to repudiate the allotment since he purchased the shares relying on a misstatement contained in the prospectus. He proves 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.

**22. Question**

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.

**Answer**

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

**23. Question**

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.

Answer

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.

#### 24. Question

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.

Answer

Mr. N cannot claim damages from the company since Mr. N is not an original allottee of shares; since Mr. N did not subscribe for shares on the faith of a misleading prospectus

#### 25. Question

The Board of Directors of XYZ Private Limited, a subsidiary of SRN Limited, decides to grant a loan of Rs. 2.00 lac to P, the finance manager of the company getting salary of Rs. 30,000 per month, to buy 400 partly paid-up equity shares of Rs. 1,000 each of XYZ Limited. Examine the validity of Board's decisions with reference to the provisions of the Companies Act.

Answer

XYZ Private Limited shall be treated as a public company. since it is a subsidiary of a public company [Sec. 2(71)]. since the loan of Rs. 2 lakh given to the Finance Manager exceeds his 6 months' salary; since the loan is given for purchase of partly paid shares.

#### 26. Question

ABC Company Limited at a general meeting of members of the company passes an ordinary resolution to buyback 30% of its equity share capital. The articles of the company empower the company for buyback 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?

Answer

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.

### 27. Question

Xgen Limited has a paid-up equity capital and free reserves to the extent of Rs. 50,00,000. The company is planning to buy-back shares to the extent of Rs. 4,50,000. The company approaches you for advice with regard to the following:

1. Is special resolution required to be passed?
2. What is the time limit for completion of buy-back?
3. What should be ratio of aggregate debts to the paid-up capital and free reserves after buy-back?

Answer

Special resolution is not required to be passed since the buy-back shall not exceed 10% of aggregate of paid up equity shares capital and free reserves.

The buy-back has to be completed within 1 year of passing the resolution for buy-back.

Debt equity ratio The ratio of debt (secured as well as unsecured debt) owed by the company must not be more than twice the aggregate of paid up capital and free reserves after such buy-back.

### 28. Question

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.

Answer

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.

### 29. Question

500 equity shares in 'XYZ Limited were acquired by Mr. 'B'. But the signature of Mr. 'A', the transferor, on the transfer deed was forged. Mr. 'B', after getting the shares registered by the company in his name, sold 200 equity shares to Mr. 'C' on the strength of the share certificate issued by XYZ Limited.

Mr 'B' and Mr. 'C' were not aware of the forgery. What are the rights of Mr. 'A', 'B' and 'C' against the company with reference to the aforesaid shares?

Answer

Rights of Mr. A: He can compel the company to restore his name on the register of members (since a forged transfer is without any legal effect and the true owner continues to be the member of the company). Liabilities of B 'B' is liable to compensate the loss caused to the company since he had lodged the forged transfer deed, even though he was not aware of the forgery.

Rights of C The company can refuse to register 'C' as a member. The company is liable to 'C' since the company had issued the share certificate to B, and therefore, the company shall be stopped from denying the liability accruing to it from its own default.



## CHAPTER 5 – MEMBERS AND SHAREHOLDERS

### 1. Question

If a company has appointed a Company Secretary then his signature is mandatory on the share certificate issued by the company. Analyse with reference to the provisions of the Companies Act, 2013.

Answer

According to Section 46(3) of the Companies Act, 2013 a share certificate, 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, is the prima facie evidence of the title of the person to such shares.

Hence where the company has appointed a Company secretary then his signature is mandatory on the share certificate issued by the company.

### 2. Question

A member of an incorporated company becomes insolvent. He claimed right to vote and receive dividend from the company. Referring to the provisions of the Companies Act, 2013 discuss whether his claim is valid.

Answer

An insolvent may be a member of a company as long as he is on the register of members. He is entitled to vote, but he loses all beneficial interest in the shares and company will pay dividend on his shares to the Official Assignee or Receiver [Morgan v. Gray, (1953)]. Hence his claim is invalid and his dividend shall be paid to official assignee.

### 3. Question

The Articles of Association of a company cannot impose a blanket ban prohibiting transfer of shares in favour of a minor. Such a restriction is unreasonable and not sustainable.

## Answer

The Articles of Association of a company cannot impose a blanket ban prohibiting transfer of shares in favor of a minor, as such a restriction is unreasonable and not sustainable. Section 44 of the Companies Act, 2013 provides that shares in a company are movable property and are transferable in the manner provided by the Articles.

The expression “in the manner provided by the articles of association the company” can only be interpreted to mean the procedure to be opted for transfer and impose restrictions, which are meaningful and reasonable. In case, the restriction imposed on transfer to a minor is accepted, it would mean that the shares of a deceased member can never be inherited by the legal heir who might be a minor. This would lead to a highly unjust situation and cannot be accepted as tenable. Accordingly, if the shares can be transmitted in favour of a minor, there is no reason why the shares which are fully paid -up and in respect of which no financial liability devolves on the minor are to be held as not transferable merely because of the ban imposed in the Article of Association [Saroj V. Britannia Industries Ltd., Appeal No.5/80 decided 14.12.81 by CLB].

## 4. Question

Every shareholder of a company is known as member while every member may not be known as shareholder.

## Answer

A company is composed of, members, though it has its own separate legal entity. The members of the company are the persons who, constitute the company as a corporate entity.

In the case of a company limited by shares, the shareholders are the members. The terms “members” and “shareholders” are usually used interchangeably being synonymous, as there can be no membership except through the medium of shareholding. Thus, generally speaking every shareholder is a member and every member is a shareholder. However, there may be exceptions to this statement, e.g., a person may be a holder of share(s) by transfer but will not become its member until the transfer is registered in the books of the company in his favor and his name is entered in the register of members. Similarly, a member who has transferred his shares, though he does not hold any shares yet he continues to be member of the company until the transfer is registered and his name is removed from the register of members maintained by the company under Section 88 of the Companies Act, 2013. A member is a person who has subscribed to the memorandum of association of the company. A shareholder is a person who owns the shares of the company.

The bearer of a share warrant is not a member, but the bearer of a share warrant can be a shareholder.

## 5. Question

Who is a 'Significant Beneficial Owner' under the Companies Act, 2013 ? Is Significant Beneficial Owner required to file BEN-1 to the reporting company ?

Answer - In terms of Section 90 of the Companies Act, 2013 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 25% or such other percentage as may be prescribed, in shares of a company or the right to exercise or the actual exercise of significant influence or control as per as Section 2(27) of Companies Act, 2013, over the reporting company is a significant beneficial owner.

Such an individual being the Significant beneficial Owner holding such beneficial interest is required to make a declaration to the reporting company specifying the nature of his interest & other particulars as required. From commencement of the Companies (SBO) Amendment Rules, 2019, every SBO in a reporting company, is required to give the requisite declaration of his beneficial ownership in Form No. BEN-1 to the reporting company within 90 days from such commencement.

## 6. Question

Ram Singh is a shareholder of Alexandra India Ltd. The Board of directors of the company are of the view that the conduct of Ram Singh has been detrimental to the interest of the company. Further, the Board also noted that Ram Singh is director in a company which is a competitor company of Alexandra India Ltd. The Articles of Association of Alexandra India Ltd. permit expulsion of members.

The Board unanimously decided to expel Ram Singh from the company. Discuss the relevant provisions of Companies Act, 2013 in this regard. If Ram Singh files a case against the Board whether he will win the case?

Answer

A controversy has arisen as to whether a public limited company had powers to insert an article in its Articles of Association relating to expulsion of a member by the Board of Directors of the company where the directors

were of the view that the activities or conduct of such a member was detrimental to the interests of the company.

The Department of Company Affairs (now, Ministry of Corporate Affairs) clarified that an article for expulsion of a member is opposed to the fundamental principles of the Company Jurisprudence and is ultra vires the company, the reason being that such a provision will be against the provisions of the Companies Act relating to the rights of a member in a company, the powers of the Central Government as an appellate authority under Section 111 of the Act and the powers of the Court under Sections 107, 395 and 397 of the Companies Act, 1956.

These sections correspond to sections 38, 58, 48, 235 & 241 of the Companies Act, 2013 respectively having the same impact as earlier provisions.

Further, according to Section 6 of the Companies Act, 2013, the Act shall override the Memorandum and Articles of Association and any provisions contained in these documents repugnant to the provisions of the Companies Act, 2013 shall be void.

Therefore, any assumption of the powers by the Board of Directors to expel a member by alteration of Articles of Association shall be illegal and void.

The Supreme Court in the case of Bajaj Auto Ltd. v. N.K. Firodia [1971] 41 Com Cases 1 has laid down the law as to the conditions on the basis of which directors could refuse a person to be admitted as a member of the company. The principles laid down by the Supreme Court in this case, even though pertain to the refusal by a company to the admission of a person as a member of the company, are applicable even with greater force to a case of expulsion of an existing member. As, under Article 141 of the Constitution, the law declared by the Supreme Court is binding on all courts within the territory of India, any provision pertaining to the expulsion of a member by the management of a company which is against the law as laid down by the Supreme Court will be illegal and ultra vires. In the light of the aforesaid position, it is clarified that assumption by the Board of directors of a company of any power to expel a member by amending its articles of association is illegal and void.

If Ram Singh a files a suit against the company or the directors he will certainly win the case, as expulsion of a member is illegal and void as per the Companies Act 2013.

#### 7. Question

Sumeet, Puneet and Manmeet were subscribers to the Memorandum of Association of a private company for 500 shares, 300 shares and 200 shares respectively. After incorporation, Sumeet and Puneet bought the shares, they had subscribed for, from the company whereas Manmeet bought 200 shares from Sumeet. Will Manmeet be liable to the company for the shares, he has not bought from the company?

Answer

In the case of a subscriber, no application or allotment is necessary to become a member. Since, by virtue of his subscribing to the memorandum, he is deemed to have agreed to become a member and he becomes ipso facto member on the incorporation of the company and is liable for the shares he has subscribed.

According to Section 10(2) of the Companies Act, 2013, all monies payable by any member to the company under the Memorandum of Association or Articles of Association of the company shall be debt due from him to the company. Further, a subscriber to the Memorandum must make payment for his shares, even if the

promoters have promised him the shares for services rendered in connection with the promotion of the company. When the Subscriber subscribes to the Memorandum, he gives an undertaking to the company that he will pay to the company for the shares he has subscribed.

Further, Subscribers has to take these shares directly from the company and not through transfer from other member(s).

In the instant case, Manmeet is not absolved from his liability to the company by purchasing the shares from Sumeet. He has a statutory obligation to buy the shares from the company by making payment to the company.

#### 8. Question

Examine with reference to the provisions of the Companies Act, 2013 whether any of the following persons can become member of the company engaged in the business of producing steel products ? (1) Pawnee

(2) Partnership firm

(3) Unregistered trade union.

Answer

Subject to the provisions contained in the Memorandum of Association and Articles of Association of the company, any person who is capable to contract can become a member of company.

1. Pawnee - A Pawnee cannot be treated as holder of shares pledged in his favour, and the pawner continues to be member and exercise the rights of member. Pawnee has no right to foreclosure since he never had the absolute ownership at law and his equitable title cannot exceed what is specifically granted by law.
2. A partnership firm is not a legal person and as such it cannot, in its own name, become a member of a company.
3. A trade union registered under the Trade Union Act, can be registered as member and can hold shares but unregistered trade union cannot become member of company.

### 9. Question

Local Ltd. is planning to issue its equity shares to persons residing outside India. In this context, Chairman of the company wants to know on the following matters :

- What are the provisions relating to maintaining the foreign register of members?
- Can company discontinue maintaining foreign register of members ? If so, when ? Give your inputs to the Chairman of Local Ltd.

Answer



Section 88(4) of the Companies Act, 2013 empowers a company to keep foreign registers of members or debenture-holders, other security holders or beneficial owners residing outside India. Company may maintain such register if it is authorised by its Articles of Association. It shall contain the names and particulars of the members, debenture-holders, other security holders or beneficial owners residing outside India. A foreign register is deemed to be a part of the company's principal register and it should be kept in the same manner as the principal register and be likewise open to inspection.

The company shall, within thirty days from the date of the opening of any foreign register, file with the Registrar notice of the situation of the office in Form No.MGT.3 along with the fee where such register is kept; and in the event of any change in the situation of such office or of its discontinuance, shall, within thirty days from the date of such change or discontinuance, as the case may be, file notice in Form No.MGT.3 with the Registrar of such change or discontinuance.

A duplicate of such register should be maintained at the registered office in India and all entries made in the foreign register should be made in the duplicate register at the registered office as soon as possible. The company may discontinue the keeping of any foreign register; and thereupon all entries in that register shall be transferred to some other foreign register kept by the company outside India or to the principal register. If a company does not maintain foreign register of members or fails to maintain them in accordance as per the provisions of the Companies Act, 2013, the company and every officer of the company who is in default shall be punishable with fine. Based on the above provisions, advice may be given to chairman of Local Ltd.

#### 10. Question

X had applied for the allotment of 1,000 shares in a company. No allotment of shares was made to him by the company. Later on, without any further application from X, the company transferred 1,000 partly-paid shares to him and placed his name in the Register of members. X, knowing that his name was placed in the Register of Members, took no steps to get his name removed from the Register of Members. The company later on made final call. X refuses to pay for this call. Referring to the provisions of the Companies Act, examine whether his (X's) refusal to pay for the call is tenable and whether he can escape himself from the liability as a member of the company.

**Answer** Register of members is a prima facie evidence: of any matters directed or authorized to be inserted therein by the Act (Sec. 95). X is a member by estoppels since he knowingly permitted inclusion of his name in the register of members. X is liable to pay the final call since a member by estoppels is liable to pay the unpaid calls.

### 11. Question

M/s Honest Cycles Ltd. has received an application for transfer of 1,000 equity shares of Rs. 10 each fully paid up in favour of Mr. Balak. On scrutiny of the application form it was found that the applicant is minor. Advise the company regarding the contractual liability of a minor and whether shares can be allotted to Balak by way of transfer.

### Answer

The company is advised to transfer fully paid shares to Mr. Balak. since a minor can become a member, if the shares are fully paid up; since there is no question of liability of minor if the shares are fully paid up

### 12. Question

X, a minor purchased 500 equity shares of Rs. 10 each of a company, on which only Rs. 5 per share were paid, from the Mumbai Stock Exchange, and submitted an application to the company for transfer of these shares in his name. Examining the provisions of the Companies Act, decide whether these shares can be transferred to X.

### Answer

The company is advised not to transfer partly paid shares to X, the minor since a minor is not bound to pay the unpaid calls;

Since such transfer does not create any contractual relations between the minor and the company;

Since if the shares are transferred to the minor, the minor or the company may afterwards, repudiate such transfer.

## CHAPTER 6 – DEBT INSTRUMENTS

### 1. Question

A public company may issue secured irredeemable debentures.

### Answer

A Debenture, in which no time is fixed for the company to pay back the money, is an irredeemable debenture. According to Rule 18(1)(a) Companies (Share Capital and Debentures) Rules, 2014 an issue of secured debenture may be made for a period of redemption not exceeding ten years from the date of issue. In case of certain companies such redemption period may exceed ten years but not exceed thirty years.

After the commencement of the Companies Act, 2013, no company either public or private can issue perpetual or irredeemable debentures.

### 2. Question

The Board of directors of Wood Ltd. are authorised to borrow money upto `2 crore. The Board of directors got sanctioned a loan of `30 lakh from a Bank for payment of debt liabilities of the company. But the Board of directors used this amount towards payment of their travelling & tour expenses. Will Wood Ltd. be held liable for repayment of the loan ? Discuss.

### Answer

In a decided case of V.K.R.S.T Firm v. Oriental Investment Trust Ltd. under the authority of the company, its managing director borrowed large sums of money and misappropriated it. The company was held liable stating that where the borrowing is within the powers of the company, the lender will not be prejudiced simply because its officer have applied the loan to unauthorized activities provided the lender had no knowledge of the intended misuse.

Applying the principles of the above decided case in the given case Wood Ltd. will be held liable for repayment of the loan of Rupees 30 lakhs which well within the sanctioned limits of the company.

### 3. Question

With reference to the provisions of the Companies Act, 2013 and the rules framed there under, state the disqualifications for a Debenture Trustee. Explain whether the following persons can be appointed as Debenture Trustee ?

- (i) A relative of whole-time director of the company.
- (ii) A shareholder who has no beneficial interest.

Answer

Section 71 of the Companies Act 2013, read along with rule 18(2) of the Companies (Share capital and Debentures) Rules, 2014 provides that a person shall not be appointed as a debenture trustee, if he

- (a) beneficially holds shares in the company;
- (b) 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;
- (c) is beneficially entitled to moneys which are to be paid by the company otherwise than as remuneration payable to the debenture trustee;
- (d) is indebted to the company, or its subsidiary or its holding or associate company or a subsidiary of such holding company;
- (e) has furnished any guarantee in respect of the principal debts secured by the debentures or interest thereon;
- (f) has any pecuniary relationship with the company amounting to two per cent 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;
- (g) is relative of any promoter or any person who is in the employment of the company as a director or key managerial personnel.

Accordingly, the explanations to the questions would be as under:

- (i) A relative of whole-time director of the company (KMP) cannot be appointed as debenture trustee.
- (ii) A shareholder who has no beneficial interest can be appointed as debenture trustee.

#### 4. Question

What are disqualifications for debenture trustees ?

Answer

The disqualifications for debenture trustees as referred in Rule 18 of the Companies (Share Capital & Debentures) Rules, 2014, are as under:

- (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 2% 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 relative of any promoter or any person who is in the employment of the company, as a director, or as a key managerial personnel.

#### 5. Question

IOL, a manufacturing company, issued partly convertible debentures with ₹ 6 crore few years back. The convertible option is only for 50% of the issue and debentures are redeemable in the current financial year. What is the quantum of Debenture Redemption Reserve (DDR) required to be created by the company now and how much should be deposited or invested by the company ?

Answer

Section 71(4) of Companies Act, 2013, read with Rule 18(7) of the Companies (Share Capital & Debentures) Rules, 2014 provides for creation of a Debenture Redemption Reserve (DRR) out of the profits of the company available for payment of dividend. The amount credited to such account shall not be utilised by the company except for the redemption of debentures.

The provisions for creation of DRR for manufacturing companies are 25% of the value of outstanding debentures issued through public issue as per present SEBI (Issue and Listing of Debt Securities) Regulations, 2008 and also 25% DRR is required in the case of privately placed debentures by listed companies. For unlisted companies issuing debentures on private placement basis, the DRR will be 25% of the value of outstanding debentures.

Every company required to create Debenture Redemption Reserve shall on or before the 30th day of April in each year, is required to invest or deposit a sum which shall not be less than 15% of the amount of debentures maturing during the current financial year ending 31st March of next year.

In case of partly convertible debentures, Debenture Redemption Reserve shall be created in respect of non-convertible portion of debenture issue in accordance with this rule.

Since, only 50% of the debentures are convertible, for the non-convertible part the DRR is required to be created. Hence, only for 3 crore worth of debentures DRR is required. Therefore, 25% of 3 crore is 75 lakhs to be created as DRR and 45 Lakhs (15%) deposited in the invested bank account or in securities, etc. during the current financial year.

## 6. Question

In the course of business of the company, RST Logistics Ltd. received `2 lakh on 31st March, 2015 as advance towards consideration for providing future services in the form of warranty as per their agreement with Apurva. The period for providing such services in terms of common business practice is 3 years. The amount is still lying as advance and while auditing the books of accounts for the year ended 31st March, 2019, the statutory auditor had commented about contravention of the provisions of the Companies Act, 2013 in its preliminary findings to the Vice-President (Finance). Advise the Vice-President (Finance) if the comments of the auditor are justified in terms of provisions of the Companies Act, 2013.

## Answer

According to Rule 2(1) (xii) (e) of the Companies (Acceptance of Deposits) Rules, 2014. The term 'deposit' does not include any 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.

In the instant case, the amount of `2 lakh received on March 31, 2015 as advance towards consideration for providing future services in the form of a warranty, is still lying with the company until March 31, 2019 and the period prevalent as per common business practice, for providing such service is 3 years, which has expired. Accordingly, this amount has come within the ambit of the term 'deposit'. Hence, the comments of the auditor



are justified and the Vice-President (Finance) is advised to immediately refund the advance amount along with the due interest thereon to Apurva.

### 7. Question

Debapriya was appointed as alternate director of Julien in Amal Housing Finance Ltd. The company was served a demand notice by Goods & Service Tax department for `25 lakh for violation of certain provisions of

GST law. Due to cash crunch the CEO approached Debapriya for a help of `12 lakh. Debapriya borrowed `7.50 lakh from his sister's husband and gave to the company. The company recorded the same in its books of account.

Answer

Rule 2(1)(c)(viii) of the Companies (Acceptance of Deposits) Rules 2014, provides that any amount received from a person who, at the time of receipt of the amount, was a director of the company shall not be regarded as deposit, if the director from whom money is received, furnishes to the company at the time of giving the money, a declaration in writing that the amount is not being given out of funds acquired by him by borrowing or accepting loans or deposits from others.

However, proviso to Section 73(1) read with Rule 1(3)(iii) of the Companies (Acceptance of Deposits) Rules 2014 excludes a housing finance company registered with National Housing Bank established under the National Housing Bank Act, 1987 from the provisions of Section 73 to 76A of the Companies Act, 2013 and the Companies (Acceptance of Deposits) Rules, 2014.

So, the transaction of accepting money from the director recorded by Amal Housing Finance Ltd. in its book of account is not regarded as non-compliance of the provisions of the Companies Act 2013.

### 8. Question

A private limited company incorporated under the Companies Act, 2013 may issue debentures to any number of persons and can accept deposits from the public.

Answer

According to the definition of private company under Section 2(68) of the Companies Act, 2013, a private limited company is prohibited to make an invitation to the public to subscribe for any securities of the company.

'Securities' has been defined under section 2(81) of the Companies Act, 2013 to mean the securities as defined in Section 2(h) of the Securities Contracts (Regulation) Act, 1956. As per Section 2(h) of the Securities Contracts (Regulation) Act, 1956, "Securities" include debentures, debenture stock or other marketable securities of a like nature.

However, under Section 42 of the Companies Act, 2013, a Private Company may issue such securities on private placement basis only to a selected group of persons who have been identified by the Board, and whose number shall not exceed 200 in the aggregate in a financial year excluding the qualified institutional buyers and employees of the company being offered securities under a scheme of employees stock option subject to prescribed conditions.

Further, as per Section 73 and 76 of the Companies Act, 2013, only the following may invite, accept or renew public deposits from the public:

- a banking company,
- non-banking financial company as defined in the Reserve Bank of India Act, 1934,
- to such other company as the Central Government may, after consultation with the Reserve Bank of India, specify in this behalf,
- Public company (Eligible Company) having Net worth not less than Rs. 100 Crores or Turnover not less than Rs. 500 Crores and which has obtained the prior consent of the company in general meeting by means of a resolution and also filed the said resolution with the Registrar of Companies before making any invitation to the Public for acceptance of deposits. Thus, a Private Company cannot accept deposits from Public.

## 9. Question

Write any five differences between debenture the and loan.

Answer

| Debenture                                                                                                      | Loan                                                                                                              |
|----------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------|
| Debenture means a document which creates or acknowledges a debt.                                               | A loan, creates a right in the creditor to demand repayment.                                                      |
| Company can issue debenture as per the provisions of the Companies Act, 2013.                                  | Loan can be given to anyone.                                                                                      |
| Debenture can be classified as secured or unsecured; convertible or non- convertible; redeemable or perpetual. | Loan can be classified as secured or unsecured.                                                                   |
| Debenture trust deed is executed at the time of issue of debenture.                                            | No trust deed is executed at the time of granting loan. Loan agreement is executed between borrower and creditor. |
| Debenture trustee is appointed.                                                                                | No requirement to appoint trustee in case of loan.                                                                |

## 10. Question

Ajit, a minority shareholder in PQR Ltd., filed a suit against the Directors on the ground that they sold a property of the Company for ₹24,50,000 whereas its real value was over ₹41,00,000. Is the action of Ajit justified?

Answer

The general principle of company law is that every member holds equal rights with other members of the company in the same class. The scale of rights of members of the same class must be held evenly for smooth functioning of the company. In case of difference(s) amongst the members the issue is decided by a vote of the majority.

Since the majority of the members are in an advantageous position to run the company according to their command, the minority of shareholders are often oppressed. The company law provides for adequate protection for the minority shareholders when their rights are trampled by the majority. But the protection of the minority is not generally available when the majority does anything in the exercise of the powers for internal administration of a company.

In *Pavlides v. Jensen* (1956) Ch. 565, a minority shareholder brought an action for damages against three directors and against the company itself on the ground that they have been negligent in selling a mine owned by the company for £ 82,000, whereas its real value was about £ 10,00,000. It was held that the action was not maintainable. The judge observed, it was open to the company, on the resolution of a majority of the shareholders to sell the mine at a price decided by the company in that manner, and it was open to the company by a vote of majority to decide that if the directors by their negligence or error of judgement has sold the company's mine at an undervalue, proceedings should not be taken against the directors".

Accordingly, the action of Ajit is not justified.

## 11. Question

Hi-Fi Ltd. has defaulted in repaying security deposits received from its dealers. Such security deposits were accepted from the dealers for proper and timely performance of the contracts by them. Hi-Fi Ltd. wants to invest ₹ 5 crore in equity shares of Wi-Fi Ltd. Is there any restriction under Section 186 of the Companies Act, 2013 when a company is in default with respect to the repayment of security deposits ?

Answer

As per section 186(8) of the Companies Act, 2013, a company which is in default in repayment of public deposits and/or interest thereon is not permitted to make or give any loan or investment or to provide any guarantee or security till the default is subsisting.

But it is to be noted that in the given question, company has defaulted in repaying security deposit received from its dealers which were received for performance of contract of supply of goods or provisions of services. Such security deposits accepted for performance of contracts for supply of goods or provision of services are not considered as deposits within meaning of Rule 2(1)(c) of the Companies (Acceptance of Deposits) Rules, 2014. Therefore, the provisions of section 186(8) are not attracted.

Hi-Fi Ltd. can make investment into equity shares of Wi-Fi Ltd. subject to fulfillment of other provisions of the Companies Act, 2013.

### 12. Question

'ABC Ltd. having a net worth of Rs. 80 crores and turnover of Rs. 30 crores wants 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 ABC Ltd. for accepting deposits from public other than its members.

### Answer

ABC Ltd. is not eligible to accept deposits from the public Since its net worth is not Rs. 100 crore or more and its turnover is not Rs. 500 crore or more.

### 13. Question

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 INR 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 INR 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 INR 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 INR 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?

Answer

- i) the amount of INR 30.00 lacs shall be considered as deposit.
- ii) 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 INR 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, INR 30.00 lacs shall not be treated as deposit iii) she will be liable for action under section 447 (punishment for fraud).
- iv) In the given case of Shringaar Readymade Garments Limited, it wants to accept deposits of INR 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) it being an exempted company, can accept deposits from the public from time to time without following the prescribed manner.

#### 14. Question

ABC Limited having a net worth of 120 crore rupees wants to accept deposit from its members. They have approached you to advise them regarding that if they fall within the category of eligible company, what special care has to be taken while accepting such deposit from members in case their company falls within the category of an eligible company.

Answer

ABC has to ensure that acceptance deposits from members should not exceed 10% of the aggregate of the Paidup share capital, free Reserves and securities premium account of the company

#### 15. Question

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

the given statement of eligibility of ABC Private Ltd. to accept deposits from its members to the extent of INR 50.00 lakh is True.

the given statement prescribing the limit of 25% to accept deposits is False.



### 16. Question

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;

- a. 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.
- b. 2,00,000 received from Mr. T, an employee of the company who is drawing annual salary of INR 1,50,000 under a contract of employment with the company in the nature of non-interest-bearing security deposit.
- c. Amount of INR 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.

### Answer

- a. In the first case, where INR 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.
- b. In the second case, INR 2,00,000 was received from Mr. T, an employee of the company drawing annual salary of INR 1,50,000 under a contract of employment with the company in the nature of non-interestbearing 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 noninterest- bearing security deposit.
- c. In the third case, amount of INR 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.

### 17. Question

State, with reasons, whether the following statements are True or False?

- a. ABC Private Limited may accept the deposits from its members to the extent of INR 50.00 Lakh, if the aggregate of its paid-up capital; free reserves and security premium account is INR 50.00 Lakh.
- b. 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.

Answer

- a. the given statement of eligibility of ABC Private Ltd. to accept deposits from its members to the extent of INR 50.00 lakh is True.
- b. the given statement prescribing the limit of 25% to accept deposits is False.

### 18. Question

Ashish Ltd. having a net-worth of INR 80 crores and turnover of INR 30 crores wants 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.

Answer

Ashish Ltd. has a net worth of INR 80 crores and turnover of INR 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 fulfil the eligibility criteria of net worth or Turnover or both and then the other conditions.

## CHAPTER 7 – CHARGES

### 1. Question

Explain whether a Floating charge attached to the company's property generally remains dormant till it crystallizes or becomes fixed.

### Answer

A floating charge attached to the company's property generally remains dormant till it crystallizes or becomes fixed. The company has a right to carry on its business with the help of assets over which a floating charge has been created till the happening of some event which determines this right. Crystallization is the process by which a floating charge converts into a fixed charge. A floating charge crystallises and the security becomes fixed in the following cases: (a) when the company goes into liquidation;

- (b) when the company ceases to carry on its business;
- (c) when the creditors or the debenture holders take steps to enforce their security  
e.g. by appointing receiver to take possession of the property charged; (d) on the happening  
of the event specified in the deed.

In the aforesaid circumstances, the floating charge is said to become fixed or to have been crystallised. Until the charge crystallises or attaches or becomes fixed, the company can deal with the property so charged in any manner it likes. Once crystallized, the security cannot be sold, and the lender may take possession of it.

### 2. Question

An unregistered charge shall be void against the liquidator and other creditors of the company.

### Answer

According to Section 77 of the Companies Act, 2013, all types of charges created by a company are to be registered with the Registrar of Companies (ROC), Where they are non-compliant and are not filed with the Registrar of Companies for registration, the charge shall be void as against the liquidator and any other creditor of the company. In the case of ONGC Ltd v. Official Liquidators of Ambica Mills Co Ltd (2006), the ONGC had not been able to point out whether the so called charge, on the basis of which it was claiming preference as a secured

creditor, was registered or not. It was held that in the light of this failure, ONCG could not be treated as a secured creditor in view of specific provisions of section 125 of Companies Act, 1956 and the statutory requirement under the said section. This does not, however, mean that the charge is altogether void and the

debt is not recoverable. So long as the company does not go into liquidation, the charge is good and may be enforced.

Void against the liquidator means that the liquidator, on winding up of the company, can ignore the charge for the purpose of ascertaining the priority of payment and can treat the concerned creditor as an unsecured creditor. The property will be treated as free of charge i.e. the creditor cannot sell the property to recover its dues.

Void against any other creditors of the company means that if any subsequent charge is created on the same property and the earlier charge is not registered, the earlier charge would have no consequence and the latter charge if registered would enjoy priority over the earlier charge. In other words, the latter charge holder can have the property sold in order to recover its money.

Thus, non-filing of particulars of a charge as required under Section 77 of the Companies Act, 2013 does not invalidate the charge against the company as a going concern. It is void only against the liquidator and the creditors at the time of liquidation. The company itself cannot have a cause of action arising out of nonregistration.

### 3. Question

An encumbrance may be created by a charge, pledge or a mortgage.

Answer

An encumbrance means a restriction imposed on the owner's right over his property. All the three words used above impose a restriction on the right of the owner over his own property.

As per Clause 16 of Section 2 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 a mortgage. A charge is called fixed or specific when it is created to cover assets which are ascertained and definite or are capable of being ascertained and defined, at the time of creating the charge whereas a floating charge is not attached to any definite property but covers property of a fluctuating type such as stock in trade. On the contrary, in case of

a fixed or a floating charge the possession of the assets remains with the borrower. The ownership of the property also remains with the borrower. In case of fixed charge he has no right to sell or transfer the asset except with the consent of the charge holder. In case of a floating charge the borrower can treat his floating assets as if they have not been charged. He loses this right only when he commits a default and the charge holder decides to take action for recovery of the money due. In this case we say the floating charge crystallizes.

A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt or performance of an agreement which may give rise to pecuniary liability.

In a pledge the borrower loses possession of the goods pledged as a security for repayment of a debt or performance of an obligation. The pawnor (pledgor) remains the owner of the property. He is entitled to get back the possession on repayment of the debt. However, in all these cases if the borrower commits a default in payment of the principal and interest thereof the lender gets a right to sell the property and recover the amount due to him.

Thus, an encumbrance may be created by a charge, pledge or a mortgage.

#### 4. Question

As a Company Secretary, explain the procedure of satisfaction of charge.

Answer

According to Section 82 of the Companies Act, 2013 read with Rule 8 of the Companies (Registration of Charges) Rules, 2014, the company shall give intimation to the Registrar of Companies of the payment or satisfaction in full of any charge within a period of 30 days from the date of such payment or satisfaction in Form No.CHG-4 along with the specified fees.

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 such additional fees as prescribed.

On receipt of intimation of satisfaction of charge, the Registrar of Companies shall issue a notice to the holder of the charge calling upon him to show cause within such time not exceeding 14 days, as may be specified in such notice, as to why payment or satisfaction in full should not be recorded as intimated to the Registrar of Companies.

If no cause is shown, by such holder of the charge, the Registrar of Companies shall order that a memorandum of satisfaction shall be entered in the register of charges maintained by the Registrar of Companies under Section 81 of the Companies Act, 2013 and shall inform the company. However, if the cause is shown to the Registrar, he shall record a note to that effect in the register of charges and shall inform the company accordingly.

Further, Proviso to Section 82(2) of the Companies Act, 2013 provides that the aforesaid notice shall not be required to be sent, in case intimation to the Registrar of Companies in this regard is in the specified form along with the Letter of the charge holder stating that the amount has been satisfied, which is a mandatory attachment in all cases of CHG-4 and is signed by the holder of charge. Where the Registrar of Companies 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.

### 5. Question

Every company is required to have active website. Comment.

### Answer

The Companies Act, 2013 does not mandate companies to have an active website, but the SEBI (LODR) Regulations, 2015 requires that all listed entities shall maintain a functional website containing the basic information about the listed entity:

As per the provisions of the SEBI (LODR) Regulation, 2015, the listed entity shall disseminate the prescribed informations under a separate section on its website, including: a) details of its business;

- b) terms and conditions of appointment of independent directors;
- c) composition of various committees of board of directors;
- d) code of conduct of board of directors and senior management personnel;
- e) details of establishment of vigil mechanism/ Whistle Blower policy;
- f) criteria of making payments to non-executive directors, if the same has not been disclosed in annual report;
- g) policy on dealing with related party transactions;
- h) policy for determining 'material' subsidiaries;
- i) details of familiarization programmes imparted to independent directors including the following details:- (i) number of programmes attended by independent directors (during the year and on a cumulative basis till date),



(ii) number of hours spent by independent directors in such programmes (during the year and on cumulative basis till date), and (iii) other relevant details.

- j) the email address for grievance redressal and other relevant details;
- k) contact information of the designated officials of the listed entity who are responsible for assisting and handling investor grievances;
- l) financial information including:
  - (i) notice of meeting of the board of directors where financial results shall be discussed;
  - (ii) financial results, on conclusion of the meeting of the board of directors where the financial results were approved;
  - (iii) complete copy of the annual report including balance sheet, profit and loss account, directors report, corporate governance report etc.
- m) shareholding pattern;
- n) details of agreements entered into with the media companies and/or their associates, etc.;
- o) the information, report, notices, call letters, circulars, proceedings, etc. concerning non-convertible redeemable preference shares or non-convertible debt securities;
- p) all information and reports including compliance reports filed by the listed entity;
- q) information with respect to the following events:
  - (i) default by issuer to pay interest on or redemption amount;
  - (ii) failure to create a charge on the assets;
  - (iii) revision of rating assigned to the non-convertible debt securities.

It is important that the listed entity ensures the contents of the website are correct and updated at any given point of time.

## 6. Question

XYZ Limited has an office building in London. The Company has been granted a term loan of ₹15 crore from a Bank. The Company wants to mortgage office building of London. Examining the provisions of the Companies Act, 2013, answer the following :

- (i) Whether the company can mortgage the above office building ?
- (ii) Whether a charge can be created for property situated outside India ?

## Answer

In accordance with the provisions of the Companies Act, 2013 as contained in Section 77(1) read with Rule 3 of the Companies (Registration of Charges) Rules, 2014, it shall be the duty of every 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 chargeholder together with the instruments, if any, creating or modifying such charge in Form No.

CHG-1 (for other than Debenture) or Form No. CHG-9 (For Debentures) as the case may be, and is required to be filed with the Registrar of Companies within a period of 30 days of the date of creation or modification of charge along with the specified fees.

(i) In light of the above mentioned provisions, XYZ Limited can mortgage the office building situated in London (UK).

(ii) In light of the above mentioned provisions, a charge can be created for property situated outside India. The e-form prescribed for the purpose of Registration of the charge is Form No. CHG-1 and it will be filled within the prescribed period.

## 7. Question

Renuka Soaps and Detergents Limited realised on 2nd May 2019 that particulars of charge created on 12th March, 2019 in favour of a Bank were not registered with the Registrar of Companies. What procedure should the company follow to get the charge registered? Would the procedure be different if the company realised its mistake of not registering the charge on 7th June, 2019 instead of 2nd May, 2019? Explain with reference to the relevant provisions of the Companies Act, 2013.

## Answer

Since first sixty days from creation of charge were expired on 11th May, 2019, Renuka soaps and Detergents limited can still get the charge registered within a further period of sixty days from 11th May 2019, after paying the prescribed advalorem fees. The company is required to make an application to the registrar in this respect giving sufficient cause for non – registration of charge.

## 8. Question

Mr Antriksh entered into an agreement for purchasing a commercial property in Delhi belonging to NRT Ltd. 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 the name of Mr Antriksh saying that he ought

to have had the knowledge of charge created on the property of the company. Explain with the help of 'Notice of a charge', whether the contention of NRT LTD. is correct?

Answer

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. Thus, the contention of NRT Ltd. is correct.

### 9. Question

ABC Limited created a charge in favour of Z Bank. The charge was duly registered. Later, the Bank enhanced the facility by another INR 20 crores. Due to inadvertence, this modification in the original charge was not registered. Advise the company as to the course of action to be pursued in this regard.

Answer

The application in Form CHG-8 shall be filed by the company or any interested person.

Therefore, Z Bank can also proceed under Section 87 as aforesaid. The order of rectification shall be made by the Central Government on such terms and conditions as it deems just and expedient

### 10. Question

State, with reasons, whether the following statements are True or False?

- a) 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.
- b) 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.

Answer

- a) 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.
- b) 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.

#### 11. Question

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.

Answer - 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.

## CHAPTER 8 – DISTRIBUTION OF PROFITS

### 1. Question

A company declared dividend on 21st November, 2018. It reports on 22nd December, 2018 that it could not pay dividend to 46 members as they are not traceable for last three years. Advise the company with regard to unpaid dividend under the provisions of the Companies Act, 2013.

### Answer

According to Section 126(1) of the Companies Act, 2013 where a dividend has been declared by a company but has not been paid or claimed within thirty days from the date of the declaration to any shareholder entitled to the payment of the dividend, the company shall, within seven days from the date of expiry of the said period of thirty 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.

In the given case the company declared dividend on 21st November, 2018, the dividend remains unpaid after 30 days of declaration i.e. 22nd December, 2018. The company is advised to transfer the remaining unpaid or unclaimed dividend to a special account called the Unpaid Dividend Account in any scheduled bank within seven days from the date of expiry of the said period of thirty days. Further any money transferred to the Unpaid Dividend Account of a company which remains unpaid or unclaimed for a period of seven years from the date of such transfer shall be transferred by the company along with interest accrued, if any, thereon to the Investor Education and Protection Fund.

### 2. Question

Referring to the provisions of Companies Act, 2013 advise a public company which declared dividend on 30th September, 2018 as to the procedures to be followed in this regard for payment of dividend. Whether any intervening holidays in the month of October 2018 shall be taken into account in calculating the time limit?

**Answer** Section 123(4) of the Companies Act, 2013 provides that the amount of the dividend, including interim dividend shall be deposited in a scheduled bank in a separate account within five days from the date of declaration of dividend. However, in case of Government Company sub section 4 of Section 123 shall not apply

in which 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 or by one or more Government Company. Inferring from section 124(1) dividend must be paid to any shareholder entitled to the payment of the dividend, within 30 days from the date of declaration of dividend.

Secretarial Standard-3(SS-3) hereby clarifies that the Dividend shall be deposited in a separate bank account within five days from the date of declaration and shall be paid within 30 days of declaration. The intervening holidays, if any, falling during such period shall be included.

Therefore in the given illustration the dividend shall be deposited into a separate bank account of a scheduled bank on or before 05.10.2018 and the same must be paid to the registered shareholder or to his order or to his banker on or before 30.10.2018.

### 3. Question

While adopting accounts for the year, the Board of directors of Prima Ltd. decided to consider the interim dividend @ 12% as final dividend and did not consider transfer of profit to reserves. Explain whether decisions of the Board were justified referring to relevant provisions.

#### Answer

Section 123 of the Companies Act, 2013 provides for the provisions relating to declaration of dividends.

Since interim dividend is also a dividend, companies should provide for depreciation under section 123 of the Companies Act, 2013 before declaration of interim dividend. However, the first proviso to the section 123(1) of the Companies Act, 2013 provides that a company may, before declaration of any dividend in any financial year, transfer such percentage of its profits for that financial year as it consider appropriate to the reserves of the company irrespective of the size of declared dividend i.e. company is not mandatorily required to transfer the profit to reserves, and it is only an option made available to the company to transfer such percentage of profit to reserves.

In the instant case, the Board has decided to pay interim dividend @12% of the paid up capital. Assuming the company has complied with the depreciation requirement and other applicable provisions, the interim or final dividend can be declared without transferring such percentage of its profits as it may consider appropriate to the reserve of the company.

Thus, from the facts and provisions, it may be concluded that Prima Ltd is under no violation of law by not transferring i.e. the company is free to transfer any amount of its profit to the reserves, without any compulsion or restriction before declaration of any dividend.

Section 123(3) of the Companies Act, 2013 provides that 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. The amount of dividend including interim dividend should be deposited in a separate bank account within five days from declaration of such dividend for compliance of section 123(4) of the Companies Act, 2013.

#### 4. Question

The following summarized information is available in respect of a company for the year ended 31st March, 2019:

₹ Lakh

|                                                                   |      |
|-------------------------------------------------------------------|------|
| Equity Share Capital 10,000 shares of the face value of ₹100 each | 10   |
| Free Reserve                                                      | 2    |
| Revaluation Reserve                                               | 1    |
| Profit and Loss Account (Dr.)                                     | 0.35 |
| Net loss for the year 2018-2019                                   | 0.25 |

The company has paid dividends to the equity shareholders @ 8%, 10% and 12% during the immediately preceding three financial years. Advise the Board of directors the maximum amount they can pay this year by way of dividends.

#### Answer

As per Section 123 (1) of the Companies Act, 2013, a company can distribute dividends out of profits of the current year or from profits of previous financial years.

In the event of inadequacy or absence of profits in any financial year, if the company wants to propose declaration of dividend, it can pay it out of accumulated profits earned by it in previous years and transferred by the company to the free reserves, according to the conditions prescribed under Rule 3 of the Companies (Declaration and Payment of Dividend) Rules, 2014.

In the instant case, the net loss for the year 2018-19 is ₹25000.



According to Rule 3 of the Companies (Declaration and Payment of Dividend) Rules, 2014 the following conditions must be fulfilled:

- (i) The rate of dividend cannot exceed the average of the rates at which dividend was declared in the three years immediately preceding that year i.e.  $(8\%+10\%+12\%)/3 = 10\%$ , so in this case, the amount of dividend should not exceed `1 Lakh.
  - (ii) 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. Thus the company can draw only upto `1.2 lakh.
  - (iii) The balance of reserves after such withdrawal shall not fall below 15% of its paid up capital as appearing in the latest audited balance sheet. Accordingly the maximum that may be withdrawn cannot exceed ` 50000.
  - (iv) However, the amount so withdrawn must be used to set-off losses of the current year i.e. `25000.
- Therefore, the maximum amount in this instant case that can be paid by way of dividend is `25000.

### 5. Question

Manish, a shareholder of a company has not claimed his dividends from the company for the last 10 years due to different reasons. He wants to know whether he will be able to recover the dividends declared by the company for all these years. Explain to him, the relevant legal provisions.

### Answer

According to Section 124 of the Companies Act, 2013 dividends must be paid within 30 days from the date of declaration and if any amount remains unpaid or unclaimed then the company is required to transfer the unpaid dividend to a special account, known as Unpaid Dividend Account opened by the company in any scheduled bank within seven days from the date of expiry of thirty days. If any money transferred to this account remains unpaid or unclaimed for a period of seven years from the date of transfer to such account it shall be transferred by the company to the Investor Education and Protection Fund established under Section 125 (1) of the Companies Act, 2013 maintained and administered by the Central Government.

In the present case, the amount of dividend for the first 3 years must have been transferred to the Investor Education and Protection Fund. The amount for remaining period must be in the Unpaid Dividend Account of the Company.

According, to Section 125 of the Companies Act, 2013 read with Rule 7 of the IEPF(Accounting, Audit, Transfer and Refund) Rules, 2016, the person whose amounts has been transferred to Investor Education and Protection

Fund, shall be entitled to get refund out of the fund in respect of such claims by submitting an online application in Form IEPF-5.

Manish should approach the company for amount of dividend for last 7 years.

#### 6. Question

Dealing with dividend is the prerogative of Board of directors. However there are certain parameters included in dividend distribution policy of a company.

Answer

Regulation 43A of the SEBI (LODR) Regulations, 2015 provides for formulation of policy for dividend distribution which broadly specifies the external and internal factors including parameters that may be considered while declaring dividend and the circumstances under which the shareholders of the company may or may not expect dividend.

The dividend distribution policy shall include the following parameters:

- (a) the circumstances under which the shareholders of the listed entities may or may not expect dividend;
- (b) the financial parameters that shall be considered while declaring dividend;
- (c) internal and external factors that shall be considered for declaration of dividend;
- (d) policy as to how the retained earnings shall be utilized; and
- (e) parameters that shall be adopted with regard to various classes of shares.

Therefore, the top 500 listed entities based on market capitalization (calculated as on March 31 of every financial year) is required to formulate a dividend distribution policy which shall be disclosed in their annual reports and on their websites.

The listed entities other than top 500 listed entities based on market capitalisation may also disclose their dividend distribution policies on a voluntary basis in their annual reports and on their website.

#### 7. Question

Examine the validity of the following :

- (a) XYZ Ltd wants to declare the dividend out of the current year profit without adjusting the previous year's carry forwarded losses and depreciation.
- (b) Board of Directors of XYZ Ltd wants to declare interim dividend after the end of financial year.

Answer

Answer 2A(iii)(a)

Section 123(1) of the Companies Act, 2013 provides that the dividend shall be declared or paid by a company for any financial year out of the profits of the company for that year arrived at after providing for depreciation or out of the profits of the company for any previous financial year or years arrived at after providing for depreciation and remaining undistributed, or out of both.

Proviso to this section provides that a company shall not declare dividend unless carried over previous losses and depreciation not provided in previous year or years are set off against profits of the company for the current year.

Therefore, XYZ Ltd has to set off the previous year's carry forward loss and depreciation from current year profit before declaration of dividend.

Answer 2A(iii)(b)

As per section 123(3), 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 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 quarter preceding the date of declaration of the interim dividend.

## 8. Question

XYZ Ltd. is carrying out a project under its CSR initiatives. Some of its employees are working in this project. The company want to monetize and account it under the head of 'CSR expenditure' ? Advice the company.

Answer

As per the Ministry of Corporate Affairs General Circular No. 01/2016 dated 12th January, 2016, the contribution and involvement of employees in CSR activities of the company will no doubt generate interest/pride in CSR work and promote transformation from Corporate Social Responsibility (CSR) as an obligation, to Socially Responsible Corporate (SRC) in all aspects of their functioning. Companies therefore, should be encouraged to involve their employees in CSR activities. However monetization of such services of employees would not be counted towards CSR expenditure.

## 9. Question

Strike in the postal department could be a valid reason for delay in dispatch of dividend warrants.

Answer

Section 127 of the Companies Act, 2013 provides that dividend shall be paid or dividend warrant shall be posted within period of thirty days from date of declaration of dividend; otherwise the company and the defaulting directors will be liable for default.

However, proviso to section 127 of the Act further provides a list of situations where no offence under this section shall be deemed to have been committed:-

- 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 period under this section was not due to any default on the part of the company.

In this case, delay has taken place due to strike in the postal department and it can be attributed as "for any other reason" and without any default on the part of company. Hence, the Statement is correct.

#### 10. Question

Which parameters shall be included in the Dividend Distribution Policy by the top 500 listed entities as per the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ?

Answer

As per the Regulation 43(A) of SEBI (Listing Obligation and Disclosure Requirements) Regulations, 2015, the Dividend Distribution Policy shall include following parameters:

- a) The circumstances under which the shareholders of the listed entities may or may not expect dividend;
- b) The financial parameters that shall be considered while declaring dividend;
- c) Internal and external factors that shall be considered for declaration of dividend;
- d) Policy as to how the retained earnings shall be utilized; and

e) Parameters that shall be adopted with regard to various classes of shares.

### 11. Question

While sanctioning working capital limits, the rate of interest has been fixed at a specified percentage above the bank rate as notified by the Reserve Bank of India (RBI). But later on, there was a change in the interest rate due to RBI notification. The lending bank insisted on filing necessary documents and forms for modification of charge under section 79 of the Companies Act, 2013. Decide if the claim of the lending bank is tenable.

#### Answer

The term "modification of charge" includes variation of any of the terms of the agreement entered into between lender and borrower. It includes change (i.e., increase or decrease) in amount of borrowing, change in security, extension of time for repayment. It also includes variation in rate of interest taken place due to mutual agreement or by operation of law. Even if the rights of a charge holder are assigned to a third party, it will be regarded as modification. The provisions applicable to the registration of a charge under section 77 shall apply to the modification of a charge.

However, change in interest rate fixed by Reserve Bank India does not amount to modification of charge in terms of the conditions of the charge under section 79 of the Companies Act, 2013. Hence, claim of the lending bank to file documents for modification of charge is not tenable.

### 12. Question

The Board of Directors of Nimbahera Chemicals Limited proposes to transfer more than 10% of the profits of the company to the reserves for the current year. Advise the Board of Directors of the said company mentioning the relevant provisions of the Companies Act, 2013.

#### Answer

The first proviso to 123 (1) of the Companies Act, 2013 provides that 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. Therefore, under the Companies Act, 2013 the amount transferred to reserves out of profits for a financial year has been left at the discretion of the company acting vide its Board of Directors. Therefore the company is free to transfer any part of its profits to reserves as it deems fit.

### 13. Question

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.

Answer

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.

#### 14. Question

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.

Answer

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. Ranjan will not succeed in his claim for 20% interest as the limit under section 127 is 18% per annum.

### 15. Question

The Board of Directors of Neema Tools Limited recommended dividend on 20th February, 2014 and the same was approved and declared by the company in its Annual General Meeting held on 31st May, 2014 and was paid to the shareholders on 15th June, 2014. But dividend was not paid to Mr. Goyameer, a shareholder. The company adjusted the amount of dividend against a sum due to it from Mr. Goyameer. Decide, under the provisions of the Companies Act, 2013 the liability of the company in this regard?

#### ANSWER:

In the instant case, dividend was declared on 31st May, 2014 and was paid on 15th June, 2014 i.e. within 15 days. The time limit prescribed by section 127 of the said Act is 30 days so no offence is committed. Further, no dividend was paid to Mr. Goyameer as the company adjusted the amount of dividend against a sum due to it from Mr. Goyameer. Section 127 expressly authorizes the company to lawfully adjust the amount of dividend against any sum due to it from the shareholder. In instant case, adjustment of amount of dividend is also not violative of Companies Act, 2013



### 16. Question

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.

### Answer

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.

### 17. Question

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 Rs.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?
- (ii) 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?
- (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.

### 18. Question

Referring to the provisions of the Companies Act, 2013, examine the validity of the following: The Board of Directors of ABC Limited 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

Answer

The Board of Directors of ABC 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. So according to the above provision, declaration of dividend by the ABC Limited is not valid.

### 19. Question

WL Limited is facing loss in business during the current financial year 2015-16. In the immediate preceding three financial years, the company had declared dividend at the rate of 8%, 10% and 12% respectively. To maintain the goodwill of the company, the Board of Directors has decided to declare 12% interim dividend for the current financial year. Examine the applicable provisions of the Companies Act, 2013 and state whether the Board of Directors can do so?

In the given case the company is facing loss during the current financial year 2015-16. In the immediate preceding three financial years, the company declared dividend at the rate of 8%, 10% and 12%. As per the above mentioned provision, 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 [i.e.  $8+10+12=30/3=10\%$ ]. Therefore, decision of Board of Directors to declare 12% of the interim dividend for the current financial year is not tenable.





## CHAPTER 9 – ACCOUNTS, AUDIT AND AUDITORS

### 1. Question

Ram is a practising Chartered Accountant and partner of two audit firms namely PYMG and YE. In the immediately preceding financial year, PYMG has completed its two terms of five consecutive years in Gayatri Pvt. Ltd. having paid-up share capital of ₹60 crore. Now Gayatri Pvt. Ltd. is considering appointing YE firm as its statutory auditors. Can Gayatri Pvt. Ltd. appoint YE firm as its auditors ?

What will be your answer in the following cases ? (i) If appointing company is a one person company; (ii) If appointing company is a small company.

### Answer

According to the provisions of section 139 of the Companies Act, 2013 read with Rule 5 of Companies (Audit and Auditors) Rules, 2014 the following companies are required to appoint and rotate auditors: a. all listed companies;

b. all unlisted public companies having paid up share capital of rupees ten crore or more;

c. all private limited companies having paid up share capital of rupees fifty crore or more;

d. all companies having paid up share capital of below threshold limit mentioned in

(a) and (b) above, but having public borrowings from financial institutions, banks or public deposits of rupees fifty crores or more.

An individual auditor who has completed his term as auditor for more than one term of five consecutive years and an audit firm who has completed the term as auditor for more than two terms of five consecutive years shall not be re-appointed as an auditor of the company.

It is further provided that as on the date of appointment no audit firm having a common partner or partners to the other audit firm, whose tenure has expired in a company immediately preceding the financial year, shall be appointed as auditor of the same company for a period of five years

Accordingly in the present case the company is required to appoint and rotate the auditors on completion of the tenure. Thus Gayatri Ltd cannot appoint YE audit firm as auditor of the company.

- a. In case the appointee company is a One Person Company, rotation of auditor does not apply and hence the appointing company can appoint YE audit firm as auditor.
- b. In case the appointee company is a Small Company, rotation of auditor does not apply and hence the appointing company can appoint YE audit firm as auditor.

## 2. Question

Every financial statement of the company must give true and fair view of the state of affairs of the company at the end of the financial year.

Answer

As per provisions of sub-sections (1) and (2) of section 129 of the Companies Act 2013, every financial statement of 'the company must give true and fair view of the state of affairs of the company at the end of financial year. True and Fair view in respect of financial statement means-

- Financial statements and items contained should comply with accounting standards notified under section 133;
- Financial statement shall be in form or forms as provided for different class or classes of companies in Schedule III;
- Financial statement shall not be treated as not disclosing a true and fair view of the state of affairs of the company, merely by the reason of the fact that they do not disclose-

in the case of an insurance company, any matters which are not required to be disclosed by the Insurance Act, 1938, or the Insurance Regulatory and Development Authority Act, 1999;

in the case of a banking company, any matters which are not required to be disclosed by the Banking Regulation Act, 1949;

in the case of a company engaged in the generation or supply of electricity, any matters which are not required to be disclosed by the Electricity Act, 2003;

in the case of a company governed by any other law for the time being in force, any matters which are not required to be disclosed by that law.

### 3. Question

Vijay is an auditor of XYZ Ltd, a listed public company having paid-up share capital of `10 crore. Advise him as to whether he can render the following services, keeping in mind, the relevant provisions of Companies Act , 2013 ?

(i) Vijay wants to conduct internal audit of XYZ Ltd. He also wishes to provide actuarial services to XYZ Ltd. (ii) Vijay wishes to “design and implement one financial system” and offer management services to ABC Ltd, the holding company of XYZ Ltd.

(iii) What will be your answer in the above two cases if services are provided to PQR Ltd, a subsidiary company of XYZ Ltd. ?

#### Answer

Section 144 of the Companies Act, 2013 provides that an auditor shall provide to the company only such other services as are approved by the Board of Directors/ the audit committee, but which shall not include any of the following services (whether such services are rendered directly or indirectly to the company or its holding company or subsidiary company, namely:-

- (a) accounting and book keeping services;
- (b) internal audit;
- (c) design and implementation of any financial information system;
- (d) actuarial services;
- (e) investment advisory services;
- (f) investment banking services;
- (g) rendering of outsourced financial services; (h) management services; and
- (i) any other kind of services as may be prescribed.

Therefore based on the above mentioned provisions advice to Vijay will be as under:

- (i) Vijay cannot conduct internal audit of XYZ Ltd or carryout actuarial services to XYZ Ltd.



- (ii) Vijay cannot provide management services or implementation of financial system to ABC Ltd as such services to the holding company is also not allowed.
- (iii) Providing (i) and (ii) services above to PQR Ltd the subsidiary company of XYZ Ltd is also not allowed.

#### 4. Question

Reels India Ltd. is a wholly owned subsidiary of Wheels India Ltd. The auditor of Wheels India Ltd. has intimated the Board of directors that the company will not be required to prepare consolidated financial statements if provisions of section 129, Companies Act, 2013 are complied with. As a company secretary give your comments in this regard.

#### Answer

The consolidation of financial statements of the company shall be made in accordance with the provisions of Schedule III of the Act and the applicable accounting standards:

Provided that in case of a company covered under sub-section (3) of section 129 of Companies Act, 2013 which is not required to prepare consolidated financial statements under the Accounting Standards, it shall be sufficient if the company complies with provisions on consolidated financial statements provided in Schedule III of the Act.

The contention of the Auditor is justifiable as Section 129 (3) provides for not preparing the consolidated financial statement if conditions are fulfilled. Which according to second proviso to rule 6 are as under: Provided further that nothing in this rule shall apply in respect of preparation of consolidated financial statements by a company if it meets the following conditions:-

- (i) it is a wholly-owned subsidiary, or is a partially-owned subsidiary of another company and all its other members, including those not otherwise entitled to vote, having been intimated in writing and for which the proof of delivery of such intimation is available with the company, do not object to the company not presenting consolidated financial statements;
- (ii) it is a company whose securities are not listed or are not in the process of listing on any stock exchange, whether in India or outside India; and
- (iii) its ultimate or any intermediate holding company files consolidated financial statements with the Registrar which are in compliance with the applicable Accounting Standards.

## 5. Question

Annual Return is a significant document in relation to the company.

Answer

Annual Return is a significant document in relation to the company

Annual Return is a significant document for the stakeholders of a company as it provides a very comprehensive information about various aspects of a company. It is perhaps the most important document required to be filed by every company with the Registrar of Companies. Apart from the Financial Statements, this is the only document to be compulsorily filed with the Registrar of Companies, every year irrespective of any events / happenings in the company. While the Financial Statements give information on the financial performance of a company, it is the Annual Return which gives extensive disclosure and greater insight into the non-financial matters of the company and the people entrusted with the management of the company. Annual Return contains the following particulars in consonance with the Section 92(1) of the Companies Act, 2013:

- 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 [omitted by the Companies (Amendment) Act, 2017) (Yet to be notified by CG)];
- 4) its members and debenture-holders along with 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 as may be prescribed;
- 10) details, as may be prescribed, in respect of shares held by or on behalf of the Foreign Institutional Investors [indicating their names, addresses, countries of incorporation, registration and percentage of shareholding held by them - omitted by the Companies (Amendment) Act, 2017) (yet to be notified by CG)] and
- 11) such other matters as may be prescribed.

## 6. Question

Advise whether the internal auditor is required to be appointed in the following scenarios :

Amount (`crore)

| Name of the Company | Status of the Company | Paid-up Capital | Turnover | Outstanding loans and borrowings |
|---------------------|-----------------------|-----------------|----------|----------------------------------|
| Lala Ltd.           | Listed                | 49              | 195      | 99                               |
| Dilo Ltd.           | Unlisted public       | 23              | 200      | 56                               |
| Craft Ltd.          | Unlisted public       | 50              | 123      | 65                               |
| Wood Pvt. Ltd.      | Private               | 55              | 186      | 89                               |

Can the following persons be appointed as internal auditor ?

- (i) President (HR)
- (ii) DGM (Finance).

Answer

Section 138 of the Companies Act, 2013 read with Rule 13 of the Companies (Accounts) Rules, 2014, prescribes the following class of companies which is required to appoint an internal auditor namely:-

- (a) Every listed company;
- (b) Every unlisted public company having:
  - (i) paid up share capital of Rs.50 crore or more during the preceding financial year; or
  - (ii) turnover of Rs.200 crore or more during the preceding financial year; or
  - (iii) Outstanding loans or borrowings from banks or public financial institutions exceeding Rs. 100 crore or more at any point of time during the preceding financial year; or
  - (iv) Outstanding deposits of Rs. 25 crore or more at any point of time during the preceding financial year; and
- (c) Every private company having –
  - (i) Turnover of Rs.200 crore or more during the preceding financial year; or
  - (ii) Outstanding loans or borrowings from banks or public financial institutions exceeding Rs.100 crore or more at any point of time during the preceding financial year.

Accordingly, in the given case, answer is as under:

| Name of the company | Requirement to appoint internal auditor |
|---------------------|-----------------------------------------|
|---------------------|-----------------------------------------|

|                |                                                                                   |
|----------------|-----------------------------------------------------------------------------------|
| Lala Ltd.      | Yes, since it is a listed company                                                 |
| Dilo Ltd.      | Yes, since the turnover is Rs. 200 crore                                          |
| Craft Ltd.     | Yes, since the paid-up capital is Rs. 50 crore                                    |
| Wood Pvt. Ltd. | No, since the turnover or loans / borrowings does not exceed the threshold limits |

An 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 internal auditor may or may not be an employee of the company.

So, if President (HR) and DGM (Finance) satisfying the above criteria, can be appointed as internal Auditor.

## 7. Question

Chief Financial Officer (CFO) of a conglomerate is of the view that secretarial audit is mandatory for all the companies. He has approached you to determine whether secretarial audit is applicable in case of the following companies :

Amount (`crore)

| Name of the Company | Status of the Company  | Paid-up Share-Capital | Turnover |
|---------------------|------------------------|-----------------------|----------|
| Helo Ltd.           | Listed                 | 49                    | 120      |
| Jam Ltd.            | Unlisted               | 38                    | 500      |
| Butter Pvt. Ltd.    | Subsidiary of Jam Ltd. | 7                     | 26       |

Advise the CEO

Answer

Considering the increasing importance of Corporate Governance, Section 204 of the Companies Act, 2013 mandates every listed company and such other class of prescribed companies to annex a Secretarial Audit Report, given by a Company Secretary in practice in Form MR-3 with its Board's report.

As per rule 9 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014, the prescribed class of companies is as under:

- (a) every public company having a paid-up share capital of Rs.50 Crore or more; or
- (b) every public company having a turnover of Rs.250 crore or more; or
- (c) every company having outstanding loans or borrowings from banks or public financial institutions of Rs.100 crore or more.

Secretarial Audit is also applicable to a private company which is a subsidiary of a public company, and which falls under the prescribed class of companies as indicated above. In light of the above provisions, applicability is given in the table below:

| Name of the Company | Applicability of Secretarial Audit | Reason                                                                                                    |
|---------------------|------------------------------------|-----------------------------------------------------------------------------------------------------------|
| Helo Ltd.           | Yes                                | Secretarial audit is applicable to every listed company.                                                  |
| Jam Ltd.            | Yes                                | Turnover exceeds the prescribed limit.                                                                    |
| Butter Pvt. Ltd.    | No                                 | Though it is a subsidiary of a public company, yet it does not fall under the prescribed threshold limit. |

### 8. Question

National Financial Reporting Authority (NFRA) has wide powers to recommend, enforce and monitor the compliance of accounting and auditing standards.

### Answer

The Central Government has introduced a new regulatory authority named as National Authority for Financial Reporting known as National Financial Reporting Authority (NFRA) with wide powers to recommend, enforce and monitor the compliance of accounting and auditing standards. The Companies Act, 1956 empowered the Central Government to form a Committee for recommendations on Accounting Standards which is National Advisory Committee on Accounting Standards (NACAS). This is now being renamed with enhanced independent oversight powers and authority as National Financial Reporting Authority (NFRA). The National Financial Reporting Authority shall perform its functions through such divisions as may be prescribed. NFRA shall be responsible for monitoring and enforcing compliance of auditing and accounting standards and for that purpose, oversee the quality of professions associated with ensuring such compliances. The Authority has power to investigate professional and other misconducts which may be committed by Chartered Accountancy members and firms. There is also a provision for appellate authority.

The National Financial Reporting Authority is a quasi – judicial body to regulate matters related to accounting and auditing. With increasing demand of non-financial reporting, it may be referred to as a National level business Reporting Authority to regulate standards of all kind of reporting, financial as well as non – financial, by the companies in future.

National Financial Reporting Authority gives its recommendations on accounting standards and auditing standards. It can only recommend and it is the Central Government who prescribes such standards.

The objectives of National Financial Reporting Authority are as follows:

- 1) Make recommendations on formulation of accounting and auditing policies and standards for adoption by companies, class of companies or their auditors;
- 2) Monitor and enforce the compliance with accounting standards and auditing standards;
- 3) Oversee the quality of service of professionals associated with ensuring compliance with such standards and suggest measures required for improvement in quality of service; and
- 4) Perform such other functions as may be prescribed in relation to aforementioned objectives.

### 9. Question

Answer the following with regard to appointment of auditor :

- (i) X, a practising chartered accountant holds shares in ABC Ltd. The nominal value of shares is `50,000. Whether ABC Ltd can appoint him as auditor ?
- (ii) A, a practising chartered accountant has business relationship with XYZ Hotels Ltd. The hotel used to provide services to A frequently on the same price as charged from other customers. Whether XYZ Hotels Ltd appoint A as its auditor ?
- (iii) X, a chartered accountant is working as a General Manager Accounts with ABC Ltd. Could X be appointed as auditor in ABC Ltd ?

### 10. Question

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.

Answer

The Board of Bharat Ltd. is empowered to keep its books of account at its corporate office in Mumbai by following the above procedure.

### 11. Question

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.

Answer

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 imprisonment for a term which may extend to one year or with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees or with both. Hence, Mr. White is liable for punishment as referred above.

## 12. Question

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?

ANSWER:

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.



### 13. Question

Gujarat Textiles Limited is having a foreign subsidiary company. The said Indian holding company failed to furnish particulars of its foreign subsidiary company in its Balance Sheet. Decide the liability of Gujarat Textiles Limited under the Companies Act, 2013.

#### Answer

Under Section 129(3) of the Companies Act, 2013, where a company has one or more subsidiaries, it shall, in addition to financial statements provided under sub-section (2), prepare a consolidated financial statement 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 subsection (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. For reference, sub section 2 of section 129 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.

### 14. Question

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?

#### Answer

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

### 15. Question

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?

Answer

- (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.
- (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.

#### 16. Question

The Board of Directors of Sunrise Ltd. want to circulate unaudited accounts before the Annual General Meeting of the shareholders of the Company. Examine the validity of the act of the Board of Directors under the provisions of the Companies Act, 2013.

Answer

Unaudited accounts cannot be sent to members or unaudited accounts cannot be filed with the Registrar of Companies. So the act of the Board of Directors of Sunrise Limited is not valid.

#### 17. Question

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?

Answer

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.

### 18. Question

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?

### Answer

(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.

### 19. Question

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?

Answer

- i) 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

### 20. Question

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.

Answer

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.

### 21. Question

PQR Limited is an unlisted Public company having paid up share capital of ₹ 80 crores during the preceding financial year 2014-15. The turnover of the company was ₹ 110 crores for the same period.

Referring to the provisions of the Companies Act, 2013, answer the following:

- (i) Is it mandatory for the above company to appoint an internal auditor for the financial year 2015-16?
- (ii) What are the qualifications of the Internal Auditor?

Answer

- i) Section 138 of the Companies Act, 2013 and the Companies (Accounts) Rules, 2014 prescribes the class of companies required to appoint Internal Auditor ii) As per the Section 138(1), an internal auditor shall either be a Chartered Accountant (engaged in practice on not) or a Cost Accountant, or such other professional as may

be decided by the Board. Even an employee of the company may also be appointed as an Internal Auditor of the company as per the Rule 13 of the Companies (Accounts) Rules, 2014

## 22. Question

State the procedure for the following, explaining the relevant provisions of the Companies Act, 2013: (i) Appointment of First Auditor, when the Board of directors did not appoint the First Auditor within one month from the date of registration of the company.

(ii) Removal of Statutory Auditor (appointed in last Annual General Meeting) before the expiry of his term.

What difference it would make, if the Auditor was First Auditor appointed by the Board of Directors?

## Answer

i) Section 139(6) of the Companies Act, 2013 lays down that the first auditor of a company shall be appointed by the Board of Directors within 30 days of the registration of the company. Section 139 (6) continues to provide further that if the Board of Directors fails to appoint such auditor, it shall inform the members of the company, who shall within ninety days at an extraordinary general meeting appoint such auditor and such auditor shall hold office till the conclusion of the first annual general meeting. ii) Section 140 of the Companies Act, 2013 prescribes certain procedure for removal of auditors.

Under Section 140 (1) the auditor appointed under Section 139 may be removed from his office before the expiry of his term only by a special resolution of the company, after obtaining the previous approval of the Central Government in that behalf in the prescribed manner. From this sub section it is clear that the approval of the Central Government shall be taken first and thereafter the special resolution of the company should be passed. Provided that before taking any action under this sub-section, the auditor concerned shall be given a reasonable opportunity of being heard.

## 23. Question

Explain how the auditor will be appointed in the following cases:

- (i) A Government Company within the meaning of section 394 of the Companies Act, 2013.
- (ii) The Auditor of the company has resigned on 31st December, 2013, while the Financial Year of the company ends on 31st March, 2014.
- (iii) A company, whose shareholders include the following:
  - a) Bank of Baroda (A Nationalized Bank) holding 12% of the subscribed capital in the company.

- b) National Insurance Company Limited (carrying on General Insurance Business) holding 10% of the subscribed capital in the company.
- c) Maharashtra State Financial Corporation (A Public Financial Institution) holding 8% of the subscribed capital in the company.

Answer

- i) In case of subsequent auditor for existing government companies, the Comptroller & Auditor General of India shall appoint the auditor within a period of 180 days from the commencement of the financial year and the auditor so appointed shall hold his position till the conclusion of the Annual General Meeting.
- ii) Under Section 139(8) any casual vacancy in the office of an auditor arising as a result of his resignation, such vacancy can be filled by the Board of Directors within thirty days thereof and in addition the appointment of the new auditor shall also be approved by the company at a general meeting convened within three months of the recommendation of the Board and he shall hold the office till the conclusion of the next annual general meeting.
- iii) in the given case as the total shareholding of the three institutions adds upto 30% of the subscribed capital of the company it is not a government company also not a deemed Government company.

Hence, the provisions applicable to nongovernment companies in relation to the appointment of auditors shall apply.

#### 24. Question

Parkash Carriers Limited appointed Mr. Raman as its auditor in the Annual General Meeting held on 30th September, 2009. Initially, he accepted the appointment. But he resigned from his office on 31<sup>st</sup> October, 2009 for personal reasons. The Board of directors seeks your advice for filling up the vacancy by appointment of Mr. Albert as auditor. Advise as per the provisions of the Companies Act, 2013. Also suggest the procedure to be adopted in case Mr. Albert is proposed to be removed from his office before the expiry of his term.

Answer

- a) Passing of the Board Resolution for the removal of the auditor;
- b) The application to the Central Government for removal of auditor shall be made in Form ADT-2 and shall be accompanied with fees as provided for this purpose under the Companies (Registration Offices and Fees) Rules, 2014

- c) The application shall be made to the Central Government within thirty days of the resolution passed by the Board.

### 25. Question

One-fourth of the subscribed capital of AMC Limited was held by the Government of Rajasthan. Mr. Neeraj a qualified Chartered Accountant was appointed as an auditor of the Company at the Annual General Meeting held on 30th April, 2014 by an ordinary resolution. Mr. Sanjay, a shareholder of the Company objects to the manner of appointment of Mr. Neeraj on the ground of violation of the Companies Act 2013. Decide, whether the objection of Mr. Sanjay is tenable? Also examine the consequences of the above appointment under the said Act.

Answer

The contention of Mr Sanjay is not tenable. The appointment is valid under the Companies Act, 2013.

### 26. Question

Examine the validity of the following with reference to the provisions of the Companies Act, 2013:-

- (i) EF Limited appointed an individual firm, Naresh & Company, Chartered Accountants, as Auditors of the company at the Annual General Meeting held on 30th September, 2014. Mrs. Kamala, wife of Mr. Naresh, invested in the equity shares face value of ₹ 1 lakh of EF Limited on 15th October, 2014. But Naresh & Company continues to function as statutory auditors of the company.
- (ii) Mr. Suresh, a Chartered Accountant, was appointed by the Board of Directors of AB Limited as the First Auditor. The company in General Meeting removed Mr. Suresh without seeking the approval of the Central Government and appointed Mr. Gupta as Auditor in his place.

Answer

- (i) Disqualification of auditor: According to Section 141(3)(d)(i) of the Companies Act, 2013, a person who, or his relative or partner holds any security of the company or its subsidiary or of its holding or associate company a subsidiary of such holding company, which carries voting rights, such person cannot be appointed as auditor of the company.
- (ii) Removal of first auditor: Section 140(1) stipulates that any auditor appointed under section 139 may be removed from office before the expiry of his term by passing special resolution in general meeting, after obtaining the previous approval of the Central Government in that behalf



## 27. Question

Mr. Prince, A Chartered Accountant, holding certificate of practice from the Institute of Chartered Accountants of India has been appointed as auditor of ABC Limited, which is a public limited company.

Mr. Y, a relative of Mr. Prince, hold security in the company, the face value of which is ₹5,000.

Explaining the provisions of the Companies Act, 2013 answer the following:

- (i) Examine the validity of Mr. Prince's appointment as auditor in the above company.
- (ii) What would be your answer in case Mr. Prince is already the auditor of 10 companies?
- (iii) What shall be your answer in case Mr. Prince has some business relationship with a subsidiary company of ABC Limited and is rendering consulting services to the subsidiary company?

## Answer

- i) appointment of Mr. Prince as an auditor is valid, since Mr. Y, a relative of Mr. Prince holds securities of the value not more than ₹ 1,00,000 (₹ 5,000 in the given case).
- ii) Mr. Prince is auditor in only 10 companies, he can accept the appointment as an auditor in 10 more companies.
- iii) Mr. Prince cannot be appointed as an auditor of the company in the given case, since he is having some business relationship with a subsidiary of ABC Limited.

## 28. Question

AB & Co. is an audit firm comprising of two partners Mr. A and Mr. B holding appointments as an auditor in 41 private companies out of which paid-up capital of 20 companies exceeds 50 Lakhs. XYZ Private Limited wants to appoint AB & Co. as its auditor. Decide whether this is in consonance with the provisions as contained in the Companies Act, 2013.

## Answer

XYZ Private Limited cannot appoint AB & Co. as its auditor since they are holding appointments as an auditor in 41 private companies which exceeds overall ceiling of 40. Thus, in above case such appointment shall not be in order. There is no relevance of paid up share capital in the above case.

### 29. Question

XYZ, a refinery company controlled by the Central Government, incorporated on 30th June, 2015. The XYZ Company decided to appoint Mr. Ramaswamy as a first auditor. The Board of Directors of XYZ Company appointed him as an auditor in first annual general meeting. M, a member of the company raised its objection on the appointment of the Mr. Ramaswamy as a first auditor of XYZ company stating that Board is not authorized for the appointment. Examining the provisions of the Companies Act, 2013, state whether the contention of M is tenable.

Answer

M objection on the appointment of the Ramaswamy as auditor, is correct. As per the above provision, Comptroller and Auditor-General of India is authorized to appoint him as auditor, in case of his failure to appoint within the prescribed period, then the Board may appoint such auditor of the company.

### 30. Question

An audit firm, comprising of two partners, holds office as auditor of 40 private companies. Such audit firm wants to be further appointed as an auditor in XYZ Pvt. Ltd with a paid up capital of ₹ 110 crore.

Decide whether this is in consonance with the applicable law.

Answer

XYZ Pvt. Ltd. is with paid up share capital ₹ 110 crore and so will be included in the prescribed ceiling limit of audit, therefore, such audit firm cannot be appointed as an auditor of XYZ Pvt. Ltd as it will exceed the ceiling prescribed for number of audits.

### 31. Question

Selected Directors of Confidence Ltd. conspired with the Auditor of the company to embezzle the accounts of the company in their interest. Tribunal on an application filed by the certain directors passed the order for the removal of auditor. In view of the given facts state the following-

- (i) Whether the order directing removal of auditor by tribunal on an application of certain directors is valid?
- (ii) If an order of removal passed against the auditor, will he be eligible to be appointed in other company?

## Answer

- i) Tribunal on an application filed by certain directors for removal of auditor of the company on the account of embezzlement of the accounts of the company in the interest of selected directors, passed the order for removal.
- ii) Proviso to section 140(5) of the Act provides that an auditor against whom final order has been passed by the Tribunal under this section shall not be eligible to be appointed as an auditor of any company for a period of five years from the date of passing of the order and the auditor shall also be liable for action under section 447.

## CHAPTER 10 – COMPROMISE ARRANGEMENT & AMALGAMATION

### 1. Question

On 3rd December, 2018 the Registrar of Companies applied to the Regional Director for seeking sanction to file a winding up application against a company. On next day i.e. on 4th December, 2018 the Regional Director granted its sanction. Examine the validity of Regional Director's action.

### Answer

According to section 272(1) of Companies Act, 2013 a petition to the Tribunal for the winding up of a company can be presented by Registrar of Companies. However, Registrar shall obtain the previous sanction of the Central Government to the presentation of a petition. The section also provides that the Central Government shall not accord its sanction unless the company has been given a reasonable opportunity of making representations. The power of Central Government in this context has been delegated to Regional Directors. In the given case Regional Director granted its sanction on the very next day of filing of the petition without giving reasonable opportunity to the company of being heard. Here the action of Regional Director is invalid.

### 2. Question

In a case pertaining to oppression and mismanagement, the respondents pleaded that the legal heirs of a deceased member whose name is still on the register of members are not entitled to apply before Tribunal, as only member of the company can complain about oppression and mismanagement. Thus, legal heirs have no locus standi. Examine this argument in the light of decided cases.

### Answer

According to section 241 of Companies Act, 2013 any member of the company may make an application to the tribunal for relief in cases of oppression or mismanagement under given circumstance. In *Worldwide Agencies (P) Ltd. v. Margaret T. Desor* (1990), it was decided that the legal representatives of a deceased member whose name is still on the register of members are entitled to file a petition under Sections 397 and 398 of the Companies Act, 1956, for relief against oppression or mismanagement.

In the present case the abovementioned case is applicable, where the member has died and his name still exists in the register of members, the legal heirs are entitled to maintain the petition.

### 3. Question

The provisions of the Companies Act, 2013 relating to compromises and arrangements are uniformly applicable to all companies.

Answer

Section 230 to 240 covered under Chapter XV of the Companies Act, 2013 provides for the Compromise, Arrangements and Amalgamation of Companies. The said provisions are uniformly applicable to all companies except Section 233 which prescribes simplified procedure for merger or amalgamation of -

- two or more small companies, or
- between a holding company and its wholly-owned subsidiary company, or
- such other class or classes of companies as may be prescribed.

Accordingly, sub-section (1) of Section 233 of Companies Act, 2013 states that notwithstanding the provisions of section 230 and section 232 of Companies Act, 2013, a scheme of merger or amalgamation may be entered into between two or more small companies or between a holding company and its whollyowned subsidiary company or such other class or classes of companies as may be prescribed, subject to the following, namely:-

(a) a notice of the proposed scheme inviting objections or suggestions, if any, from the Registrar and Official Liquidators where registered office of the respective companies are situated or persons affected by the scheme within thirty days is issued by the transferor company or companies and the transferee company; (b) the objections and suggestions received are considered by the companies in their respective general meetings and the scheme is approved by the respective members or class of members at a general meeting holding at least ninety per cent of the total number of shares;

(c) each of the companies involved in the merger files a declaration of solvency, in the prescribed form, with the Registrar of the place where the registered office of the company is situated; and

(d) the scheme is approved by majority representing nine-tenths in value of the creditors or class of creditors of respective companies indicated in a meeting convened by the company by giving a notice of twenty-one days along with the scheme to its creditors for the purpose or otherwise approved in writing.

### 4. Question

Can a contributory file a petition for winding up of the company ? Discuss.

Answer

Section 272(1) of the Companies Act, 2013 provides that subject to the provisions of this section, a petition to the Tribunal for the winding up of a company shall be presented by, inter-alia, any contributory or contributories. As per Section 272(2) of Companies Act, 2013, a contributory shall be entitled to present a petition for the winding up of a company, notwithstanding that he may be the holder of fully paid-up shares, or that the company may have no assets at all or may have no surplus assets left for distribution among the shareholders after the satisfaction of its liabilities, and shares in respect of which he is a contributory or some of them were either originally allotted to him or have been held by him, and registered in his name, for at least six months during the eighteen months immediately before the commencement of the winding up or have devolved on him through the death of a former holder.

#### 4. Question

“The Companies Act, 2013 attempts to maintain a balance between the rights of majority and minority shareholders.” Discuss.

Answer In India, the Companies Act, 2013 attempts to maintain a balance between the rights of majority and minority shareholders by admitting in, the rule of the majority but limiting it at the same time by a number of well-defined minority rights, and thus protecting the minority shareholders as well. The rule of Foss V. Harbottle establishes the rule of majority but it is not absolute but subject to certain exceptions and the minority shareholders are protected by

(a) the common law; and

(b) the provisions of the Companies Act, 2013.

Section 241 to Section 245 of Chapter XVI of the Companies Act, 2013 deals with the provisions relating to prevention of oppression and mismanagement of a company. Oppression and mismanagement of a company mean that the affairs of the company are being conducted in a manner that is oppressive and biased against the minority shareholders or any member or members of the company. To prevent the same, there are provisions for the prevention and mismanagement of a company.

#### 6. Question

Sunita sold her flat to NOP Televisions Ltd: on 1st April, 2016. The company appointed Prakash (a registered valuer and also husband of Sunita) on 1st May, 2019 to determine the value of the flat purchased from Sunita.

Can Prakash validly undertake this assignment? Would your answer differ if the appointment had been made on 1st March, 2019?

Answer

According to Section 247(2)(d) of the Companies Act, 2013, valuer shall not undertake valuation of any assets in which he has a direct or indirect interest or becomes so interested at any time during a period of three years prior to his appointment as a valuer or three years after the valuation of assets was conducted by him.

In the instant case, Prakash had an indirect interest in the property because it was owned by his wife (Sunita). However, he was appointed on May 01, 2019 as valuer of the property, since a period of three years has already elapsed after the sale of property, Prakash can validly take up the assignment of valuation of the property.

However, if the appointment had been made on March 01, 2019, the period of three years would not have elapsed and he could not have taken up the assignment.

## 7. Question

Every company is required to comply the disclosure requirements under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 in their Board Report.

Answer

As per Section 134 read with Rule 8(5) (x) of the Companies (Accounts) Rules, 2014, every company except (Small Companies and One Person Companies) is required to include the following in its Director's Report:

- Statement that the company has complied with provisions relating to the constitution of Internal Complaints Committee under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013

Disclosure Requirements under the Sexual Harassment of Women at Workplace (Prevention, Prohibition & Redressal) Act, 2013

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 is applicable to every workplace, establishment, company or organisation employing 10 or more employees irrespective of its location or nature of industry. The said Act provides for constitution of a Committee to be known as the "Internal Complaints Committee".

Section 21 of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 mandates that Internal Committee shall prepare an Annual Report and Section 22 of the said Act provides that



the employer shall include in its report the number of cases filed, if any, and their disposal under this Act in the Annual Report.

- (a) Rule 14 of Sexual Harassment of Women at Workplace (Prevention, Prohibition & Redressal) Rules, 2013 provides that the annual report which the Complaints Committee is required to prepare under Section 21 of the Sexual Harassment of Women at Workplace (Prevention, Prohibition & Redressal) Act, 2013 shall contain the following details:
  - (b) (a) Number of complaints of sexual harassment received in the year;
  - (c) Number of complaints disposed off during the year;
  - (d) Number of cases pending for more than 90 days;
  - (e) Number of workshops or awareness programme against sexual harassment carried out; (e) Nature of action taken by the employer or District Officer.

## 8. Question

Appointed date and Effective date are very important in any merger or amalgamation through a scheme of arrangement. Do you agree ?

Answer

Appointed date and Effective date are two significant dates in any scheme of Merger and Amalgamation. Mention of an appointed date is mandatory for the schemes falling under Section 232 of the Companies Act, 2013. Schemes involving Merger or Amalgamation or division of undertaking are required to fix an appointed date.

In *Marshall Sons & Co. India Ltd. vs. ITO*, it was held by the Hon'ble Supreme Court that every scheme of amalgamation has to necessarily provide a date with effect from which the amalgamation/transfer shall take place, and that such date may precede the date of sanctioning of the scheme by the Court, the date of filing of certified copies of the orders of the Court before the Registrar of Companies, and the date of allotment of shares, etc. It was observed therein that, the scheme, however, would be given effect from the transfer date (appointed date) itself.

Section 232(6) of the Companies Act, 2013 states that the scheme shall be deemed to be effective from the 'appointed date' and not a date subsequent to the 'appointed date'. This is an enabling provision to allow the companies to decide and agree upon an 'appointed date' from which the scheme shall come into force. The "Effective date" is the date when the amalgamation/merger is completed in all respects after having gone through the formalities involved, and the transferor company is dissolved by the Registrar of Companies and

certified copy of the order for the scheme of compromise and arrangement is filed with ROC and all other required statutory authorities, if any.

#### 10. Question

Govt. of West Bengal filed an application for winding up of KTC Ltd in the Tribunal citing sec. 271 of the Companies Act, 2013 in the interest of sovereignty and integrity of India which was opposed by the company stating that state government cannot file a petition for winding up. Is the claim of the company sustainable and why ?

Answer

Section 271(b) of the Companies Act, 2013 provides that a company may, on a petition under section 272, be wound up by the Tribunal if the company has acted against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality. Section 272(1) of the Companies Act, 2013 provides that subject to the provisions of this section, a petition to the Tribunal for the winding up of a company shall be presented by—

- (a) the company;
- (b) any contributory or contributories;
- (c) all or any of the persons specified in clauses (a) and (b);
- (d) the Registrar;
- (e) any person authorised by the Central Government in that behalf; or
- (f) in a case falling under clause (b) of sub-section (1) of section 271, by the Central Government or a State government.

In view of the above provisions, the claim of the company is not sustainable.

#### 10. Question

CPR Ltd. and TJC Ltd. are wholly owned by Government of Tamil Nadu. As a policy matter, the Government issued administrative orders for merging TJC Ltd. with CPR Ltd. in the public interest. State the authority with whom the application for merger is required to be filed under the provisions of the Companies Act" 2013. Also state the provisions governing the preservation of Books and Records of TJC Ltd. after merger under the said Act.

Answer

Authority to whom the application for merger is to be made

According to Section 237 of the Companies Act, 2013, where the Central Government is satisfied that it is essential in the public interest that two or more companies should amalgamate, the Central Government may, by order notified in the Official Gazette, provide for the amalgamation of those companies into a single company.

Thus, In the given situation of merger between two wholly owned Government companies in public interest, there is no specific authority with whom the application for merger is required as the Central Government shall by notification in the Official Gazette, will provide for the amalgamation of the two said companies into a single company.

Preservation of books and records of amalgamated companies  
According to Section 239 of the Companies Act, 2013, the books and papers of a Company which has been amalgamated with, or whose shares have been acquired by, another Company shall not be disposed of without the prior permission of the Central Government and before granting such permission, that Government may appoint a person to examine the books and papers or any of them for the purpose of ascertaining whether they contain any evidence of the commission of an offence in connection with the promotion or formation, or the management of the affairs, of the transferor company or its amalgamation or the acquisition of its shares.

### 11. Question

A meeting of members of Evergreen Limited was convened under the orders of the Court for the purpose of considering a scheme of compromise and arrangement. The meeting was attended by 300 members holding 9,00,000 shares. 120 members holding 7,00,000 shares in the aggregate voted for the scheme. 140 members holding 2,00,000 shares in aggregate voted against the scheme. 40 members holding 1,00,000 shares abstained from voting. Determine with reference to the relevant provisions of the Companies Act, 2013 whether the scheme was approved by the requisite majority?

Answer

As per section 230 (6) of the Companies Act, 2013 where majority of persons at a meeting held representing 3/4th in value, voting in person or by proxy or by postal ballot, agree to any compromise or arrangement and if such compromise or arrangement is sanctioned by the Tribunal by an order. The majority of person representing 3/4 th Value shall be counted of the following:

- ☐ the creditors, or
- ☐ class of creditors or
- ☐ members or
- ☐ class of members, as the case may be,

The majority is dual, in number and in value. A simple majority of those voting is sufficient. Whereas the 'threefourths' requirement relates to value. The three-fourths value is to be computed with reference to paidup capital held by members present and voting at the meeting.

In this case 300 members attended the meeting, but only 260 members voted at the meeting. As 120 members voted in favor of the scheme the requirement relating to majority in number (i.e. 131) is not satisfied.

260 members who participated in the meeting held 9,00,000 shares, three-fourth of which works out to 6,75,000 while 120 members who voted for the scheme held 7,00,000 shares. The majority representing threefourths in value is satisfied.

Thus, in the instant case, the scheme of compromise and arrangement of Evergreen Limited is not approved as though the value of shares voting in favor is significantly more, the number of members voting in favor do not exceed the number of members voting against.

## 12. Question

A meeting of members of ABC Limited was convened as per the orders of the Court to consider a scheme of compromise and arrangement. Notice of the meeting was sent to 1000 members holding in aggregate 500000 equity shares. The meeting was attended by 800 members holding 350000 shares. 450 members holding 240000 shares voted in favour of the scheme; 200 members holding 60000 shares voted against the scheme. The remaining 150 members abstained from voting. Explain with reference to the provisions of the Companies Act, 2013, whether the scheme is approved by the requisite majority.

Answer:

As per section 230 (6), of the Companies Act, 2013 where majority of persons at a meeting held representing 3/4th in value, voting in person or by proxy or by postal ballot, agree to any compromise or arrangement and if such compromise or arrangement is sanctioned by the Tribunal by an order. The majority of person representing 3/4th Value shall be counted of the following:

- the creditors, or
- class of creditors or
- members or
- class of members, as the case may be,

Usage of word “majority” in the provision is dual in nature i.e., may be taken into account in number & in value. A simple majority of those voting is sufficient. Whereas the ‘three-fourths’ requirement relates to value. The three-fourths value is to be computed with reference to paid-up capital held by members present and voting at the meeting.

In this case, out of 1000 members, 800 members attended the meeting and 450 members voted in favor of the scheme, thus, the requirement relating to majority in number (i.e. more than 325) is satisfied.

Further, as per the facts, total 650 members participated in the meeting holding 3,00,000 shares. According to the provision, three-fourth of which works out to 2,25,000, while 450 members who voted for the scheme held 2,40,000 shares. Hence, the requirements as to the holding of 3/4th values of shares as a majority is also met. Therefore, the scheme is approved by the requisite majority.

#### 14. Question

ABC Limited was amalgamated and merged in XYZ Limited. Some workers of ABC Limited refuse to join as workers of XYZ Limited and claim compensation for premature termination of service. XYZ Limited resists the claim on the ground that their services are transferred to XYZ Limited by the order of amalgamation and merger and, therefore, the workers must join service of XYZ Limited and cannot claim any compensation. According to the provisions of the Companies Act, 2013, examine whether the workers' contention is correct.

Answer:

An order under section 232 of the Companies Act, 2013 transferring the property, rights and liabilities of one company to another does not automatically transfer contracts of personal service, which are in their nature, incapable of being transferred and no contract of service is thereby created between an employee of the transferor company on the one hand and the transferee company on the other.

In compliance with section 232(1) and (2), the tribunal may by order make a provision for the transfer of the employees of the transferor company and the transferee company. And provisions shall also be made for any persons who dissent from the compromise or arrangement scheme.

According to the above provisions, the workers/employees and their services cannot be transferred without their consent. Tribunal may by order safeguard the interest of the employees/ workers. Therefore, the workers of ABC Ltd. (Transferor) will succeed against XYZ Ltd.

#### 14. Question

Cotton On Yarn Ltd., and Country Cotton Blossom Ltd., are two listed companies engaged in the Business of Textiles. The companies are not making profits and as such their share's market price have gone down. A substantial portion of their share capital is held by Central Government as well as some Public Financial Corporations. In order to increase the share value, the Central Government wants to amalgamate the aforesaid two companies into a single company. Examine the powers of Central Government to amalgamate the two companies in public interest as per the provisions of the Companies Act, 2013.

Answer:

Central Government may by order provide for amalgamation in public interest. According to Section 237 of the Companies Act, 2013, where the Central Government is satisfied that it is essential in the public interest that two or more companies should amalgamate, the Central Government, may, by order notified in the official gazette, provide for the amalgamation of those companies into a single company with such constitution, with such property, powers, rights, interests, authorities and privileges and with such liabilities, duties and obligations, as may be specified in the order.

Continuation by or against the transferee company of any legal proceedings

The order may also provide for the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company and such consequential, incidental and supplemental provisions as may, in the opinion of the Central Government, be necessary to give effect to amalgamation.

Same interest rights or compensation

Every member or creditor including a debenture holder of each of the transferor companies before the amalgamation shall have, as nearly as may be, the same interest in or rights against the transferee company as he had in the company of which he was originally a member or creditor and in case the interest or rights of such member or creditor in or against the transferee company are less than the interest in or rights against the original company, he shall be entitled to compensation to that extent, which shall be assessed by such authority as may be prescribed and every such assessment shall be published in the official gazette and the compensation so assessed shall be paid to the member or creditor concerned by the transferee company.

### 15. Question

Dragon Copper Limited was facing acute financial difficulty as operations were continuously disrupted due to (a) non-availability of raw material (b) successive drought in its marketing areas and loss of demand and (c) frequent breakdown due to non-replacement of old plant and machinery. On the verge of liquidation, the Management proposes one last arrangement between creditors and the company, whereby the creditors have to forego 50% of their dues to the company. This has evoked strong protest from some of the creditors who may block the arrangement. Examine the arrangement in the light of the Companies Act, 2013 and advise the course of action/procedure to be adopted by the company to implement the same.

### Answer

Scheme of Compromise or arrangement (Section 230 of the Companies Act, 2013): The scheme provides for sacrifice on the part of creditors as they have to forego 50% of their dues to the company. The company is sick and therefore it can be considered as a company liable to be wound up within the meaning of Section 230(a) of the Companies Act, 2013. The proposed scheme involves as a compromise or arrangement with creditors and it attracts section 230.

While the company or any creditor or member can make application to the Tribunal under section 230 (6)(1), it is usual for the company to make an application. On such application, the Tribunal may order that a meeting of creditors and/or members be called and held as per directions of the Tribunal.

Company must arrange to send notice of meeting to every creditor containing a statement setting forth the terms of compromise or arrangement explaining its effect. Material interest of directors, Managing Director, or manager of the company in the scheme and the effect of scheme on their interest should be fully disclosed [Section 230(1)(a)]. Advertisement issued by the company must comply with the requirements of section 230(2). At the meetings convened, as per directions of the Tribunal, majority in number representing at least ninety percent in value of creditors present and voting (either in person or by proxy if allowed) must agree to compromise or arrangement.

Thereafter the company must present a petition to the Tribunal for confirmation of the compromise or arrangement. The notice of application made by the company will be served on the Central Government and the Tribunal will take into consideration representation, if any made by the Central Government. The Tribunal will sanction the scheme, if it is satisfied that the company has disclosed all material facts relating to the company



e.g. latest financial position, auditors report on accounts of the company, pendency of investigation of company, etc. Copy of Tribunal order must be filed with the Registrar of Companies and then only the order will come into effect. Copy of Tribunal order must be annexed to every Memorandum of Association issued thereafter.

If the Tribunal sanctions the scheme, it will be binding on all members and creditors even those who were dissenting. (Case Law: S. K. Gupta Vs. K. P. Jain, AIR 1979 SC 374)

#### 16. Question

ABC Limited is a wholly owned subsidiary company of XYZ Limited. The Company wants to make application for merger of Holding and Subsidiary Companies under Section 232. The Company Secretary of the XYZ Limited is of the opinion that company cannot apply for merger as per section 232. The company shall have to apply for merger as per section 233 i.e. Fast Track Merger. Is the contention of Company Secretary being valid as per law?

Answer:

As per section 233 (1), notwithstanding the provisions of section 230 and section 232, a scheme of merger or amalgamation may be entered between,

- 2 or more small companies
- a holding company and its wholly-owned subsidiary company. If 100% of its share capital is held by the holding company, except the shares held by the nominee or nominees to ensure that the number of members of subsidiary company is not reduced below the statutory limit as provided in section 187
- such other class or classes of companies as may be prescribed.

The provisions given for fasttrack merger in the section 233 are in the optional nature and not a compulsion to the company. If a company wants to make application for merger as per section 232, it can do so. Hence, here the Company Secretary of the XYZ limited has erred in the law and his contention is not valid as per law. The company shall have an option to choose between normal process of merger and fast track merger.

#### 17. Question

A meeting of members of ABC Limited was convened under the orders of the Court to consider a scheme of compromise and arrangement. Notice of the meeting was sent in the prescribed manner to all the 600 members holding in the aggregate 25,00,000 shares. The meeting was attended by 450 members holding 15,00,000 shares. 210 members holding 11,00,000 shares voted in favor of the scheme. 180 members holding 3,00,000 shares voted against the scheme. The remaining members abstained from voting.

Examine with reference to the relevant provisions of the Companies Act, 2013 whether the scheme is approved by the requisite majority.

Answer

As per section 230 (6), of the Companies Act, 2013 where majority of persons at a meeting held representing 3/4th in value, voting in person or by proxy or by postal ballot, agree to any compromise or arrangement and if such compromise or arrangement is sanctioned by the Tribunal by an order. The majority of person representing 3/4th Value shall be counted of the following:

- the creditors, or
- class of creditors or
- members or
- class of members, as the case may be,

The majority is dual, in number and in value. A simple majority of those voting is sufficient. Whereas the 'threefourths' requirement relates to value. The three-fourths value is to be computed with reference to paidup capital held by members present and voting at the meeting.

In this case out of 600 members, 450 members attended the meeting, but only 390 members voted at the meeting. As 210 members voted in favor of the scheme the requirement relating to majority in number (i.e. 196)

is satisfied. 390 members who participated in the meeting held 14,00,000, three-fourth of which works out to 10,50,000 while 210 members who voted for the scheme held 11,00,000 shares. As both the requirements are fulfilled, the scheme is approved by the requisite majority.

### 18. Question

A meeting of members of DEF Limited was convened under the orders of the Court for the purpose of considering a scheme of compromise and arrangement. The meeting was attended by 300 members holding 9,00,000 shares. 120 members holding 7,00,000 shares in the aggregate voted for the scheme. 140 members holding 2,00,000 shares in aggregate voted against the scheme. 40 members holding 1,00,000 shares abstained from voting. Examine with reference to the relevant provisions of the Companies Act, 2013 whether the scheme was approved by the requisite majority?

## Answer

As per section 230 (6), of the Companies Act, 2013 where majority of persons at a meeting held representing 3/4th in value, voting in person or by proxy or by postal ballot, agree to any compromise or arrangement and if such compromise or arrangement is sanctioned by the Tribunal by an order. The majority of person representing 3/4th Value shall be counted of the following:

- the creditors, or
- class of creditors or
- members or
- class of members, as the case may be,

The majority is dual, in number and in value. A simple majority of those voting is sufficient. Whereas the 'threefourths' requirement relates to value. The three-fourths value is to be computed with reference to paidup capital held by members present and voting at the meeting. In this case 300 members attended the meeting, but only 260 members voted at the meeting.

As 120 members voted in favor of the scheme the requirement relating to majority in number (i.e. 131) is not satisfied. 260 members who participated in the meeting held 9,00,000 shares, three-fourth of which works out to 6,75,000 while 120 members who voted for the scheme held 7,00,000 shares.

The majority representing three-fourths in value is satisfied. Thus, in the instant case, the scheme of compromise and arrangement of DEF Limited is not approved as though the value of shares voting in favor is significantly more, the number of members voting in favor do not exceed the number of members voting against.

## 19. Question

The shareholders and creditors of XYZ Limited, in a meeting convened for approval of a scheme of reconstruction of the Company, passed the necessary resolutions. The scheme of reconstruction provided for the following:

- (i) Sale of plant and machineries and appropriation of proceeds for payment of outstanding wages, tax dues and repayment of loan.
- (ii) Unsecured creditors to forego 60% of their claims against the Company and receive debentures of the balance amount. A few shareholders and creditors raised objections against the said arrangements. Advise the directors about the steps to be taken by the Company to give effect to the scheme of reconstruction under the Companies Act, 2013.

## Answer

Scheme of compromise or arrangement: As per section 230 of the Companies Act, 2013, the proposed scheme of reconstruction involves scheme of compromise or arrangement with members and creditors. The scheme of reconstruction provided for sale of plant and machineries and appropriation of proceeds for payment of outstanding wages, tax dues and repayment of loan. And also the unsecured creditors are to forego 60% of their claims against company and receive debentures of the balance amount. Besides, a few shareholders and creditors raised objections against the said arrangements.

Following is the procedure to give effect to the said Scheme of Compromise/arrangement:

1. Filing of an application: While the company or any creditor or member or liquidator (in case of voluntary liquidation) can make application to the Tribunal under section 230. On such application, the Tribunal may order that a meeting of creditors and/or members, be called and held and conducted as per directions of the Tribunal.
2. Disclosure by applicant: All the relevant disclosures as regards material facts related to financial aspects, reduction of share capital, scheme of corporate debt restructuring consented by not less than 75% of the secured creditors, and the valuation report, shall be made to the Tribunal by affidavit.
3. Serving of Notice: Company must arrange to send notice of meeting to every creditor/member/debenture holders/sectoral regulators at the registered address. Notice shall be containing a statement setting forth the terms of compromise or arrangement explaining its effect.
4. Such notice and other documents shall be hosted on website and published in newspaper and also advertised.
5. Tribunal may dispense with the calling of meeting where such creditors/ class of creditors having at least 90% value, agree and confirm to the scheme.
6. Person to whom notice is sent may vote in the meeting to the adoption of the compromise or arrangement within 1 month from the date of receipt of such notice.
7. Any objection to the scheme shall be made only by persons holding not less than 10% of the shareholding or having outstanding debt amounting to not less than 5% of the total outstanding debt as per the latest audited financial statement.
8. At the meetings convened as per directions of the Tribunal, majority in number representing  $\frac{3}{4}$ th in value of creditors/members present and voting (either in person or by proxy or by postal ballot if allowed) must agree to the scheme of compromise or arrangement.

9. Such scheme of the compromise or arrangement is sanctioned by the Tribunal by an order.
10. Such an order shall be binding on the company, all the creditors, members or on liquidator, and the contributories of the Company.
11. Copy of order must be filed with the Registrar of Companies.

In the light of above the order shall be binding on the company, all creditors, members or on liquidator and contributories of the company and the objections raised by a few shareholders and creditors will not sustain.

## 20. Question

The issued and paid up capital of MNC Limited is Rs. 5 crores consisting of 5,00,000 equity shares of Rs. 100 each. The said company has 500 members. A petition was submitted before the Tribunal signed by 80 members holding 10,000 equity shares of the company for the purpose of relief against oppression and mismanagement by the majority shareholders. Examining the provisions of the Companies Act, 2013, decide whether the said petition is maintainable. Also explain the impact on the maintainability of the above petition, if subsequently 40 members, who had signed the petition, withdrew their consent.

## Answer

Right to apply for oppression and mismanagement: As per the provisions of Section 244 of the Companies Act, 2013, in the case of a company having share capital, members eligible to apply for oppression and mismanagement shall be lowest of the following:

100 members; or

1/10th of the total number of members; or

Members holding not less than 1/10th of the issued share capital of the company. The share holding pattern of MNC Limited is given as follows:

Rs. 5,00,00,000 equity share capital held by 500 members

The petition alleging oppression and mismanagement has been made by some members as follows:

(i) No. of members making the petition – 80

(ii) Amount of share capital held by members making the petition – Rs. 10,00,000 The petition shall be valid if it has been made by the lowest of the following:

100 members; or

50 members (being 1/10th of 500); or

Members holding Rs. 50,00,000 share capital (being 1/10th of Rs. 5,00,00,000)

As it is evident, the petition made by 80 members meets the eligibility criteria specified under section 244 of the Companies Act, 2013 as it exceeds the minimum requirement of 50 members in this case. Therefore, the petition is maintainable.

The consent to be given by a shareholder is reckoned at the beginning of the proceedings. The withdrawal of consent by any shareholder during the course of proceedings shall not affect the maintainability of the petition [Rajamundhry Electric Corporation Vs. V. Nageswar Rao A.I.R.].

## 21. Question

A group of members holding 380 lakh issued share capital in Zolo Ltd. a listed public company having total issued share capital of 15000 lakhs as per latest financial statements alleged that company board of director is conducting an act which is ultra vires the articles or memorandum of the company without altering the memorandum or articles of the company.

They make application to tribunal (NCLT) to restrain the company from doing such ultra-virus act. With reference to the provision of Companies Act, 2013 ascertain whether the application will be admitted by tribunal (NCLT).

## Answer

As according to section 245 of Companies Act, 2013, such number of member or members, depositor or depositors or any class of them, as the case may be, as are indicated in sub-section

(2) may, if they are of the opinion that the management or conduct of the affairs of the company are being conducted in a manner prejudicial to the interests of the company or its members or depositors, file an application before the Tribunal on behalf of the members or depositors for seeking an orders, to restrain the company from committing an act which is ultra-virus the articles or memorandum of the company. Requisite number of members to make Application under Section 245(1) for Class Action for depositors is as prescribed in rule 84(4) of the National Company Law Tribunal (Second Amendment) Rules, 2019. Accordingly, in case of a company having a share capital the requisite number of member or members to file an application under section 245(1) shall be:-

- (a) at least five per cent. of the total number of members of the company; or
- (b) one hundred members of the company, whichever is less; or
- (c) In case of a listed company, member or members holding not less than two per cent. of the issued share capital of the company.

In above case, members holds 2.53% ( $380/15000 \times 100$ ) of issued share capital of Zolo Ltd. which is a listed company make application before tribunal (NCLT). Hence as members meet condition of 2% of issued share capital, therefore their application can be admitted by the NCLT.

## 22. Question

Mr. M, a member of XYZ Ltd. filed an application before the Tribunal complaining of oppression and mismanagement w.r.t. an agreement entered by XYZ Ltd. effecting the interest of the company. Vide order passed by the Tribunal under section 242 of the Companies Act, 2013, terminated the said agreement. The agreement was entered by Mr. H and Mr. G who was managing director and the executive director of the XYZ Ltd. Mr. Rasik, with whom the XYZ Ltd entered the agreement, filed a petition claiming the loss caused due to termination of the said agreement. Also state the legal position of Mr. H and Mr. G holding their place of office in the said situation. Examine the given facts and address the issues in terms of the relevant provisions of Companies Act, 2013.

Answer

As per section 243 of the Companies Act, 2013 , where an order made under section 242 terminates, sets aside or modifies an agreement which was entered by the company, were in a manner prejudicial to the interests of the company,—

- (a) such order shall not give rise to any claims whatever against the company by any person for damages or for compensation for loss of office or in any other respect either in pursuance of the agreement or otherwise;
- (b) no managing director or other director or manager whose agreement is so terminated or set aside shall, for a period of five years from the date of the order terminating or setting aside the agreement, without the leave of the Tribunal, be appointed, or act, as the managing director or other director or manager of the company:

Accordingly, Mr. Rasik, with whom the XYZ Ltd entered the agreement, filed a petition claiming the loss caused due to termination of the said agreement, is not viable. Further, Mr. H and Mr. G, managing director and the executive director of the XYZ Ltd. who entered agreement with Mr.

Rasik which was ordered to be terminated by the Tribunal, shall not act as the managing director or other director or manager of the company, for a period of five years from the date of the order terminating or setting aside the agreement, without the leave of the Tribunal



### 23. Question

A group of shareholders consisting of 25 members decide to file a petition before the Tribunal for relief against oppression and mismanagement by the Board of Directors of M/s Fly By Night Operators Ltd. The company has a total of 300 members and the group of 25 members holds one-tenth of the total paid-up share capital accounting for one-fifteenth of the issued share capital. The main grievance of the group is the due to mismanagement by the board of directors, the company is incurring losses and the company has not declared any dividends even when profits were available in the past years for declaration of dividend. In the light of the provisions of the Companies Act, 2013, advise the group of shareholders regarding the success of (i) getting the petition admitted and (ii) obtaining relief from the Tribunal.

Answer:

Section 244 of the Companies Act, 2013 provides the right to apply to the Tribunal for relief against oppression and mis-management. This right is available only when the petitioners hold the prescribed limit of shares as indicated below:

- (i) In the case of company having a share capital, not less than 100 members of the Company or not less than one tenth of the total number of its members whichever is less or any member or members holding not less than one tenth of the issued share capital of the company, provided that the applicant(s) have paid all calls and other dues on the shares.
- (ii) In the case of company not having share capital, not less than one-fifth of the total number of its members.

Since the group of shareholders do not number 100 or hold 1/10th of the issued share capital or constitute 1/10th of the total number of members, they have no right to approach the Tribunal for relief.

However, the Tribunal may, on an application made to it waive all or any of the requirements specified in (i) or (ii) so as to enable the members to apply under section 241.

As regards obtaining relief from Tribunal, continuous losses cannot, by itself, be regarded as oppression (Ashok Betelnut Co. P. Ltd. vs. M.K. Chandrakanth).

Similarly, failure to declare dividends or payment of low dividends also does not amount to oppression. (Thomas Veddon V.J. (v) Kuttanad Robber Co. Ltd).

Thus, the shareholders may not succeed in getting any relief from Tribunal.

#### 24. Question

ABC Private Limited is a company in which there are eight shareholders. Can a member holding less than onetenth of the share capital of the company apply to the Tribunal for relief against oppression and mismanagement? Give your answer according to the provisions of the Companies Act, 2013.

Answer:

Under section 244 of the Companies Act, 2013, in the case of a company having share capital, the following member(s) have the right to apply to the Tribunal under section 241:

- (a) Not less than 100 members of the company or not less than one-tenth of the total number of members, whichever is less; or
- (b) Any member or members holding not less than one-tenth of the issued share capital of the company provided the applicant(s) have paid all the calls and other sums due on the shares.

In the given case, since there are eight shareholders. As per the condition (a) above, 10% of 8 i.e. 1 satisfies the condition. Therefore, a single member can present a petition to the Tribunal, regardless of the fact that he holds less then one-tenth of the company's share capital

#### 25. Question

The issued and paid up capital of MNC Limited is Rs. 5 crores consisting of 5,00,000 equity shares of Rs. 100 each. The said company has 500 members. A petition was submitted before the Tribunal signed by 80 members holding 10,000 equity shares of the company for the purpose of relief against oppression and mismanagement by the majority shareholders. Examining the provisions of the Companies Act, 2013, decide whether the said petition is maintainable. Also explain the impact on the maintainability of the above petition, if subsequently 40 members, who had signed the petition, withdrew their consent.

Answer:

Right to apply for oppression and mismanagement: As per the provisions of Section 244 of the Companies Act, 2013, in the case of a company having share capital, members eligible to apply for oppression and mismanagement shall be lowest of the following:

100 members; or

1/10th of the total number of members; or Members holding not less than 1/10th of the issued share capital of the company. The share holding pattern of MNC Limited is given as follows: Rs. 5,00,00,000 equity share capital held by 500 members

The petition alleging oppression and mismanagement has been made by some members as follows:

- (i) No. of members making the petition – 80
- (ii) Amount of share capital held by members making the petition – Rs. 10,00,000 The petition shall be valid if it has been made by the lowest of the following:

100 members; or

50 members (being 1/10th of 500); or

Members holding Rs. 50,00,000 share capital (being 1/10th of Rs. 5,00,00,000)

As it is evident, the petition made by 80 members meets the eligibility criteria specified under section 244 of the Companies Act, 2013 as it exceeds the minimum requirement of 50 members in this case. Therefore, the petition is maintainable.

The consent to be given by a shareholder is reckoned at the beginning of the proceedings. The withdrawal of consent by any shareholder during the course of proceedings shall not affect the maintainability of the petition [Rajamundhry Electric Corporation Vs. V. Nageswar Rao A.I.R.].

## 26. Question

Mansi Ltd. with the issued and paid up capital of Rs. 8 crores consisting of 8,00,000 equity shares of Rs. 100 each, has 600 members. A petition was submitted before the Tribunal signed by 65 members holding 20,000 equity shares of the company for the purpose of relief against oppression and mismanagement by the majority shareholders. Examining the below situations in the light of the provisions of the Companies Act, 2013:

- (i) Whether the petition filed by the signed members is maintainable.

If subsequently 40 members, who had signed the petition, withdrew their consent. The impact on the maintainability of the above petition.

Answer: Right to apply for oppression and mismanagement: As per the provisions of Section 244 of the Companies Act, 2013, in the case of a company having share capital, members eligible to apply for oppression and mismanagement shall be lowest of the following:

- (i) 100 members; or
- (ii) 1/10th of the total number of members; or
- (iii) Members holding not less than 1/10th of the issued share capital of the company.

The share holding pattern of Mansi Limited is given as follows:

Rs. 8,00,00,000 equity share capital held by 600 members

Particulars of the petition alleging oppression and mismanagement made by members are as follows:

- (i) No. of members making the petition – 65
- (ii) Amount of share capital held by members making the petition - Rs. 20,00,000
- (iii) The petition shall be valid if it has been made by the lowest of the following:

100 members; or

60 members (being 1/10th of 600); or

Members holding Rs. 80,00,000 share capital (being 1/10th of Rs. 8,00,00,000)

As it is evident, the petition made by 65 members meets the eligibility criteria specified under section 244 of the Companies Act, 2013 as it exceeds the minimum requirement of 60 members in this case. Therefore, the petition is maintainable.

The consent to be given by a shareholder is reckoned at the beginning of the proceedings. The withdrawal of consent by any shareholder during the course of proceedings shall not affect the maintainability of the petition [Rajamundhry Electric Corporation Vs. V. Nageswar Rao A.I.R.].

## 27. Question

A group of shareholders consisting of 30 members decide to file a petition before the Tribunal for relief against oppression and mismanagement by the Board of Directors of M/s. Aravalli Manufacturing Company Limited having a paid up Share Capital of Rs. 1 crore.

The company has a total of 500 members and the group of 30 members holds one-tenth of the total paidup share capital accounting for one- fifteenth of the issued share capital. The grievance of the group is that due to the mismanagement by the Board of Directors, the company is incurring losses and has not declared any dividend for the past five years. In the light of the provisions of the Companies. Act, 2013, please advise the group of shareholders regarding the admission of the petition and the relief thereof.

Answer:

Section 244 of the Companies Act, 2013 provides the right to apply to the Tribunal for relief against oppression and mis-management. This right is available only when the petitioners hold the prescribed limit of shares as indicated below:

- (1) In the case of company having a share capital, not less than 100 members of the Company or not less than one tenth of the total number of its members whichever is less or any member or members holding

not less than one tenth of the issued share capital of the company, provided that the applicant(s) have paid all calls and other dues on the shares.

- (2) In the case of company not having share capital, not less than one-fifth of the total number of its members.

As per the facts, a group of 30 members decided to file a petition. Total number of members are 500 & one tenth of 500 will be 50 and lower of above is 50. Thus, the group of shareholders who decides to file the petition are less than 50. However, the group of 30 members holds one- fifteenth of the issued share capital which is less than the required one tenth of the issued share capital. In view of this, the group is not having requisite number of shares and shareholding for being eligible to approach the Tribunal for relief.

Also, the shareholders may not succeed in getting any relief from the tribunal as continuous losses cannot, by itself, be regarded as oppression (Ashok Betelnut Co. P. Ltd. vs. M.K. Chandrakanth). Similarly, the failure to declare dividend or payment of low dividends also does not amount to oppression. (Thomas VeddonV.J. Vs.

Kuttanad Rubber Co. Ltd.)

## CHAPTER 19 DORMANT COMPANY

**Que. 1] Write a short note on: Dormant Companies**

**Explain the term 'Significant Accounting Transaction' while determining status of a company as a dormant company under the Companies Act, 2013. CS (Executive) - Dec 2018 (3 Marks)**

**Ans.:** The Companies Act, 2013 has recognized a new set of companies called as dormant companies. **Section 455** read with the **Companies (Miscellaneous) Rules, 2014** makes the provisions for the Dormant Companies.

**Dormant Company [Section 455(1)]:** Where a company is formed and registered under the 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 ROC in prescribed manner for obtaining the status of a dormant company.

**Inactive Company:** Inactive Company means a company:

- (a) Which has not been carrying on any business or operation, or has not made any significant accounting transaction during the last 2 financial years or
- (b) Has not filed financial statements and annual returns during the last 2 financial years.

**Significant Accounting Transaction:** It means any transaction other than -

- (a) Payment of fees to the ROC.
- (b) Payments made by it to fulfill the requirements of Companies Act or any other law.
- (c) Allotment of shares.
- (d) Payments for maintenance of its office and records.

Other important provisions applicable to dormant company are as follows:

**Register of dormant companies [Section 455(3)]:** The Registrar shall maintain a register of dormant companies in such form as may be prescribed.

As per Rule 5 of the Companies (Miscellaneous) Rules, 2014, the Register maintained under the portal maintained by the Ministry of Corporate Affairs on its web-site [www.mca.gov.in](http://www.mca.gov.in) or any other website notified by the Central Government, shall be the register for dormant companies.

**Que. 2] A group of persons wants to form a company for a future project and acquire the status of a 'dormant company'. The group seeks your advice about the procedure and the conditions to be complied with under the provisions of the Companies Act, 2013.**

**CS (Executive) - Dec 2015 (2 Marks)**

**Ans.:** Dormant Company means any of the following type of company:

- (a) A company which has been formed and registered for a future project or to hold an asset or intellectual property and has no significant accounting transaction.
- (b) Inactive company.

A Company can obtain status as Dormant Company by Suo motu or ROC can declare a company as Dormant company.

**On certain defaults ROC can treat the company as dormant company [Section 455(4)]:** If a company has not filed financial statements or annual returns for 2 financial years consecutively, the Registrar shall issue a notice to that company and enter the name of the company in the register of dormant companies. Registrar shall initiate the process of striking off the name of the company if the company remains as a dormant company for a period of consecutive **5 years**.

**Procedure to be adopted by the company for obtaining status of dormant company suo motu:**

A company may make an application in **Form No. MSC-1** along with prescribed fee to the Registrar for obtaining the status of a Dormant Company after passing a **special resolution** to this effect in the general meeting of the company or after issuing a notice to all the shareholders of the company for this purpose and obtaining consent of at least **3/4th shareholders in value**.

**Application for obtaining status of dormant company [Section 455(2)]:**

The Registrar on consideration of the application shall allow the status of a dormant company to the applicant and issue a certificate. As per **Rule 4**, the Registrar shall, after considering the application filed in **Form No. MSC-1**, issue a certificate in **Form No. MSC-2** allowing the status of a Dormant Company to the applicant.

**Procedure for obtaining the status of dormant company:**

- (1) The company shall call a board meeting to fix day, date, time and venue for General Meeting of the members of the company to pass resolution for making application to the ROC to obtain status of a dormant company.
- (2) The company shall obtain Statement of affairs from the Auditor of the company. The statement of affairs shall give the financial position of the company at the time of passing resolution in the shareholders meeting.
- (3) The company shall hold the General Meeting at the appointed time, place and date as per the notice calling the said meeting. The notice shall propose the resolution as a special resolution. The company shall pass a special resolution for obtaining the status of a dormant company and authorizing the director(s) to make application to ROC or After issuing a notice to all the shareholders of the company for this purpose and obtaining consent of at least 3/4th shareholders (in value).
- (4) After passing the special resolution, the company shall file Form No. MGT-14 with ROC for filing special resolution.
- (5) After filling of Form No. MGT-14, the company shall file Form No. MCS-1 with the ROC along with the copy of the special resolution, copy of statement of affairs, declarations by the directors and other necessary documents.
- (6) On being satisfied with the merits of the application, the ROC shall issue certificate in Form No. MSC-2 on confirming the application.

**Que. 3] What are the prerequisite for obtaining the status of Dormant Company?**

**Ans.:** As per **Rule 3**, the Registrar shall not grant the status of a dormant company if:

- (a) Any inspection, inquiry or investigation has been ordered or taken up or carried out against the company.
- (b) Any prosecution has been initiated and pending against the company under any law.
- (c) There are public deposits which are outstanding or the company is in default in payment thereof or interest thereon.
- (d) There are outstanding loans, whether secured or unsecured.
- (e) The company is having any outstanding loan, whether secured and unsecured. (But if company has any outstanding unsecured loan then the company may apply for status of dormant company only after obtaining NOC from the lender. Such NOC is required to be attached to the Form which is required to be filed with ROC)
- (f) There is dispute in the management or ownership of the company. A certificate in this regard required to taken from Management. Such Certificate required to be attached in the Form which is required to be filed with ROC.
- (g) There are outstanding statutory taxes, dues, duties etc.
- (b) There is default in payment of its workmen's dues.
- (i) The Company is a listed company.



**Que. 4] State the privileges and exemptions available to dormant company under the provisions of the Companies Act, 2013.**

**CS (Executive) - Dec 2015 (2 Marks)**

**Anshul Gold Farm Ltd. has obtained the status of dormant company on 15th December 2018. Enumerate the various exemptions which the company shall be entitled to under the Companies Act, 2013.**

**CS (Executive) - Dec 2018 (3 Marks)**

**Ans.: Privileges of a Dormant Company:** The privileges and exemptions enjoyed by a dormant company or its advantages over other companies are as follows:

- (1) Dormant Company is required to hold only one meeting of the Board of Directors in each half of a calendar year. However, the gap between the two meetings should not be less than 90 days.
- (2) Dormant Company is not required to include the statement of Cash Flow in its financial statement.
- (3) The provision of rotation of auditors is not applicable in case of the dormant company.
- (4) Dormant companies enjoy the advantages of lower statutory compliance cost as less statutory compliance are applicable to dormant company as compared to active company.
- (5) Dormant status is an advantage to promoters who want to hold an intellectual property or an asset under the corporate shield for its usage at a later stage.
- (6) Companies can enjoy the status of dormant company for a period of 5 consecutive years.

**Que. 5] How many directors are required on the board of dormant company under the Companies Act, 2013? Which return is required to be filed with the ROC by the dormant company once in a year?**

**Ans.: Number of directors and obtaining status of active company [Section 455 (5)]:** A dormant company shall have such minimum number of directors, file such documents and pay such annual fee as may be prescribed to the Registrar to retain its dormant status in the register.

As per **Rule 6**, a dormant company shall have a minimum number of 3 directors in case of a public company, 2 directors in case of a private company and 1 director in case of OPC. The provisions of the Act in relation to the rotation of auditors shall not apply on dormant companies.

As per **Rule 7**, a dormant company shall file a "Return of Dormant Company" position duly audited by a chartered accountant in practice in Form **MSC-3** within a period of 30 days from the end of each financial year.

**Que. 6] When dormant company becomes active company under the provisions of the Companies Act, 2013? Also state the procedure to be followed in this regard.**

**Ans.:** A company cannot be in the dormant status for more than 5 years. Before completion of 5 years as dormant Company, such company has to apply for activation or strike off.

As per **Section 455(5)**, a dormant company may become an **active company** voluntarily on an application made in this behalf accompanied by prescribed documents and fee.

As per **Rule 8**, an application for obtaining the status of an active company shall be made in **Form No. MSC-4** and shall be accompanied by a return in **Form No. MSC-3** in respect of the financial year in which the application for obtaining the status of an active company is being filed.

However, Registrar shall initiate the process of striking off the name of the company if the company remains as a dormant company for a period of consecutive **5 years**.

The Registrar shall, after considering the application, issue a certificate in **Form No. MSC-5** allowing the status of an active company to the applicant.

**Que. 7] XYZ Ltd. is a public company incorporated under the Companies Act, 2013. The company obtained a status of dormant company as it has not been carrying on any business or operation. Later company started functioning and also started its business operations. However, company failed to inform the ROC about commencement of its business operations. Examining the provisions of the Companies Act, 2013 state what action can be taken by the ROC.**

**Ans.:** If a company becomes active it must file an application within 7 days for obtaining the status of Active Company. Registrar on his own also can treat it as active company if it is found that company is functional.

Where the Registrar has reasonable cause to believe that any company registered as 'dormant company' under his jurisdiction has been functioning in any manner, directly or indirectly, he may initiate the proceedings for enquiry u/s 206 and if, after giving a reasonable opportunity of being heard to the company in this regard, it is found that the company has actually been functioning, the Registrar may remove the name of such company from register of dormant companies and treat it as an active company.

**Striking of name of the company [Section 455(6)]:** The Registrar shall strike off the name of a dormant company from the register of dormant companies, which has failed to comply with the requirements of Section 455.

**Que. 8] Distinguish between: Small Company and Inactive Company**

**CS (Executive) - June 2016 (4 Marks)**

**Ans.: Small Company [Section 2(85)]:** Small company means a private company,

**(i) Paid-up share capital** of which does not exceed Rs. **50 lakh** or such higher amount as may be prescribed which shall not be more than **Rs. 10 Crore** or

**(ii) Turnover** of which as per its last profit and loss account does not exceed Rs. **2 Crore** or such higher amount as may be prescribed which shall not be more than Rs. **100 Crore**.

Nothing in this definition shall apply to: (This means following companies cannot be small companies)

- (a) Holding or a subsidiary company
- (b) Company registered u/s 8 or
- (c) Company or body corporate governed by any Special Act.

**Inactive Company** means a company:

- (a) Which has not been carrying on any business or operation, or has not made any significant accounting transaction during the last 2 financial years or
- (b) Has not filed financial statements and annual returns during the last 2 financial years.

## 13. GENERAL MEETINGS

### 1. Question

Kirti Ltd. has total paid-up share capital of `23 crore and its annual general meeting is scheduled on 27th December, 2018. Ritik is holding paid-up share capital having nominal value of `3 crore and Sonu is holding paid-up share capital having nominal value of `2.4 crore. On 24th December, 2018 both Ritik and Sonu wanted to issue proxy in favour of Rohit to attend meeting on their behalf. Rohit is not a member of any company. Decide under the provisions of the Companies Act, 2013 whether both Ritik and Sonu can appoint Rohit as their proxy.

### Answer

Section 105 of the Companies Act, 2013 provides that a member, who is entitled to attend and vote, can appoint another person as a proxy to attend and vote at the meeting on his behalf. Proxy need not be a Member. A Proxy can act on behalf of Members not exceeding fifty and holding in the aggregate not more than ten percent of the total share capital of the company carrying Voting Rights.

However, a Member holding more than ten percent of the total share capital of the company carrying Voting Rights may appoint a single person as Proxy for his entire shareholding and such person shall not act as a Proxy for another person or shareholder.

Ritik holding in the given case is 13.0% and Sonu is 10.4%, since the holding of both severally exceeds 10% of total share capital of the company same person cannot be appointed as Proxy for both Ritik and Sonu, he can be appointed as proxy for either of the two.

### 2. Question

In Pallavi Chemicals Ltd. resolution for issue of bonus shares in the general meeting was put to remote e-voting and requisite majority has approved but quorum is not present at the general meeting. What would be the implications ?

### Answer

The general meeting can only be held valid if the quorum is present at the meeting. The resolution that was put to remote e-voting and has obtained majority votes shall be taken up at adjourned meeting. Meeting without requisite quorum is invalid.

### 3. Question

Assume yourself as Company Secretary in practice and secretarial auditor of Rama Ltd. which is having its annual general meeting scheduled on 17th August, 2018 at its registered office in Mumbai. On 16th August, 2018 you have a business meeting fixed at Kochi and return flight to Mumbai in the evening of 16th August, 2018. But due to bad weather conditions all flights departing from Kochi are declared cancelled. Discuss the alternatives available to you with regard to the annual general meeting of Rama Ltd.

**Answer**

According to section 146 of the Companies Act, 2013 the auditor shall, unless otherwise exempted by the company, attend either by himself or through his authorised representative, who shall also be qualified to be an auditor, any general meeting and shall have right to be heard at such meeting on any part of the business which concerns him as the auditor.

In the given circumstance provision of section 146 is applicable and authorized representative may be sent to attend the general meeting of the company.

**4. Question**

On 5th January, 2018 in a general meeting a motion for removal of a director was put to vote. The Chairman declared the motion passed as ordinary resolution by show of hands. In the next general meeting held on 28th September, 2018, a member questioned the validity of the said resolution which was declared as passed by the Chairman alleging that majority votes were against the motion and asked the chairman to disclose number of votes cast in favour of and against the said resolution. Referring to the provisions of the Companies Act, 2013 discuss if the demand of member is tenable.

**Answer**

According to section 107 of Companies Act, 2013 at any general meeting, a resolution put to the vote of the meeting shall, unless a poll is demanded under section 109 or the voting is carried out electronically, be decided on a show of hands. A declaration by the Chairman of the meeting of the passing of a resolution or otherwise by show of hands and an entry to that effect in the books containing the minutes of the meeting of the company shall be conclusive evidence of the fact of passing of such resolution or otherwise. Hence the demand of members is not tenable.

**5. Question**

As a company secretary referring to the provisions of Companies Act, 2013 examine the validity of following propositions :

- (a) A company wishes to call its annual general meeting on a working day at 6.30 p.m.
- (b) Due to the availability of chairman, the AGM of the company can be held only on 15th August, 2018. All members are ready to give consent in writing in advance for the same.
- (c) Due to technical problem, company wants to hold its AGM at a city other than a city at which registered office of the company is situated.

**Answer**

According to section 96(2) of the Companies Act 2013, every annual general meeting can be called during business hours, that is, between 9.00a.m. to 6.00p.m. on any day that is not a National Holiday. It should 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 situated. The Central Government is empowered to exempt any company from these provisions, subject to such conditions as it may impose.

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.

In case of Government Company, the Central Government may approve such other place for holding AGM, if the place is other than the registered office.

In case of Section 8 Company, the time, date and place of each AGM are decided upon before-hand by the Board having regard to the directions if any, given in this regard by such company in the general meeting.

In view of the above provisions of the Companies Act, 2013:

- (a) Annual General Meeting can be held only between 9:00 a.m. to 6:00 p.m, unless exempted by the Central Government.
- (b) AGM cannot be held on a National Holiday, unless exempted by the Central Government, even though the company has consent in writing in advance to conduct AGM on 15th August, 2018.
- (c) AGM can be held only at the city of registered office, unless exempted. As per the proviso to Section 96(2), 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.

**6. Question**

Last Annual General Meeting (AGM) of one of the top 100 listed companies was held on 25th May, 2018 pertaining to the FY 2017-18. The Board of directors of the company is planning to hold this year's AGM at a

possible later date due to technical issues in finalisation of accounts. Give your suggestions about the date before which the AGM should be held in reference to relevant provisions of the Companies Act, 2013.

**Answer**

Section 96 of the Companies Act, 2013 provides that every company, other than a one person company is required to hold an annual general meeting every year.

Secretarial Standards on General Meetings (SS-2) provides that the Board shall, every year, convene or authorize convening of a meeting of its members called the Annual General Meeting to transact items of ordinary business specifically required to be transacted at an annual general meeting as well as special business, if any. If the Board fails to convene its Annual General Meeting in any year, any Member of the company may approach the prescribed authority, which may then direct the calling of the Annual General Meeting of the company.

Following are the key provisions regarding the holding of an Annual General Meeting:

1. Annual general meeting should be held once in each calendar year.
2. First annual general meeting of the company should be held within 9 months from the closing of the first financial year. Hence it shall not be necessary for the company to hold any annual general meeting in the year of its incorporation.
3. Subsequent annual general meeting of the company should be held within 6 months from the date of closing of the relevant financial year.
4. The gap between two annual general meetings shall not exceed 15 months.

Additionally for listed entities SEBI vide recent notification provided that the top 100 listed entities by market capitalization, determined as on March 31st of every financial year, shall hold their annual general meetings within a period of five months from the date of closing of the financial year. The top 100 listed entities shall provide one-way live webcast of the proceedings of the annual general meetings.

Explanation : The top 100 entities shall be determined on the basis of market capitalization, as at the end of the immediate previous financial year. (Notified on 9th May, 2018 effective from April 1, 2019) Hence for the financial year 2018-19, the meeting should/ought to have been held within earlier of the two dates given below i.e.:

Before 31.8.2019 - within 5 months from the close of financial year 2018-19, OR Before 24.8.2019 - lapse of 15 months from date of last AGM

Hence, AGM ought to have been held before 24th August, 2019.

However, according to third proviso to section 96(1) of Companies Act, 2013, on an application from the company, 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 of not exceeding three months. The company may apply to the Registrar for extension for holding AGM, justifying it as a special reason based on the facts of the case.

Accordingly, the company will be advised to hold its meeting on or before 24.08.2019 or such extended period, as may be permitted by the Registrar on an application by the company.

### 7. Question

A newly joined trainee of the secretarial department would like to know details of information to be entered in respect of resolution passed through postal ballot by the company. Advise him.

### Answer

As per Section 110 of Companies Act, 2013 and Rule 22(10) of the Companies (Management and Administration) Rules, 2014, every company which is required to or which proposes to get any resolution passed through postal ballot should maintain a separate register for each postal ballot to record the assent or dissent received through postal ballot.

The scrutinizer shall maintain a register either manually or electronically to record their assent or dissent received, mentioning the particulars of name, address, folio number or client ID of the shareholder, number of shares held by them, nominal value of such shares, whether the shares have differential voting rights, if any, details of postal ballots which are received in defaced or mutilated form and postal ballot forms which are invalid.

Entries in the register should be made immediately after the opening of postal ballots. Separate folios should be maintained for each resolution passed through postal ballot. The register should be kept at the registered office of the company after the Scrutinizer has submitted his report.

The register, postal ballot forms and all other related records are not available for inspection. All postal ballot forms should be authenticated by the Scrutinizer. Entries in the register should be authenticated by the Scrutinizer.

The register, postal ballot forms and all other related records should be kept in the safe custody of the Scrutinizer till the Chairman signs the Minutes Book in which the result of the voting by postal ballot is recorded.



The secretary of the company, managing director or whole-time director or the director so authorised and the Scrutinizer should make adequate arrangements for safe custody of the register and proof of dispatch of Notices and all envelopes received by post or by hand, until the Scrutinizer submits his report to the Chairman.

The Scrutinizer should return the postal ballot forms and any related documents or records to the designated person of the company for safekeeping until the resolution has been implemented.

The Scrutinizer's report and office copies of the notices should be preserved in good order until the resolution has been implemented or for a period of 10 years, whichever is later.

### 8. Question

'A', a shareholder, appointed 'X' as his proxy for the general meeting of a company. The proxy forms were lodged 50 hours before the meeting. The Chairman of the meeting refused to accept the proxy stating that the proxies should be lodged at least 70 hours before the beginning of the meeting as per articles of the company. However, despite Chairman's refusal proxy participated in the meeting. Meanwhile 'A' also rushed to attend the meeting and both 'A' and 'X' voted on a particular resolution of the meeting. On the basis of above facts, answer the following :

- (i) Can 'X' compel the Chairman to admit the proxy ?
- (ii) Since both 'A' and 'X' voted, the Chairman invalidated both the votes. Discuss whether the Chairman acted as per the provisions of the Companies Act, 2013.

### Answer

- (i) Section 105(4) of Companies Act, 2013 specifies the time limit for deposit of proxy forms. The instrument appointing the proxy must be deposited with the company, 48 hours before the meeting. Any provision contained in the articles, requiring a longer period than 48 hours shall have effect as if a period of 48 hours had been specified.

Para 6.6.1 of SS-2 provides that proxies shall be deposited with the company either in person or through post not later than forty-eight hours before the commencement of the Meeting in relation to which they are deposited and a Proxy shall be accepted even on a holiday if the last date by which it could be accepted is a holiday.

Articles of the company cannot prescribe a longer than 48 hours for lodging the proxy forms. And so the refusal of the chairman is void. X can compel the chairman to accept the Proxy.

- (ii) If after appointment of proxy, the member himself attends the meeting, it amounts to automatic revocation of proxy. But once the proxy has voted, it cannot be revoked.

Since Mr. A i.e. a member himself attended a meeting and voted on resolution, it will amount to revocation of proxy. Thus, any vote put by Mr. X i.e. proxy shall be invalid.

Chairman cannot invalidate both the votes. Vote of the shareholder has to be considered and of the proxy should be invalidated. Decision of the Chairman is void.

### 9. Question

A group of shareholders holding 13% of the total paid-up share capital of Lala Investments Ltd. requested the Board of directors of the company to convene the Extraordinary General Meeting (EGM) by their letter dated 5th October, 2019, to discuss the matters set out in their requisition to the company. The Board of directors did not act on their request until end of October 2019. As a practicing Company Secretary what would you suggest as to the further course of action and the procedure to be followed in this regard ?

### Answer

Section 100(2)(a) of the Companies Act, 2013 provides that the Board shall, at the requisition made by in the case of a company having a share capital, such number of members who hold, on the date of the receipt of the requisition, not less than one-tenth of such of the paid-up share capital of the company as on that date carries the right of voting call an extraordinary general meeting of the company within twentyone days from the date of receipt of a valid requisition.

The requisition made under section 100(2) 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.

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 requisiteness themselves within a period of three months from the date of the requisition.

The meeting by the requisitionists shall be called and held in the same manner in which the meeting is called and held by the Board

Accordingly, the requisitionists members holding more than 10% of the paid-up share capital, may proceed to convene and hold the meeting themselves within 3 months from 5th October 2019, being the date of

requisition. Rule 17 of the Companies (Management and Administration) Rules, 2014 provides the following for 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) The notice shall specify the place, date, day and hour of the meeting and shall contain the business to be transacted at the meeting.

Explanation.- For the purposes of this sub-rule, it is here by clarified that requisitionists should convene meeting at Registered office or in the same city or town where Registered office is situated and such meeting should be convened on any day except national holiday.

- (3) If the resolution is to be proposed as a special resolution, the notice shall be given as required by subsection (2) of section 114.
- (4) The notice shall be signed by all the requisitionists or by a requisitionists duly authorised in writing by all other requisitionists on their behalf or by sending an electronic request attaching therewith a scanned copy of such duly signed requisition.
- (5) No explanatory statement as required under section 102 need be annexed to the notice of an extraordinary general meeting convened by the requisitionists and the requisitionists may disclose the reasons for the resolution(s) which they propose to move at the meeting.
- (6) The notice of the meeting shall be given to those members whose names appear in the Register of members of the company within three days on which the requisitionists deposit with the Company a valid requisition for calling an extraordinary general meeting.
- (7) 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 fortyfive days from the date of receipt of a valid requisition.

- (8) 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.

#### 10. Question

RST Communications Ltd. has a total paid-up share capital of ` 6 crore consisting of 6 lakh shares of ` 100 each. Its annual general meeting had been scheduled for 15th September, 2019. On 25th August, 2019, two of its members jointly holding 5500 fully paid shares sent a notice to the company intimating their intention to move a resolution in the forthcoming Annual General Meeting for removing a director before the expiry of his term and appointing another person as a director in place of the director so removed. Is the company required to act on this notice? Explain with reference to the relevant legal provisions.

#### Answer

According to section 115 r/w Rule 23 of the Companies (Management and Administration) Rules, 2014 and with Section 169(2) of the Companies Act, 2013, the special notice with the intention of removal of director of the company or to appoint somebody in place of a director so removed, is required to be sent by the members to the company not earlier than 3 months but at least 14 days before the date of the 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.

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 1% of total voting power or holding shares on which an aggregate sum of not less than `5 lakh has been paid up on the date of the notice.

In the instant case, since the two shareholders are jointly holding shares amounting to `5,50,000 and have sent a special notice 20 days before the date of Annual General Meeting intimating their intention to remove a director and appointing another person as director in place of director so removed is in compliance with the provisions under Rule 23 of the Companies (Management and Administration) Rules, 2014.

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. 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. 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.

Hence, the company is required to act on such notice and follow the other procedures w.e.f. removal of Director as prescribed under Section 169 of the Companies Act, 2013.

### 11. Question

The Annual General Meeting (AGM) of a company is scheduled to be held on 22nd August, 2019 at 2 p.m. Taking into account the relevant legal provisions contained in the Companies Act, 2013 indicate the latest time for posting notices of the meeting to the members to ensure legal compliance.

### Answer

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. For the purpose of reckoning twenty-one days clear Notice, the day of sending the Notice and the day of Meeting shall not be counted.

Further in case the company sends the Notice by post or courier, an additional two days shall be provided for the service of Notice in line with Rule 35(6) of the Companies (Incorporation) Rules, 2014 which provides that in case of delivery by post, such service shall be deemed to have been effected, at the expiration of forty eight hours after the letter containing the same is posted.

In the instant case, the Annual General Meeting is called on August 22, 2019 at 2:00 P.M. Therefore, the notice must be sent latest by July 31, 2019. Further, if notice is sent by post or courier it must be posted latest by July 29, 2019.

### 12. Question

Ratan is a member of Adarsh Club Ltd., a company formed for promoting sports and not for profit. For the ensuing extraordinary general meeting to be held on 5th November, 2019, he appointed his daughter Prema (not a member of the company) as proxy to attend the meeting as he would be out of station on that date. Accordingly, Prema deposited the proxy with the club on 2nd November, 2019. The club rejected the proxy instrument. Is the action of the club valid ?

### Answer

According to Section 105(1) of the Companies Act, 2013, any member of a company who is entitled to attend and vote at the meeting of the company is entitled to appoint another person as a proxy (who may not be a member) to attend and vote at the meeting, though a proxy does not have the right to speak at such meeting and shall not be entitled to vote except on a poll in the meeting.

However, according to the third proviso to Section 105(1) of the Companies Act, 2013, members of certain class or classes of companies as may be specified by the Central Government shall not be entitled to appoint any other person as a proxy. Accordingly, in case of companies incorporated under Section 8 of the Companies Act, 2013 a member of a company is not entitled to appoint any other person as a proxy unless such other person is also a member of such company as prescribed under Rule 19 of the Companies (Management and Administration) Rules, 2014.

In the instant case, though the proxy has been deposited before the specified time period (i.e., at least 48 hours before the meeting) Prema cannot act as a proxy as she herself is not a member of the company. Therefore, Adarsh Club Ltd. is right in rejecting her proxy instrument.

### 13. Question

25 members of a company holding 11% of total paid up equity share capital made a requisition on 5th December, 2019 to the Board of Directors to convene an Extra Ordinary General Meeting (EGM). State the date by which the Board of Directors is required to proceed and the date by which the EGM should be held. What could the requisitionists do if the Board of Directors fail to act on the requisition ?

### Answer

Section 100(2)(a) of the Companies Act, 2013 provides that the Board shall, at the requisition made in the case of a company having a share capital, by such number of members holding, on the date of the receipt of the requisition, not less than one-tenth of the paid-up share capital of the company carrying right to vote, call an Extra-ordinary General Meeting of the company within twenty-one days from the date of receipt of a valid requisition. Such meeting shall be held on a day not later than forty-five days from the date of receipt of such requisition.

Accordingly, in the given case, the requisition has been made by 25 members of a company, holding 11% of total paid-up equity share capital on December 05, 2019 to the Board of Directors, thus, it is a valid request. Thus, the Board of directors are required to call the Extraordinary General Meeting (EGM) within 21 days from

the date of receipt of such valid requisition i.e., by December 26, 2019 and the EGM shall be held on a day not later than 45 days from the date of receipt of such requisition i.e., by January 19, 2020.

In case the Board fails to call and convene the Extra-ordinary General Meeting requisitioned by the Members within the specified time period, it may be called and held by the requisitionists themselves within a period of three months from the date of the requisition.

Therefore, in the present case, if the Board of Directors does not act upon the request, the requisitionists may call and convene an Extra-ordinary General Meeting on their own within 3 months from the date of the requisition i.e. by March 04, 2020.

#### 14. Question

Himmat Ltd. has a paid-up capital of `50,00,000 dividend into `5,00,000 shares of `10/- each. Special notice of intimation to move a resolution to remove Rajesh & Co., statutory auditor, before the expiry of their term and appointing Ritaban & Co. in their place has been given to the company by a shareholder holding 5,023 shares.

In the above context, give your suggestion to Himmat Ltd.

#### Answer

Section 115 read with rule 23 of Companies (Management and Administration) Rules, 2014 deals with resolutions requiring special notice.

Where a special notice is so required of any resolution, 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 total voting power or holding shares on which the aggregate sum of not less than Rs.5 Lakhs has been paid-up on the date of notice.

The instances which require a special notice under the provisions of the Companies Act, 2013 are as follows:

- (a) Under Section 140(4) of the Companies Act, 2013, resolution for appointing a person as auditor at the annual general meeting other than a retiring auditor or providing expressly that the retiring auditor shall not be re-appointed.
- (b) Under sub-section (2) and (5) of section 169 to remove a director before the expiry of the period of his office and to appoint somebody in place of director so removed in the same meeting.

Accordingly, there is no such provision of special notice under the Companies Act, 2013, for removal of statutory auditor. However, the Articles of Association of company may provide for additional matters which may require special notice, in terms of Section 115 of the Companies Act, 2013.



Section 140(1) read with Rule 7 of the Companies (Audit and Auditors) Rules, 2014, clearly stipulates that the auditor appointed under section 139 of the Companies Act, 2013 may be removed from his office before the expiry of his term only by passing a special resolution of the company, after obtaining the previous approval of the Central Government by filling an application in form ADT-2 within 30 days of the resolution passed by the Board. Hence, Rajesh & Co. can be removed by following the prescribed procedures. Further, as per Section 139(8) of the Companies Act, 2013, Ritaban & Co. can be appointed by the Board of Directors within 30 days to fill such casual vacancy.

### 15. Question

Can an annual general meeting be called at a shorter notice ? Would your answer be different if it were an extra-ordinary general meeting ?

#### Answer - Shorter notice

As per Section 101 (1) of the Companies Act, 2013, Annual General Meeting may be called after giving a shorter notice, if consent is accorded in writing or by electronic mode by not less than 95% of the members entitled to vote at such meeting.

In the case of extra-ordinary general meeting, a shorter notice can be given if consent is accorded by the 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 95% 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 95%, of the total voting power exercisable at that meeting.

However, where any member of a company is entitled to vote only on some resolution or resolutions to be moved at a meeting and not on the others, those members shall be taken into account in respect of the former resolution or resolutions and not in respect of the latter.

### 16. Question

Indicate steps to file an application for seeking extension for calling Annual General Meeting and mention the form in which such application needs to be filed with the Registrar of Companies

#### Answer

Section 96 of the Companies Act, 2013 provides that every company other than a One Person Company shall in each year hold in addition to any other meetings, a general meeting as its annual general meeting within a period of six months, from the date of closing of the financial year.

However, 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. The steps to file an application for seeking extension for convening Annual General Meeting (AGM) are given below:

- The company shall call for a meeting of Board of Director for which a notice must be sent at least 7 days before holding of Meeting of Board.
- Call a meeting of Board of Directors for considering the proposal of extension of date of AGM.
- Pass a resolution for extension of time limit for holding annual general meeting specifying the due reason for extension of AGM. File application in prescribed Form GNL- 1 with ROC concerned.
- Detailed application should contain the following details:
  - Reasons of extension
  - Period for which extension is required (Note: It should not exceed three months)
- The certified copy of the Board resolution passed be attached to such application. Other document, if any, justifying the application be attached also.
- The ROC shall scrutinize the form and documents and then consider granting the extension not exceeding 3 months.
- The Company shall conduct the AGM before completion of the extended time.

### 17. Question

A has been appointed as a Company Secretary in the Company by a circular resolution. In addition, he has also been advised to act as a Group Company Secretary and head of the parent Company and its subsidiary. Examine with reference to the provisions of the Act.

### Answer

Section 179(3) read with Rule 8 of Companies (Meetings of Board and its Powers) Rules, 2014, provides that the Board of Directors of a company shall appoint or remove key managerial personnel (KMP) by means of resolutions passed at meetings of the Board.

Therefore, appointment of A as a Company Secretary in the company cannot be done by circular resolution. As per Section 203(3) of the Companies Act, 2013, a whole time key managerial personnel shall not hold office in more than one Company except in its subsidiary company at the same time.

In the given situation A has is also advised to act as a Group Company Secretary consisting of a group of a parent company in which he has been appointed and its subsidiary. Therefore, he can act as a Group Company Secretary to look after the parent company and its subsidiary.

**Alternate Answer**

Section 179(3) read with Rule 8 of Companies (Meetings of Board and its Powers) Rules, 2014, provides that the Board of Directors of a company shall appoint or remove key managerial personnel (KMP) by means of resolutions passed at meetings of the Board.

Therefore, appointment of A as a Company Secretary in the company cannot be done by circular resolution. In the given situation, A has been appointed as a Company Secretary in the company by a circular resolution which is not valid hence he cannot be advised to act as a Group Company Secretary and head of the parent Company and its subsidiary.

**18. Question**

XYZ Ltd. issued a notice on 1st August, 2019 to hold its Annual General Meeting on 24th August, 2019. The company had given the notice through email to all the members as per the record of the company with read receipt. The same is received by all the members of the company. Check the validity of the notice.

**Answer**

As per section 101 of the Companies Act, 2013, a general meeting of a company may be called by giving not less than 21 clear days' notice either in writing or through electronic mode. Notice in electronic mode shall be given in such manner as may be prescribed.

'Clear days' means days exclusive of the day of the notice of service and of the day on which the meeting is held.

In this case the date of holding the Annual General Meeting is 24th August, 2019 and the date of issue of notice is 01st August, 2019. Days to be excluded is day of holding the Annual General Meeting i.e. 24th August, 2019 and day of issue of notice i.e. 01st August, 2019. Therefore, notice of 22 days is given in this case.

Number of days' notice required under section 101 of the Act is 21 days. Therefore, it is a valid notice.

**19. Question**

The directors of your company is of the opinion that every public company having more than `100 crore share capital have to provide for remote e-voting. Does the Companies Act 2013, make it compulsory or optional for such situations? Offer your comments.

**Answer**

Section 108 of the Companies Act, 2013 provides for Voting through electronic means. The Central Government may prescribe the class or classes of companies and manner in which a member may exercise his right to vote by the electronic means.

"Voting by electronic means" includes "remote e-voting" and voting at the general meeting through an electronic voting system which may be the same as used for remote e-voting. "Remote e-voting" means the facility of casting votes by a member using an electronic voting system from a place other than venue of a general meeting.

Section 108 read with Rule 20 of the Companies (Management and Administration) Rules, 2014, provides that, 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.

However, a Nidhi, or an enterprise or institutional investor referred to in chapter XB or chapter XC of the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 is not required to provide the facility to vote by electronic means.

Thus, companies fulfilling abovementioned criteria have to mandatory opt for e- Voting.

Assuming that the company with Rs. 100 crore share capital may be having more than 1000 members, the company should provide for e-voting. If there are less than 1000 members, e-voting is not compulsory.

**20. Question**

X is being appointed as a proxy for an annual general meeting of XYZ Ltd. The said meeting is being adjourned due to some reason. Now, Y is being appointed as a proxy to attend the adjourned meeting. Who will be a valid proxy for adjourned meeting ? And in case the general meeting of XYZ Ltd is scheduled on 22nd September, 2019 and the company has received 4 proxies for the same holdings of a member dated with 5th, 10th, 12th, and 19th September, 2019. Which proxy is valid ?

**Answer**

As per the Secretarial Standard on General Meeting (SS-2) an instrument of Proxy duly filled, stamped and signed, is valid only for the Meeting to which it relates including any adjournment thereof. However, if a proxy has been appointed for the original meeting and such meeting is adjourned, any proxy given for the adjourned meeting revokes the proxy given for the original meeting. A Proxy later in date revokes any Proxy/Proxies dated prior to such Proxy. Hence Mr. Y will be a valid proxy for adjourned meeting.

As per the Secretarial Standard on General Meeting (SS-2) if a company receives multiple proxies for the same holdings of a member, the proxy which is dated last shall be considered valid. So, the proxy dated last i.e. 19th September, 2019 shall be considered as valid.

**21. Question**

Decide whether the length of the notice is proper in the following cases with reference to the provisions of the Companies Act, 2013 ?

| Particulars                    | Case I – Sky Ltd.    | Case II – Moon Ltd.  |
|--------------------------------|----------------------|----------------------|
| Date of Annual General Meeting | 30th September, 2021 | 30th September, 2021 |
| Date of sending notice by post | 5th September, 2021  | 7th September, 2021  |

What would be your stand in case if Sky Ltd. and Moon Ltd. are section 8 companies ?

**Answer**

As per section 101 of the Companies Act, 2013, a General Meeting of company may be called by giving not less than 21 clear days' notice either in writing or through electronic mode. Clear days' means exclusive of the day of the notice of service and of the day on which the meeting is held. When a notice of General Meeting is sent by post, it shall be deemed to be served at the expiration of 48 hours after the letter containing the same is posted - Rule 35 of the Companies (Incorporation) Rules, 2014.

Each of 21 days must be full or complete days. The day on which the notice is deemed to be served on the member and the day of the general meeting have to be in addition to the 21 days.

|                                                                            | Case-I - Sky Ltd. | Case -II- Moon Ltd. |
|----------------------------------------------------------------------------|-------------------|---------------------|
| No. of days from the date of sending notice by post to the date of meeting | 26 days           | 24 days             |

|                                                             |         |         |
|-------------------------------------------------------------|---------|---------|
| Less: Day of meeting                                        | 1 day   | 1 day   |
| Less: Day of sending notice by post                         | 1 day   | 1 day   |
| Less: 2 days (equivalent to 48 hours) after date of posting | 2 days  | 2 days  |
| Number of clear days                                        | 22 days | 20 days |
| Length of notice                                            | Proper  | Shorter |

In case of section 8 company, a General Meeting of company may be called by giving 14 clear days' notice instead of 21 clear days. Hence, if Sky Ltd., and Moon Ltd. Are section 8 companies, notice issued for General Meeting is proper.

## 22. Question

Indra Kumar, head of the legal and secretarial department of a conglomerate wants to understand from you that which of the following resolutions shall only be passed by the postal ballot. Assist him with your answers as per the provisions of the Companies Act, 2013 based on the information available from the following table :

| Nature of Company  | Number of Members | Subject matter for which resolution is proposed |
|--------------------|-------------------|-------------------------------------------------|
| One Person company | 1                 | Alteration of Articles of Association           |
| Unlisted Company   | 190               | Buy-back of shares                              |
| Listed Company     | 12,340            | Election of small shareholders' Director        |

## Answer

Company shall transact such items of business as the Central Government may, by notification, declare to be transacted only by means of postal ballot. Provided that any item of business required to be transacted by means of postal ballot under section 110(1)(a) of the Companies Act, 2013, may be transacted at a general meeting by a company which is required to provide the facility to members to vote by electronic means under section 108, in the manner provided in that section.

As per Rule 22 of the Companies (Management and Administration) Rules, 2014 in relation to alteration of Articles of Association of the company, resolution relating to buy-back of shares and resolution relating to election of small shareholders' director shall be transacted through postal ballot. However, One Person Company and Companies having members up to 200 are not required to transact any business through postal ballot.

Accordingly, Indra Kumar can be informed that:

- One Person Company and Unlisted Company are not required to pass resolution through postal ballot. Listed Company is required to transact the business of election of small shareholders' director through postal ballot since the number of members are in excess of 200.

### 23. Question

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 requisitioners 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 Companies Act, 2013.

### Answer

Section 100(2) of the Companies Act, 2013 makes it obligatory on the Board of Directors to convene an extra ordinary meeting of members if requisitioned by the stipulated number of members (members holding at least 10% of paid up share capital carrying voting rights) 40% of members constitute the required number and the board of directors have violated the provisions of law by not calling the meeting. However, Section 100(4) of the Companies Act, 2013 provides that if Board fail to proceed to call a meeting within 21 days from the date of receipt of a valid requisition for a date within 45 days of the receipt of the requisition, the requisitionists may themselves call a meeting within 3 months of the date of the requisition.

Moreover, where a meeting is called by the requisitionists and the registered office is not made available to them it was decided in R. Chettiar v. M. Chettiar that the meeting may be held anywhere else.

Further, resolutions properly passed at such a meeting are binding on the company.

Thus, in the given case, since all the above mentioned provisions are duly complied with. Hence, the meeting with the resolution removing the managing director shall be valid.

### 24. Question

ABTF Ltd unlisted Co registered in Mumbai wants to hold its AGM in Delhi on 15 th Sept 9:30am. Is it allowed

### Answer



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.

Provided further that the Central Government may exempt any company from the provisions of this subsection subject to such conditions as it may impose.

Explanation.--For the purposes of this sub-section, "National Holiday" means and includes a day declared as National Holiday by the Central Government.

### 25. Question

XYZ Ltd wants to hold its EGM in Karnataka. The registered office of XYZ Ltd is in Tamil Nadu. Advise what will be your answer if XYZ Ltd is a subsidiary of a foreign Co. 70% Subsidiary

#### Answer

1) The Board may, whenever it deems fit, call an extraordinary general meeting of the company.

#### EGM ON REQUEST OF MEMBERS

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 place within India. Since X Ltd is not a 100% subsidiary, it cannot hold EGM Outside India.

### 26. Question

Notice given to issue sweat equity shares. But no material facts mentioned in the Notice. Is this Notice valid.

#### Answer

As per Section 102 in the case of any meeting other than an AGM, all business transacted thereat shall be deemed to be special business.

Further as per section 102, a statement setting out the following material facts concerning each item of special business to be transacted at a general meeting, shall be annexed to the notice calling such meeting:

- (a) The nature of concern or interest, financial or otherwise, if any, in respect of each item, of every director and the manager, if any or every other key managerial personnel and relatives of such persons; and
- (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. Thus, the objection of the member is valid

since the complete details about the issue of sweat equity should be sent with the notice. The notice is, therefore, not a valid notice as per section 102 of the Companies Act, 2013

### 27. Question

The articles of ABC Limited provided that only those shareholders would be entitled to vote whose names have been there on the Register of Members for two months before the date of the meeting. X, a member, of the ABC Limited was holding 200 equity shares of the Company. X transferred his shares to Y before one month from the date on which the meeting was due. The name of Y could not be entered in the Register of Members as the application of transfer of shares was pending X attended the meeting but he was prohibited by the company from exercising his voting right on the ground that he has not hold his share for specified period as provided in the articles before the date of the meeting.

State whether Y can exercise his voting right in the meeting? State also the grounds upon which Y may be excluded from exercising his voting rights in the meeting of the shareholders.

### Answer

Section 106 of Companies Act, 2013 provides that a public company shall by its Articles can put a restriction on the voting rights of a member only in the following 3 cases:

1. Any sum of call money which is due but is not paid on the shares registered in the members name.
2. Any other sum of money is due from the shareholder 3. The company has exercised a right of lien on the shares.

In the present case the restriction of ABC Ltd. To allow only those shareholder to vote whose names appear on the register of members for 2 months is therefore invalid as it would violate the provisions of the Act.

Mr. X can therefore exercise his right to vote.

Mr. X can be excluded from his right to vote only if he incurs the 3 disqualifications mentioned above

### 28. Question

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?

**Answer**

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.

**29. Question**

AGM is going to be held on 18th September

E voting is compulsory for this particular company. Please suggest the a. E voting period

**Answer**

E voting facility should remain open for at least 3 days and the period for such facility should end at 5pm on the day just before the day of general meeting. Thus, E – voting period in the present case cannot begin after 15th September. If it begins on 15th September 3 Days (15th, 16th, 17th) September would be provided for members to cast their vote electronically. Since, minimum 3 days have to be given, e – voting facility cannot begin after 15th September

**30. Question**

X Ltd, a listed Co whose equity shares are listed on stock exchange wanted to change its object clause. It decided to discuss by e-voting instead of postal ballot. Advice

**Answer**

Companies Act Provides that any item of business required to be transacted by means of postal ballot under clause (a), may be transacted at a general meeting by a company which is required to provide the facility to members to vote by electronic means under section 108, in the manner provided in that section.

**31. Question**

Tiwari Ltd. wants to declare dividend on equity shares. Can this matter be transacted by means of Postal Ballot where the total number of strength of members in the company is 300?

**Answer**

No, because declaration of dividend is an item of ordinary business so, this matter shall not be transacted by means of Postal Ballot.

**32. Question**

Mrs Kirti Singh who is not subjected to be reappointed as auditor of Uttam Ltd. has to be heard at meeting prior to her removal. Can this matter be transacted by means of Postal Ballot? The total strength of members in the company is 800.

**Answer**

No, where auditors have a right to be heard, the matter cannot be transacted by means of Postal Ballot.

**33. Question**

Abhiyogic Ltd. having 1,000 members with paid-up capital of ` 1 crore, decided to hold its Annual General Meeting (AGM) on 21st August, 2022, and it received a notice on 2nd July, 2022, from its 60 members holding paid-up capital of ` 7 lakhs, in aggregate, for a resolution to be passed at the AGM for appointing Vedya & Co., as its auditor from F.Y. 2022-23 onwards, instead of its existing auditor, Chepal & Co. which was originally appointed for 5 years term and had completed its 4 years term.

Such a notice for resolution was forthwith send by the company to Chepal & Co. which gave its representation in writing to the company along with a request for its notification to the members of the company, but it was received too late (3 days before the meeting) by the company.

In the context of aforesaid facts, please answer to the following question(s):-

- a) Whether the said notice was given by adequate number of members within the prescribed time limit to Abhiyogic Ltd.?
- b) Whether the company was bound to send to its members such representation made by Chepal & Co. and if it could not have been send, then in such case, what was the responsibility(ies) of the company?

**Answer**

As per section 140(4) of the Companies Act, 2013, resolution for appointment of an auditor other than the retiring auditor at an Annual General Meeting requires special notice. As per Section 115 of the Companies Act,

2013, read with rule 23 of Companies (Management and Administration) Rules, 2014:- Where, by any provision contained in this Act or in the Articles of Association of a company, 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.

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.

Here, Abhiyogic Ltd. is having 1,000 members with paid-up capital of ` 1 crore, and it received a notice from its 60 members holding paid-up capital of ` 7 lakhs, in aggregate, on 2nd July, 2022 for a resolution to be passed at the AGM to be held on 21st August, 2022.

As the members who gave the notice hold more than ` 5 lakhs in the paid-up capital of the company, they were eligible to give such notice.

Further, the notice should have been given not earlier than 3 months but at least 14 days before the date of meeting - 21st August, 2022, and the notice was given on 2nd July, 2022 i.e. within the prescribed time limit.

Thus, it can be said that the said notice was made by adequate number of members within the prescribed time limit to Abhiyogic Ltd.

b) As per Section 140(4) of the Companies Act, 2013: Where notice is given of a resolution appointing as auditor a person other than a retiring auditor and the retiring auditor makes with respect thereto representation in writing to the company (not exceeding a reasonable length) and requests its notification to members of the company, the company shall, unless the representation is received by it too late for it to do so,—

- I. in any notice of the resolution given to members of the company, state the fact of the representation having been made; and
- II. send a copy of the representation to every member of the company to whom notice of the meeting is sent, whether before or after the receipt of the representation by the company.

However, in the present case, Abhiyogic Ltd. received the representation made by Chepal & Co. too late and accordingly it was not bound to send such representation to its members even though it was requested by Chepal & Co. to do so.

Further, as per Section 140(4) of the Companies Act, 2013, if a copy of the representation is not sent as aforesaid because it was received too late or because of the company's default, the auditor may (without prejudice to his right to be heard orally) require that the representation shall be read out at the meeting such a copy of representation thereof shall be filed with the Registrar.

Accordingly, Abhiyogic Ltd., apart from giving to right to be heard orally to Chepal & Co. shall also made the representation read out at the AGM, if so required by Chepal & Co., and shall also file such representation with the Registrar, respectively.



## 14 . DIRECTORS

### 1. Question

Anil, a shareholder holding 9% equity shares of the company, who is not holding any directorship wants to stand for directorship in Pritam Ltd. in its next annual general meeting. State the procedure for appointment of Anil as per the provisions of the Companies Act, 2013.

### Answer

In case Mr. Anil not a retiring director in the company is desirous of standing for directorship of the Pritam Ltd., in pursuance of section 160 of the Companies Act, 2013 the following procedure needs to be followed:

1. The proposed director or some member intending to propose him as a director, has, not less than fourteen days before the general 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, along with the deposit of one lakh rupees 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 per cent. of total valid votes cast either on show of hands or on poll on such resolution.
2. The company shall, at least seven days before the general meeting, inform its members of the candidature of a person for the office of a director or the intention of a member to propose such person as a candidate for that office-
  - a. by serving individual notices, on the members through electronic mode to such members who have provided their email addresses to the company for communication purposes, and in writing to all other members; and
  - b. by placing notice of such candidature or intention on the website of the company, if any; or
  - c. Publishing the same in vernacular newspaper seven days before the meeting
3. The candidate may obtain Director Identification Number (DIN) and give his consent in DIR-2.
4. If the candidate is elected the company shall file DIR-12.

### 2. Question



In a general meeting, a motion was put for removal of small shareholders' director. A small shareholder contended that only small shareholders are entitled to vote on this motion as it is related to removal of small shareholders' director and motion should be passed as special resolution. Is the argument valid ? Analyse with reference to the provisions of the Companies Act, 2013.

**Answer**

A small shareholder director can be removed by in pursuance to section 169 of Companies Act, 2013 by passing an ordinary resolution in a general meeting. All the shareholders are eligible to vote irrespective of small shareholder or otherwise. The argument hence is not valid.

**3. Question**

"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 its 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.

#### 4. Question

'T' Ltd. a listed company has ` 20 crore paid up share capital and has nine directors on its Board. Advise T Ltd. on the following matters :

- (i) The number of independent directors it should appoint on its board.
- (ii) How many independent directors should be appointed by T Ltd. in case it is an "unlisted public company" ?
- (iii) Can T Ltd. appoint an independent director for second consecutive term of 6 years whose first term, as independent director in T Ltd. was for 4 years ?
- (iv) T Ltd. wants to appoint another independent director for further period of 2 years. He has already completed 2 consecutive tenures of 4 years each as an independent director in T Ltd. ?

#### Answer

- (i) As per Section 149(4) of the Companies Act 2013, every listed public company is mandatorily required to have at least one-third of the total number of directors as independent directors. T Ltd should appoint  $\frac{1}{3}$  of its total Directors as an Independent Director and accordingly has to appoint  $(\frac{1}{3} \times 9 = 3)$  3 independent directors.
- (ii) As per Rule 4 of the Companies (Appointment and Qualification of Directors) Rules, 2014 unlisted public companies having paid up share capital of ten crore rupees or more shall have at least two independent. Hence, Two independent directors have to be appointed by T Ltd as it is an unlisted company and its paid up share capital is more than Rs.10 crores.
- (iii) Section 149(10) of the Companies Act, 2013 states that subject to the provisions of Section 152, an independent director can be appointed for a term of up to five consecutive years on the Board. It has been clarified that as such while appointment of an Independent Director for a term of less than 5 years would be permissible, appointment for any term (whether for 5 years or less) is to be treated as a one term under section 149(10) of the Act. Therefore T Ltd cannot appoint an Independent Director for term of a six years in the second consecutive term.

(iv) Section 149(11) of the Act, no person can hold office of Independent Director(ID) for more than two consecutive term's such a person shall have to demit office after two consecutive terms, even if the total number of years of his appointment in such two consecutive terms is less than 10 years. It is clarified by the Ministry that appointment for any term (whether 5 years or less) is to be treated as one term under section 149(10) of the Companies Act, 2013. Further, under section 149(11) of the Companies Act, 2013 no person can hold office of independent director for more than two consecutive term's such a person shall have to demit office after two consecutive terms, he shall be eligible for appointment only after the expiry of the requisite cooling -off period of 3 years. Therefore T Ltd cannot appoint an independent Director who has already completed two consecutive terms for 4 years for another period of two years.

### 5. Question

'X' was appointed as an Additional director of Precious Ltd w.e.f. 21st November, 2018 in a casual vacancy caused by the unexpected death of "P" by way of a circular resolution passed by the Board of directors. With reference to the provisions of the Companies Act, 2013 advise the company on the validity of the appointment of 'X' and his continuation as Additional director.

### Answer

Section 161(4) of the Companies Act, 2013 states that if the office of any director appointed by the company in general meeting is vacated before his term of office expires in the normal course, the resulting casual vacancy may, in default of and subject to any regulations in the articles of the company, be filled by the Board of directors at a meeting of the Board which shall be subsequently approved by members in the immediate next general meeting.

Provided that any person so appointed shall hold office only up to the date up to which the director in whose place he is appointed would have held office if it had not been vacated.

Section 161 does not authorize the Board to appoint an additional director to fill the casual vacancy

- If appointment of X is made as an additional director, then, such appointment cannot amount to filling a casual vacancy.
- If X is appointed to fill a casual vacancy, then he shall not be an additional director.

It is thus clear that the appointment of X as an additional director to fill the casual vacancy is not valid. However, X can be treated as additional director and his office as additional director will be valid upto the date of ensuing

AGM. In this regard, the text of the resolution dealing with casual vacancy will be void but will be valid to the extent of additional director.

Further X has been appointed to fill the casual vacancy by passing a circular resolution. Since the appointment of a director filling a casual vacancy requires passing of resolution in a board meeting, the appointment of X is in contravention of section 161, and is therefore, invalid.

### 6. Question

Rajesh Gawda is a director of XYZ Pvt. Ltd. having a paid up share capital of ` 11 crore. The company has granted a loan of ` 2 crore to Rajesh Gawda. The company has a borrowing of ` 15 crore from HDFC Bank. The company secretary informs the company that the loan to the director is in violation of the provisions of the Companies Act, 2013. Justify the claim of the company secretary.

### Answer

According to section 185(1) of the Companies Act, 2013, no company shall, directly or indirectly, advance any loan, including any loan represented by a book debt to, or give any guarantee or provide any security in connection with any loan taken by,—

- (a) any director of company, or of a company which is its holding company or any partner or relative of any such director; or
- (b) any firm in which any such director or relative is a partner.

Further, vide Exemption Notification dated 05th June, 2015, Section 185 of Companies Act, 2013 shall not apply to Private Company meeting the following conditions:

- (a) In whose share capital no other body corporate has invested any money;
- (b) If the borrowings of such company from banks or financial institutions or anybody 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 repayment of such borrowings subsisting at the time of making transactions under this section.

Now, considering that the Paid up Capital of the Company is 11 Crores and borrowing from HDFC Bank is Rs. 15 Crore, it can be seen that the amount of borrowings by the company from Banks (Rs. 15 Crores) is less than twice the amount of paid up capital (i.e.  $2 \times 11 \text{ Cr.} = 22 \text{ Crores}$ ). So as per exemptions conditions available to private company borrowing from the bank is less than 2 times of Paid up Capital of the Company. To avail exemption, the company need to fulfill all conditions as provided in the Exemption Notification. Hence, if all the

above conditions are fulfilled, the loan to Rajesh Gowda is exempted under section 185 and the company is not in violations of the provisions of the Companies Act, 2013 and the claim of CS is not justified.

### 7. Question

ABC & Associates is an audit firm with partners A, B and C. The firm's tenure as statutory auditor in M Ltd. has expired under Companies Act, 2013. M Ltd. is a listed company. XY & Co. another audit firm is appointed as auditor of M Ltd. for the subsequent year. B joins XY & Co. as partner, 4 months after it was appointed as statutory auditor of M Ltd. Comment with reference to the provisions of the Companies Act, 2013.

### Answer

Section 139(2) of the Companies Act, 2013 provides that as on date of appointment of Auditors, no audit firm having a common partner or partners to the other audit firm whose tenure has expired in a company immediately preceding the financial year shall be appointed as auditor of the same company for a period of five years.

Here M Ltd is a listed entity and thus rotational provisions are applicable. B is a partner in ABC & associates whose tenure as statutory auditor in M Ltd has expired. He joined XY & Co. as partner 4 months after XY & Co. was appointed as statutory auditor of M Ltd.

It may be noted that there should not be a common partner in firms as on date of appointment. In the given case, B has joined XY & Co. after 4 months of its appointment as statutory auditor of M Ltd. Thus, XY & Co. can continue as statutory auditor of M Ltd for the remaining term after B joined them as Partner.

### 8. Question

A company passed a special resolution in its general meeting for grant of loan to another body corporate in excess of limits specified in section 186(2). However, one of the directors contended that prior approval of their financial institution is also required for such lending. Explain whether the contention of the director is acceptable. **Answer**

Section 186(5) of Companies Act, 2013 provides that no investment shall be made or loan or guarantee or security given by the company unless the resolution sanctioning it is passed at a meeting of the Board with the consent of all the directors present at the meeting and the prior approval of the public financial institution concerned where any term loan is subsisting, is obtained.

However, the prior approval of Public Financial Institution (FI) shall not be required where the aggregate of loans and investments so far made, the amounts for which guarantee or security so far provided to or in all other

bodies corporate, along with the investments, loans, guarantee or security proposed to be made or given does not exceed the limit of 60% of its paid-up share capital, free reserves and securities premium account or 100% of its free reserves and securities premium account, whichever is more and there is no default in repayment of loan installments or payment of interest thereon as per the terms and conditions of such loan to the public financial institution.

In the given case the Company is passing the special resolution under Section 186(2) of Companies Act, 2013, indicating thereby that the proposed loan together with the loans already given is already in excess of the limits given under Section 186 (2) of Companies Act, 2013.

Hence the contention of the director is correct as the company aggregate of loans and investments so far made, exceed the limit under Section 186(2) of Companies Act, 2013.

However, if the aggregate loans/ investments are well within the limits approval and the company is passing the Special Resolution either in terms of its Article of Association or voluntarily only due to some other commercial requirement other than Section 186(2) of Companies Act, 2013, then the prior approval from Financial Institution will not be required.

### 9. Question

Rajeev and his wife Surekha are the only two directors of Rajsur Pvt. Ltd. Rajeev went abroad for two months. Before going abroad, he registered a general power of attorney in favour of his son Ranbeer, aged 21 years, to execute all documents on his behalf as an individual as well as director of Rajsur Pvt. Ltd. Ranbeer signed a contract on behalf of Rajsur Pvt. Ltd. by exercising his power of attorney. Is this contract binding upon the company?

### Answer

Section 166 (6) of the Companies Act 2013 prohibits assignment of office of director to any other person. Any assignment of office made by a director shall be void. Authorizing any person to sign a document as a director amounts to assignment of office of director.

Hence, in the instant case Rajeev cannot assign his office of directorship in Rajsur Pvt. Ltd. to his son Ranbeer by a general power of attorney to sign documents on his behalf as director of the company. Contracts signed by Ranbeer on behalf of the company are void and not binding upon the company.

**10. Question**

Owing to the resignation of Prashant, Managing Director of Beauty Herbals Ltd. on 15th October, 2019, the company appointed one of its Senior Deputy General Manager Kristina Kelly, aged 26 years and a Canadian citizen as its Managing Director with effect from 1st November, 2019 at a meeting of the Board of Directors held on 31st October, 2019. Kristina Kelly came to India for the first time for the purpose of taking up employment in India on 1st January, 2018. She got appointed in the Company on 1st April, 2018. From 1st December, 2018 she was sent for a training program for 6 months and she returned to India on 1st June, 2019. Advise the management of the company whether her appointment by the Board of Directors is valid and if any further compliances are required to validate her appointment.

**Answer**

The Foreign national can also be appointed as a Managing Director of a company subject to the compliance of conditions prescribed under Section 196 along with Part I of Schedule V of the Companies Act, 2013. As per Part I (e) of Schedule V of the Companies Act, 2013, the person is required to be a resident of India to be appointed as a Managing Director of the company.

As per Explanation I to the above schedule, resident in India includes a person who has been staying in India for a continuous period of not less than 12 months immediately preceding the date of his appointment as a managerial person and who has come to stay in India, —

- (i) for taking up employment in India; or
- (ii) for carrying on a business or vacation in India.

In the instant case, Kristina Kelly who is a Canadian citizen, appointed as Managing Director of the company w.e.f. November 01, 2019 has not stayed in India for a continuous period of 12 months immediately preceding the date of her appointment. Thus, her appointment as Managing Director by the Board of Directors of the Company is not valid as it is not in compliance with Part I of Schedule V of the Companies Act, 2013. Hence, to validate her appointment, the company is required to file an application in e-Form MR-2 within a period of 90 days from the date of such appointment to the Central Government seeking the approval for such appointment as provided in Section 196 read with Rule 7 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014.

**11. Question**

Kailash, a director of a company has sent in his resignation notice stating that he is resigning from the office of director with effect from 10th December, 2019. The notice was received by the company on 15th December, 2019. State the effective date of resignation of Kailash and the date up to which the company is required to intimate the Registrar of Companies (ROC). Is Kailash required to intimate his resignation to the ROC mandatorily?

### Answer

According to Section 168(2) of the Companies Act, 2013, the resignation of a director shall take effect from the date on which the notice is received by the company or the date, if any, specified by the director in the notice, whichever is later. Thus, in the given case, the resignation of Kailash shall take effect from **December 15, 2019**. Section 168(1) read with Rule 15 of the Companies (Appointment and Qualifications of Directors) Rules, 2014 stipulates that the company shall within thirty days from the date of receipt of notice of resignation from a director, intimate to the Registrar of Companies in Form DIR- 12 along with specified fees and post the information on its website, if any. Thus, in this case the company will have to file form DIR-12 by **January 14, 2020**.

According to Rule 16 of the Companies (Appointment and Qualifications of Directors) Rules, 2014 the resigning director may also forward to the Registrar of Companies, a copy of his resignation along with reasons for the resignation in form DIR-11 along with specified fees within a period of thirty days from the date of resignation.

### 12. Question

Raman is a director of Mega Ltd., a company engaged in the business of selling mineral water. Rohini, wife of Raman, is a partner in M/s. Total, a partnership firm, engaged in the business of selling packaged juices. Raman also holds 100 shares in Zimba Pvt. Ltd., a company engaged in the business of manufacturing bottles. Board of directors of Mega Ltd. intends to grant loan to M/s. Total and Zimba Pvt. Ltd. within the limits specified under the Companies Act, 2013. Examine whether Mega Ltd. can grant loan. If yes, what are the conditions ?

### Answer

According to section 185(1) of the Companies Act, 2013, no company shall, directly or indirectly, advance any loan, including any loan represented by a book debt to, or give any guarantee or provide any security in connection with any loan taken by:

- (a) any director of company, or of a company which is its holding company or any partner or relative of any such director; or



(b) any firm in which any such director or relative is a partner.

**(i) Accordingly, based on the above provisions of Section 185(1) of the Companies Act, 2013, Megha Ltd. cannot grant loan to M/s. Total, since it is a partnership firm in which wife of Raman (Director of the lending company) is a partner.**

Section 185(2) of the Companies Act, 2013 prescribes that a company may advance any loan including any loan represented by a book debt, or give any guarantee or provide any security in connection with any loan taken by any person in whom any of the director of the company is interested, subject to the condition that-

(a) A special resolution is passed by the company in general meeting:

Provided that the explanatory statement to the notice for the relevant general meeting shall disclose the full particulars of the loans given, or guarantee given or security provided and the purpose for which the loan or guarantee or security is proposed to be utilised by the recipient of the loan or guarantee or security and any other relevant fact; and

(b) the loans are utilised by the borrowing company for its principal business activities.

The expression "any person in whom any of the director of the company is interested" includes any private company of which any such director is a director or member.

**(ii) Accordingly, by complying with the conditions as prescribed above under Section 185(2) of the Companies Act, 2013, Megha Ltd. can grant loan to Zimba Pvt. Ltd. in which Raman is a member holding 100 shares.**

### 13. Question

In the following scenario, examine whether the amount of sitting fees decided by the Board of directors is in accordance with the provisions of the Companies Act, 2013 and rules made thereunder :

| Name    | Nature of directorship     | Amount of sitting fees per meeting<br>(₹) |
|---------|----------------------------|-------------------------------------------|
| Raja    | Nominee director           | 1,20,000                                  |
| Raju    | Small shareholder director | 1,00,000                                  |
| Ritu    | Independent director       | 1,00,000                                  |
| Shalini | Independent director       | 75,000                                    |

### Answer

Section 197(5) of the Companies Act, 2013 read with Rule 4 of the Companies (Appointment and

Remuneration of Managerial Personnel) Rules, 2014 prescribes that a company may pay a sitting fee to a Director for attending meetings of the Board or committees thereof, such sum as may be decided by the Board of Directors, which shall not exceed Rs. 1 lakh per meeting of the Board or committees thereof.

Provided that for Independent Directors and Women Directors, the sitting fee shall not be less than the sitting fee payable to other Directors.

Based on the above stipulated provisions, the following mentioned sitting fees payable is:

| Name                              | Remarks                                                                                                      |
|-----------------------------------|--------------------------------------------------------------------------------------------------------------|
| Raja (Nominee Director)           | Sitting fees exceeds maximum amount and should be reduced to Rs. 1,00,000                                    |
| Raju (Small Shareholder Director) | Sitting fees is within limit                                                                                 |
| Ritu (Independent Director)       | Sitting fees is within limit                                                                                 |
| Shalini (Independent Director)    | Sitting fees is within limit but it should not be less than other directors and hence should be Rs. 1,00,000 |

#### 14. Question

Dim Dim Ltd. was incorporated on 31st December, 2019. An advisor to the company has suggested that since the Articles of Association (AOA) does not contain provisions relating to appointment of first directors, company can function without the directors until AOA is amended. Do you agree with the suggestion given by the advisor? Can Dim Dim Ltd. appoint a director who has just stayed for a period of 120 days in India during financial year 2019-20? (4 marks)

#### Answer

The first directors of most of the companies are named in their Articles of Association. Regulation 60 of Table F provides that the number of the directors and the names of the first directors shall be determined in writing by the subscribers of the memorandum or a majority of them.

Further, Section 152(1) of the Companies Act, 2013 provides that, where no provision is made in the Articles of Association of a company for the appointment of the first director, the subscribers to the memorandum who are individuals shall be deemed to be the first directors of the company until the directors are duly appointed.

**Accordingly, in the given case, advice given by the advisor regarding first director is not correct.** Section 149(3) of the Companies Act, 2013 provides that every company shall have at least one director who has stayed in India for a total period of not less than 182 days during the financial year. However, in case of a newly incorporated company the requirement under this sub-section shall apply proportionately at the end of the financial year in which it is incorporated.

**Hence, Dim Dim Ltd. which has been incorporated on December 31, 2019 can appoint a director who has just stayed for 120 days in India during the financial year, 2019-20.**

### 15. Question

Shankar was appointed as a small shareholders' director on 2nd March, 2017. Shankar has submitted a letter to the Board of directors expressing his desire to get re-appointed. In this context, the Board wants your opinion on the following points :

- (i) Whether Shankar can be re-appointed as on 31st March, 2021 ?
- (ii) Whether he is liable to retire by rotation as on 31st March, 2019 ?
- (iii) Since Shankar is serving as director in many companies, whether his directorship in the capacity of small shareholders' director be included in the total number of directors as per the provisions of the Companies Act, 2013 ? Answer to the Board.

### Answer

As per Section 151 read with Rule 7 of the Companies(Appointment and Qualifications of Directors) Rules, 2014, the tenure of small shareholders' director shall not exceed a period of 3 consecutive years and on the expiry of the tenure, such director shall not be eligible for re-appointment. Further, such director shall not be liable to retire by rotation.

A small shareholders' director is included in the total limit of directorship of 20 companies as prescribed under section 165 (1) of the Companies Act, 2013.

**Based on the above provisions, answers to the questions are as under:**

- (i) No, Shankar as small shareholder director cannot be re-appointed as on March 31, 2021.
- (ii) No, Shankar is not liable to retire by rotation as on March 31, 2019.
- (iii) Yes, Shankar's directorship will be counted in the over-all limit provided under Section 165 (1) of the Companies Act, 2013.

### 16. Question

Vasu is independent director in various companies and he seeks your opinion regarding presence of independent director in different types of Committees. Advise.

### Answer

#### Presence of Independent Director in various Committees of the Board

| Independent Director in various Committees   | Composition as per the Companies Act, 2013                                                                                                                                                                                      | Companies as per the SEBI(LODR) Regulations, 2015                                                                                                                                                       |
|----------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Audit committee</b>                       | As per Section 177 of Companies Act, 2013                                                                                                                                                                                       | According to Regulation 18 of the SEBI (LODR) Regulations, 2015                                                                                                                                         |
|                                              | The Audit Committee shall consist of a minimum of three directors with independent directors forming a majority.                                                                                                                | a) The Audit Committee shall have minimum three Directors as members.<br>b) Two-thirds of the members of audit Committee shall be Independent Directors                                                 |
|                                              |                                                                                                                                                                                                                                 | c) In case of a Listed Entity having outstanding SR equity shares, the Audit Committee shall only comprise of Independent Directors.                                                                    |
|                                              |                                                                                                                                                                                                                                 | d) The chairperson of the audit committee shall be an independent director.                                                                                                                             |
| <b>Nomination and Remuneration Committee</b> | Section 178 of Companies Act, 2013 provides that:<br><br>The Nomination and Remuneration Committee shall consist of three or more non-executive directors out of which not less than one - half shall be independent directors. | According to Regulation 19 of the SEBI (LODR) Regulations, 2015<br><br>The Board of Directors shall constitute the Nomination and Remuneration Committee as follows:                                    |
|                                              |                                                                                                                                                                                                                                 | (a) the Committee shall comprise of at least three Directors and all Directors shall be non-executive Directors;<br><br>(b) at least fifty percent of the Directors shall be Independent Directors; and |

|                                            |   |                                                                                                                                                                                                                                                                           |
|--------------------------------------------|---|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|                                            |   | (c) In case of a listed entity having outstanding SR equity shares, two-thirds of the Nomination and Remuneration Committee shall comprise of Independent Directors;                                                                                                      |
|                                            |   | (d) The Chairperson of the nomination and remuneration committee shall be an Independent Director.                                                                                                                                                                        |
| <b>Stakeholders Relationship Committee</b> | — | Under Regulation 20 of the SEBI (LODR) Regulations, 2015, Stakeholders Relationship Committee shall consist of at least three directors, with at least one being an independent director, who shall be the members of the Committee.                                      |
|                                            |   | In case of a listed entity having outstanding SR equity shares, at least two-thirds of the Stakeholders Relationship Committee shall comprise of independent directors.                                                                                                   |
| <b>Risk Management Committee</b>           |   | The majority of members of Risk Management Committee shall consist of members of the board of directors and in case of a listed entity having outstanding SR equity shares, at least two-thirds of the Risk Management Committee shall comprise of Independent Directors. |

|                                                  |                                                                                                                                                                                                                                                                                                                                                                                                      |   |
|--------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---|
| <b>Corporate Social Responsibility Committee</b> | <p>As per Section 135 of the Companies Act, 2013, Corporate Social Responsibility Committee shall consist of three or more directors out of which at least one should be an independent director.</p> <p>However, where a company is not required to appoint an independent director under section 149(4), it shall have in its Corporate Social Responsibility Committee two or more directors.</p> | — |
|--------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---|

**17. Question**

The following figures were extracted from the books of X Ltd (audited).

|                                             |                  |                   |
|---------------------------------------------|------------------|-------------------|
| Paid up share capital                       | ₹100 Lakh        | Reserve & Surplus |
| General Reserve                             | ₹50 Lakh         |                   |
| Security Premium Account                    | ₹25 Lakh         |                   |
| Re-valuation Reserve                        | ₹25 Lakh         |                   |
| Total                                       | <u>₹200 Lakh</u> |                   |
| Long Term Borrowings                        | ₹125 Lakh        |                   |
| Short Term Borrowings (Cash Credit Loan)    | ₹50 Lakh         |                   |
| Temporary Loan for construction of Building | ₹25 Lakh         |                   |
| Total                                       | <u>₹200 Lakh</u> |                   |

The Board of Directors further want to borrow a sum of ₹ 50 Lakh as Long Term Loan without obtaining the consent of the members in general meeting by special resolution. Advise the Board about the validity of this proposal. What will be your answer if it is a Private Limited company ?

**Answer**

As per section 180(1)(c), the board of directors of a company with the consent of the company by a special resolution shall borrow money, where the money to be borrowed, together with the money already borrowed

by the company will exceed aggregate of its paid-up share capital, free reserves and securities premium, apart from temporary loans obtained from the company's bankers in the ordinary course of business.

Temporary loans means loans repayable on demand or within six months from the date of the loan such as short-term, cash credit arrangements, the discounting of bills and the issue of other short-term loans of a seasonal character, but does not include loans raised for the purpose of financial expenditure of a capital nature.

In view of the above provision the eligible amount which can be borrowed by the Board is given below:

Paid up share capital      Rs. 100 Lakh Reserve & Surplus

General Reserve    Rs. 50 Lakh

Security Premium Account      Rs. 25 Lakh

Total      Rs. 175 Lakh

Re-valuation Reserve is not treated as free reserve as per Section 2(43).

The total borrowing of the company for the purpose of this sub section is –

Long Term Borrowings      Rs. 125 Lakh

Temporary Loan for construction of Building      Rs. 25 Lakh

Total      Rs. 150 Lakh

Short Term Borrowings (Cash Credit Loan) of Rs. 50 Lakhs is considered as temporary loan and loan for construction of building in not consider as temporary loan as per the explanation for temporary loan mentioned above.

Therefore, the company can borrow a further sum upto Rs. 25 Lakh without seeking the approval from the members. So, the board cannot borrow a sum of Rs. 50 Lakhs as Long Term Loan without obtaining the consent of the members in general meeting by special resolution.

In case of private company the provision of section 180 does not apply vide exemption notification dated 05th June, 2015, hence the board can borrow without approval.

### 18. Question

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.

### 19. Question

XYZ Ltd wants to pay sitting fees to its women directors, less than the sitting fees payable to other directors of the Company. And want to appoint X as its Managing Director of the company for a term exceeding five years at a time. Advise the company on the above proposals.

### Answer

As per Rule 4 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 a company may pay a sitting fees to a director for attending meetings of the Board or committees thereof, such sum as may be decided by the Board of directors thereof which shall not exceed one lakh rupees per meeting of the Board or committee thereof.

However, for Independent Directors and Women Directors, the sitting fees shall not be less than the sitting fee payable to other directors.



So, XYZ Ltd. cannot pay sitting fees to its women directors less than the sitting fees payable to other directors of the company.

As per Section 196 of the Companies Act, 2013 a company shall not appoint or re appoint any person as its managing director for a term exceeding five years at a time. So, Mr. X cannot be appointed as Managing Director of the company for a term exceeding five years at a time.

### 20. Question

X has applied to the Indian Institute of Corporate Affairs (IICA) for inclusion of his name in the data bank of independent directors. He is working as a director of X Ltd and Y Ltd, both are unlisted public companies having the paid-up share capital of `10 crores since last 7 years. X says that he is not required to pass the online proficiency self-assessment test as he is director of two unlisted companies with paidup share capital of `10 crores since last 7 years. Explain whether the contention of X is correct.

### Answer

As per Rule 6(4) of the Companies (Appointment and Qualification of Directors) Rules, 2014. every individual whose name is included in the data bank of independent directors of IICA shall pass an online proficiency self-assessment test conducted by the IICA within a period of two years from the date of inclusion of his name in the data bank, failing which, his name shall stand removed from the data bank of the institute.

Proviso to this sub rule provides that the individual who has served for a period of not less than three years as on the date of inclusion of his name in the data bank as director or key managerial personnel in a listed public company or in an unlisted public company having a paid-up share capital of Rs. 10 crores or more shall not be required to pass the online proficiency self-assessment test.

It is further provided that for the purpose of calculation of the period of three years referred to in the first proviso, any period during which an individual was acting as a director or as a key managerial personnel in two or more companies or bodies corporate or statutory corporations at the same time shall be counted only once.

In view of this proviso, the contention of director is valid as the experience of director is 7 years.

### 21. Question

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.

**22. Question**

A director while leaving India for medical treatment abroad informed the Board of directors that he would not be available for the next six months. During his absence, three Board meetings were held and notices were not sent to him. Is there any default under the Companies Act, 2013 ? What would be the consequences ?

**Answer**

Section 173(3) of the Companies Act, 2013 requires that not less than seven days' notice in writing shall be given to every director at the registered address (whether in India or outside India) as available with the company and such notice shall be sent by hand delivery or by post or by electronic means.

Further, notice of Board meeting shall be given even when meetings are held on pre- determined dates or at pre-determined intervals. In *Re Portuguese Consolidated Copper Mines (1889)*, it was held that notice to director is necessary even if he has informed that he will not be able to attend the Board meeting. If the notice of meeting is not given to one of its directors, meeting of Board of directors is invalid and resolution passed at such meeting are inoperative (*Parmeshwari Prasad Gupta v. Union of India [1974] 44 Comp Cas 1 [SC]*)

Therefore, notice of Board Meeting was required to be given despite the fact that while going abroad, the director had already informed his non-availability during next six months.

Consequences of not giving notice

- If the notice is not given there is violation of section 173. Every officer of company whose duty is to give notice under this section and who fails to do so shall be liable to penalty of Rs. 25,000/-
- Failure to send notice would render the resolutions passed at the meeting null and void.

### 23. Question

Extra Power Ltd. desires to appoint an additional director on its Board of directors. The Articles of Association of the company confer upon the Board to exercise the power to appoint such a director. As such Mohan is appointed as an additional director on 12th December, 2020. The 5th Annual General Meeting of the company was scheduled to be held on 17th September, 2021; however, the meeting was adjourned to and held on 30th September, 2021. Decide the date up to which Mohan can continue as an additional director in Extra Power Ltd. ?

### Answer

Section 161(1) of the Companies Act, 2013, provides that the Articles of Association of a company may confer on its Board of directors the power to appoint any person, other than a person who fails to get appointed as a director in a General Meeting, as an additional director at any time.

Person who is appointed as an additional director shall hold office up to the date of the next Annual General Meeting or the last date on which the Annual General Meeting should have been held, whichever is earlier. In case of default in holding Annual General Meeting, the additional director shall vacate his office on the last day on which the Annual General Meeting ought to be held.

Further, as per section 96, the company is required to hold an Annual General Meeting (other than First AGM) within a period of 6 months of closure of the relevant financial year. As per section 2(41), "financial year" in relation to any company means period ending on 31st March every year.

In the given case, since the Annual General Meeting was adjourned to and held on 30th September, 2021, Mohan can continue up to 30th September, 2021.

#### 24. Question

Sky Limited, a listed company has been incorporated under the Companies Act, 2013. An intermittent vacancy of a woman director has arisen on 15th June, 2020. Advise the company to fill the vacancy as per the provisions of the Companies Act, 2013. The Board meeting was held on 14th August, 2020.

#### Answer

##### Filling of casual vacancy in case of Woman Director:

- Rule 3 of Companies (Appointment and Qualification of Directors) Rules, 2014 provides that 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 3 months from the date of such vacancy whichever is later.
- In the present case, an intermittent vacancy of the women director arises on 15th June, 2020. The immediate next Board meeting was held on 14th August, 2020.

Conclusion: Applying the provisions of Rule 3, the vacancy shall be filled-up by 14th August, 2020 or by 14th September, 2020 (3 months from the date of such vacancy) whichever is later.

In this case, it shall be filled up by 14th Sep, 2020.

#### 25. Question

KMR Limited, a listed public company, has 15 directors on its Board. The Articles of Association of the said company provide for the maximum number of Directors in the company to be 15. Due to diversification and expansion of activities, the Board of Directors of the said company desire to Increase the number of Directors to 18. Decide with reference to the applicable provisions of the Companies Act, 2013:

- (i) Whether the Board of Directors can do so?
- (ii) Will your answer differ if the said Company would have been a Government Company?

#### Answer

##### Increase in number of Directors:

- Sec. 149(1) of the Companies Act, 2013 provides that 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 OnePerson Company. The maximum number of directors shall be 15.

- However, a company may appoint more than 15 directors after passing a special resolution. Limit of Maximum directors and their increase is not applicable to Government Companies and Sec. 8 Companies provided these companies has not committed a default in filing of their financial statements u/s 137 or annual return u/s 92 with the Registrar.
- In the present case, the number of directors is proposed to be increased to 16, company will be required to comply with the followings:
  - (i) Alter the Articles of Association u/s 14, so as to increase the number of directors in the Articles from 15 to 18,
  - (ii) A special resolution is to be passed at a duly convened general meeting of the company to increase the number of directors to 18

**Conclusion:** Applying the provisions of Sec. 149(1) and exemptions available, following conclusions may be drawn:

- (i) BOD can increase the number of directors after altering AOA u/s 14 and by passing a Special resolution u/s 149(1)
- (ii) In case of Govt companies limit of maximum directors not applicable, hence, BOD can increase the number.

## 26. Question

Mr. Azad, an independent director of X company, was appointed in the AGM for a period of three years. After the expiry of 3 years he was re-appointed for a period of 5 years. Considering that though Mr. Azad has completed two tenures/terms but hasn't completed ten years in total, therefore he may be appointed in the upcoming AGM for another 2 years to complete his total term of 10 years. Conferring in the light of the Companies Act, 2013, state the validity of reappointment of Mr. Azad for further term in the company.

## Answer

### Tenure of Independent Auditor

- Sec. 149(10) of Companies Act, 2013 provides that an independent director shall hold office for a term up to 5 consecutive years on the Board of a company but shall be eligible for reappointment on passing of a special resolution by the company and disclosure of such appointment in the Board's report.
- Section 149(11) of Companies Act, 2013 provides that no independent director shall hold office for more than 2 consecutive terms, but such independent director shall be eligible for appointment after the expiration of 3 years of ceasing to become an independent director, provided that he shall not, during the said period of 3 years, be appointed in or be associated with the company in any other capacity, either directly or indirectly.
- It is clarified by MCA that one tenure of independent directors may be for a period less than 5 years and if tenure of independent directors is fixed for a period less than 5 years, then cooling period of 3 years arises on completion of two tenures even if the total number of years of his appointment in such two consecutive terms is less than 10 years.
- In the present case, Mr. Azad, an independent director, has completed two tenures in the company. one for three years and second for 5 years.

**Conclusion:** Reappointment for third term is not allowed in continuation, a cooling off period of 3 years will be required after completion of two tenures, Irrespective that period served under two tenures is less than 10 years.

## 27. Question

CTC Limited is an unlisted public company having a paid up capital of 100 crores as on 31st March, 2021. The company made a turnover of ₹ 300 crores for the financial year ended 31st March, 2021. The Articles of Association of the company provides for payment of sitting fee to Directors for each board meeting/committee thereof subject to a maximum of ₹ 40,000 per meeting. The board of directors is comprised of Independent Directors and woman directors also. The company is having 7 directors in its Audit Committee. Shri PKV, working as Financial Advisor of the company, was designated as Chief Financial Officer from 1st April, 2019. He retired from service on 31st March, 2020, He is in receipt of monthly pension of ₹ 100,000 from the company. It is proposed to appoint Shri PKV as Independent Director of the company. The board of directors propose to fix sitting fee of ₹ 50,000 per meeting to Independent director and ₹ 30,000 per meeting to Woman Director taking

into consideration their experience and qualification In the light of the provisions of the companies Act, 2013, advise the board of directors in the following matters:

1. Appointment of Mr. PKV as independent director.
2. Fixing sitting fee of t 50,000 to independent director and 30,000 to Woman Director.
3. Minimum number of independent directors.
4. Maximum sitting fee to a director.

Assuming CTC Ltd. is a Government Company, what will be your advise in the matter of appointment of Mr. PKV as independent director.

### **Answer**

Appointment of Independent Directors and Sitting Fees:

#### **(i) Appointment of Mr. PKV as Independent Director**

- As per section 149(6) of Companies Act, 2013, a person is not eligible to be appointed as independent director if he holds or has held the position of a KMP or is or has been employee of the company or its holding, subsidiary or associate company in any of the 3 FYI immediately preceding the FY in which he is proposed to be appointed.
- In the present case, Mr. PKV had worked as CFO of the company for the year 2019-20. Hence Mr. PKV cannot be appointed as independent director of the company

#### **(ii) Fixing Sitting Fees of 50,000 to independent director and 30,000 to woman director:**

- As per section 197(5) read with Rule 4 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014, a company may pay a sitting foe to a director for attending board or committee meetings, such sum as may be decided by Board which shall not exceed Rs.1Lac per meeting. It is also provided that for independent director and woman director the sitting fees shall not be less than the sitting fees payable to other directors.
- In the present case, Board is willing to the sitting fees of 50,000 independent director and 20,000 in woman director. It is being allowed subject to condition that it shall not t less than the sitting fees payable to other directors and altering the Articles of Association by Spectal Resolution.

#### **(iii) Minimum number of independent director**

- As per sec. 149(4) of Companies Act, 2013, every listed public company shall have at least one-third of the total number of directors as independent directors. As per Rule 4 of the Companies (Appointment and Qualification of Directors) Rules, 2014, the following class or classes of companies shall have at least 2 directors as independent directors
  - (a) the Public Companies having paid up share capital of 10 crore rupees or more; or
  - (b) the Public Companies having turnover of 100 crore rupees or more, or
  - (c) the Public Companies which have, in aggregate, outstanding loans, debentures and deposits, exceeding 50 crore rupees.
- However, in case a company covered under rule 4 is required to appoint a higher member of independent directors due to composition of its audit committee, such higher number of independent directors shall be applicable to it.
- As per section 177(2) of the Companies Act, 2013, the Audit Committee shall consist of a minimum of three directors with independent directors forming a majority.
- In the present case, CTC Ltd. is having 7 directors in its audit committee, therefore the number of independent directors so as to form a majority should be 4.

**(iv) Maximum sitting fees to a director**

- As per sec: 197(5) read with Rule 4 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014, a company may pay a sitting fee to a director for attending board or committee meetings, such sum as may be decided by Board which shall not exceed 1 Lac per meeting
- Hence the maximum sitting fees payable to a director will be 1,00,000 provided there is no restriction in the Articles of Association.

**(v) Appointment of Mr. PKV as independent director in case of government company**

- As per section 149(6) of Companies Act, 2013, a person is not eligible to be appointed as independent director if he holds or has held the position of a KMP or is or has been employee of the company or its holding, subsidiary or associate company in any of the FYs immediately preceding the FY in which he is proposed to be appointed.



- No exemption is granted to government company from application of this clause, So, M PKV cannot be appointed as independent director of the company, as he had worked a CFO of the company for the year 2019-20.

### 28. Question

The Board of directors of M/s ABC Limited, an unlisted company having a paid-up capital of Rs. 6 crores consisting of equity share capital of Rs. 5 crores and preference share capital of Rs. 1 crore and also 1,100 'Small Shareholders' holding equity shares seeks your advice on the following:

"Is it necessary for the Company to appoint a Director to represent the 'Small Shareholders'? Advise explaining the relevant provisions of the Companies Act, 2013 and the Rules.

### Answer

#### Requirement of Small Shareholder's Director:

- Section 151 of Companies, Act, 2013 read with Rule 7 of the Companies (Appointment and Qualification of Directors) Rules, 2014 provides that a listed company may have one director elected by such small shareholders in such manner and with such terms and conditions as may be prescribed.
- In the present case, the Board of directors of M/s ABC Limited, an unlisted company having a paidup capital of Rs. 6 crores consisting of equity share capital of Rs. 5 crores and preference share capital of Rs. 1 crore and also 1,100 'Small Shareholders' holding equity shares seeking advice for requirement of director to represent the small shareholders.

**Conclusion:** Requirement of Small shareholder director applies in case of listed company. Whereas in the present case, ABC Ltd. is an unlisted company, so requirement of director to represent small shareholder is not applicable.

### 29. Question

M/s. Bharat Pharma Limited is a company listed with Bombay Stock Exchange. The company were having 500 small shareholders in the said company, so they wanted to appoint Mr. A as a Director as their representative on the Board of Directors of the said company. Mr. A is holding 1000 equity shares of 10 each in the said company. State in the light of the Companies Act, 2013 whether the proposal to appoint Mr. A as a Small Shareholders' Director can be adopted by the company. Examine, if Mr. A is already holding a position of small shareholders director in more than two companies.

### Answer

Appointment of director elected by small shareholders:

- Section 151 of Companies Act, 2013 provides that a listed company may have one director elected by such small shareholders in such manner and with such terms and conditions as may be prescribed.
- Rule 7 of the Companies (Appointment and Qualification of Directors) Rules, 2014 provides that a listed company, may upon notice of not less than 1,000 small shareholders or 1/10th of the total number of such shareholders, whichever is lower, have a small shareholders' director elected by the small shareholders.
- In the present case, there are 500 small shareholders in the company who wanted to appoint Mr. A as a Director as their representative on the Board of Directors of the said company. Mr. A is holding 1000 equity shares of 10 each in the said company.
- Sec. 151 read with Rule 7 does not prescribe any eligibility criteria in terms of shareholding in the company for being appointed as a small shareholder director.
- Rule 7 further provides that no person shall hold the position of small shareholders' director in more than two companies at the same time.

**Conclusion:** Assuming that the notice is being served by minimum prescribed number of small shareholders (1/10th of total number), Mr. A can be appointed as director.

If Mr. A is already holding a position of small shareholders director in more than 2 companies, then he cannot be appointed.

### 30. Question

B Ltd. is a listed Company and it has been served with a notice for appointment of a small share holders' director. Referring to the provisions of the Companies Act, 2013, examine the following:

- (i) The tenure of small shareholders' director and whether he can be re-appointed as such, after expiry of his tenure?
- (ii) Whether he can be appointed as an officer of the Company on expiry of his tenure as small shareholders' director.

### Answer

(i) Tenure of Small Shareholder Director:

- Sec. 151 of Companies, Act, 2013 provides that a listed company may have one director elected by such small shareholders in such manner and with such terms and conditions as may be prescribed.

- Rule 7 of the Companies (Appointment and Qualification of Directors) Rules, 2014 provides that the tenure of small shareholders' director shall not exceed a period of 3 consecutive years.
- Rule 7 further provides that on the expiry of the tenure, such director shall not be eligible for reappointment.

(ii) Eligibility for being appointed as an officer in the company after expiry of tenure:

A small shareholders' director shall not, for a period of three years from the date on which he ceases to hold office as a small shareholders' director in a company, be appointed in or be associated with such company in any other capacity, either directly or indirectly.

### 31. Question

A company has 11 directors on the Board consisting of the following:

- Mr. Active, Mr. Archive as nominees from the Public Financial Institutions
- Mr. First, Mr. Second, Mr. Third appointed at the 2<sup>nd</sup> AGM
- Mr. Fourth, Mr. Fifth appointed at the 3<sup>rd</sup> AGM
- Mr. Addition was appointed as additional director subsequent to 3<sup>rd</sup> AGM
- Mr. Casual was appointed as director in place of Mr. Soul who died and was earlier appointed during the 3<sup>rd</sup> AGM
- Mr. Excellent was appointed as Managing Director for 5 years w.e.f. 2<sup>nd</sup> AGM
- Mr. One more was appointed as additional Director soon after Mr. Addition was appointed as Additional Director

List out in order, who shall be vacating the office at the 4<sup>th</sup> AGM of the company

### Answer

#### Determination of order in which directors have to vacate the office

- Section 152(6) of the Companies Act, 2013 provides that unless the Articles provide for retirement of all the directors at every general meeting not less than 2/3<sup>rd</sup> of the total number of directors of a public company shall be persons whose period of office is liable to determination by retirement of directors by rotation.
- At the first AGM of a public company held meat after the date of the general meeting at which the first directors are appointed and at every subsequent AGM, 1/3<sup>rd</sup> of such of the directors for the time being as are able to retire by rotation, or if their number is neither 3 nor a multiple of, then, the number nearest to 1/3<sup>rd</sup>, shall retire from office.

- The directors to retire by rotation at every annual general meeting shall be those who have been longest in office since their last appointment, but as between persons who became directors on the same day, those who are to retire shall, in default of and subject to any agreement among themselves, be determined by lot.
- Sec. 161(1) of Companies Act, 2013 provides that additional Director shall hold office up to the date of the next AGM or the last date on which the ACM should have been held, whichever is earlier.
- The position in regard to the 11 directors is as under
  - i. Provisions regarding appointment and removal of directors, does not apply over the nominee directors. Hence Mr Active and Me Archive, who are nominees of Public Financial Institutions respectively, will not be considered for total number of directors for the purpose of Sec 152(6).
  - ii. Me. First, Mr. Second, Me Third, Mr. Fourth Mr. Fifth are appointed in AGM and hence considered as rotational directors for the purpose of Sec. 152(6).
  - iii. Mr. Addition & Mr. One More, who were appointed as Additional Directors subsequent to 3rd AGM will be considered as Non Rotational directors who shall vacate office on the date of 4th AGM.
  - iv. Mr. Casual was appointed in place of Mr Soul who died and will, therefore, hold office till the date Mr. Soul would have held office.
  - v. Mr. Excellent the Managing director may be a rotational or non-rotational director depending upon terms of appointment.
- Total number of directors for the purpose of Sec. 152(6) counted as 9, 2/3rd of 9, Le. 6 should be rotational director and 1/3rd of 6, Le. 2 directors shall retire by rotation. It is assumed that Mr. First, Mr. Second, Mr. Third, Mr. Fourth, Mr. Fifth and Mr. Casual are rotational directors, two amongst Mr. First, Second and Third who were appointed in 2nd AGM and have been longest in office, shall vacate office. Amongst themselves, either they can decide by mutual consent or by draw of lots.

### 32. Question

Mr. Thangavel is a Director in 7 Companies with a DIN (Director Identification Number) allotted to him. Again, another DIN was inadvertently allotted to him which was never used for filing any document with any Authority. He desires to surrender the second DIN and keep all his directorship with the first DIN. Advise him the procedure

to be followed under the provisions of the Companies Act, 2013 and the Rules made thereunder for surrendering the second DIN inadvertently obtained by him.

**Answer****Surrender of DIN:**

Rule 11 of the Companies (Appointment and Qualification of Directors) Rules, 2014 deals with the procedure for surrender of DIN inadvertently obtained. Accordingly,

- The C.G. 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 from any person, cancel or deactivate the DIN in case.
  - (a) 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;
  - (b) the DIN was obtained in a wrongful manner or by fraudulent means;
  - (c) of the death of the concerned individual;
  - (d) the concerned individual has been declared as a person of unsound mind by a competent Court;
  - (e) the concerned individual has been adjudicated an insolvent;
  - (f) 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.

**33. Question**

The Articles of Association of a company have fixed the maximum strength of the board as 12 directors. At present the Board has 9 directors of whom 6 are liable to retire by rotation and 3 not liable to retire by rotation. The Board wishes to appoint 3 additional directors. Can they appoint as desired as per provisions of the Companies Act, 2013?

**Answer****Appointment of Additional Directors:**

Section 161(1) of the Companies Act, 2013 provides the provisions relating to Additional Directors.

Accordingly:

- Articles of a company may confer on its Board of Directors the power to appoint any person.
- A person who fails to get appointed as a director at the general meeting, cannot be appointed as an additional director.
- Additional director will hold office upto the date of the next AGM or the last date on which such AGM should have been held, whichever is earlier.

Sec. 152(6) of the Companies Act, 2013 provides that unless the articles provide for the retirement of all directors at every AGM, not less than  $\frac{2}{3}$ rd of the total number of directors of a public company shall be persons whose period of office is liable to determination by retirement of directors by rotation. For purpose of Sec. 152(6), additional directors are counted for the purpose of total number of directors.

In the present case, the Articles of Association of a company have fixed the maximum strength of the board as 12 directors. At present the Board has 9 directors of whom 6 are liable to retire by rotation and 3 not liable to retire by rotation. The Board wishes to appoint 3 additional directors.

**Conclusion:** Though BOD can appoint additional directors as per the authorization of AOA, but it results into violation of Sec. 152(6). As after appointing 3 additional directors, total number of directors becomes 12 and non-rotational directors are 6 which is less than  $\frac{2}{3}$ rd of total number.

### 34. Question

Mr. Sachin was appointed as an additional Director of Conservative Finance Ltd. w.e.f. 1st Jan, 2020, in a casual vacancy by way of a circular resolution passed by the Board of Directors. The next AGM of the company was due on 30th Sep, 2020, but the same was not held due to delay in the finalization of the accounts. Some of the shareholders of the company have questioned the validity of the appointment of Mr. Sachin and his continuation as additional director beyond 30th Sep, 2020. Advise the company on the complaints made by the shareholders.

### Answer

#### Appointment of Additional Director to fill casual vacancy:

- Section 161(1) of the Companies Act, 2013 provides that the articles of a company may confer on its Board of Directors the power to appoint any person, other than a person who fails to get appointed as a director in a general meeting, as an additional director at any time who shall hold office up to the date of the next

annual general meeting or the last date on which the annual general meeting should have been held, whichever is earlier.

- Section 161(4) of the Companies Act, 2013 provides that if the office of any director appointed by the company in general meeting is vacated before his term of office expires in the normal course, the resulting casual vacancy may, in default of and subject to any regulations in the articles of the company, be filled by the Board of Directors at a meeting of the Board which shall be subsequently approved by members in the immediate next general meeting
- In the present case, Mr. Sachin was appointed as an additional Director of Conservative Finance Ltd w.e.f. 1st Jan, 2020, in a casual vacancy by way of a circular resolution passed by the Board of Directors. The next AGM of the company was due on 30th Sep, 2020, but the same was not held due to delay in the finalization of the accounts.

**Conclusion:** Applying the provisions of Sec. 161(1) and 161(4), it can be concluded that appointment of Mr. Sachin is not valid as casual vacancy cannot be filled by circular resolution. If Mr. Sachin is appointed as additional director, then the provisions of Sec. 161(1) will apply and such appointment cannot be treated as filling of casual vacancy. Compliance of the shareholders stands valid and Mr. Sachin cannot continue as a director.

### 35. Question

Referring to the provisions of the Companies Act, 2013, examine the validity of the following:

- (i) The Board of Directors of AJD Limited appointed Mr. N as an alternate director for a period of two months against a director who has proceeded abroad on leave for a period of six months. Articles of Association of the company are silent.
- (ii) Mr. P who is not qualified to be appointed as an independent director is appointed by the Board of Directors of XYZ Company Limited, for an independent director, as an alternate director.
- (i) On the request of bank providing financial assistance the Board of Directors of PQR Limited decides to appoint on its Board Mr. Peter, as nominee director. Articles of Association of the Company do not confer upon the Board of Directors any such power. Further, there is no agreement between the company and the bank for any such nomination.

**Answer****Appointment of Alternate Director and Nominee Director:**

- Sec. 161(2) of the Companies Act, 2013 provides the provisions relating to appointment of Alternate Director.

Accordingly:

- (a) Board of Directors of a company may, if so authorised by its articles or by a resolution passed by the company in general meeting, appoint a person, to act as an alternate director for a director during his absence for a period of not less than 3 months from India.
  - (b) A person holding any alternate directorship for any other director in the company or holding directorship in the same company cannot be appointed as alternate director.
  - (c) No person shall be appointed as an alternate director for an independent director unless he is qualified to be appointed as an independent director under the provisions of this Act.
- Sec 161(3) of Companies Act, 2013 provides that subject to the articles of a company, the Board may appoint any person as a director nominated by any institution in pursuance of the provisions of any law for the time being in force or of any agreement or by the CG, or the S.G. by virtue of its shareholding in a Government company.

**Conclusions:** Applying the provisions of Sec. 161 (2) and 161(3), following conclusions may be drawn: (i) Appointment is not valid because the power to appoint alternate director is not authorised by its articles or by a resolution passed by the company in general meeting

(ii) Appointment is not valid as Mr. P is not qualified to be appointed as an independent director (iii) Appointment of Mr. Peter as nominee director is not valid as Articles do not confer upon the Board of Directors any such power and as such, there is no agreement between the company and the bank for any such nomination.

**36. Question**

Mr. Abhi was appointed as an additional director of Pioneer Limited on 14th March, 2020. The AGM of the company was scheduled to be held on 29th Sep, 2020 but due to heavy rains and floods all records of the company were destroyed. In order to rebuild the records, the company approached the ROC for extension of time for holding the AGM till 30th Dec., 2020. In the light of the Companies Act, 2013 advise Mr. Abhi, who was appointed as additional director during the year.



**Answer****Tenure of Additional Director:**

Section 161(1) of the Companies Act, 2013 provides the following provisions relating to Additional Directors: •

Articles of a company may confer on its Board of Directors the power to appoint any person.

- A person who fails to get appointed as a director at the general meeting, cannot be appointed as an additional director.
- Additional director will hold office upto the date of the next AGM or the last date on which such AGM should have been held, whichever is earlier.

In the present case, Mr. Abhi was appointed as an additional director of Pioneer Limited on 14th March, 2020. The AGM of the company was scheduled to be held on 29th Sep, 2020 but due to heavy rains and floods all records of the company were destroyed. In order to rebuild the records, the company approached the ROC for extension of time for holding the AGM till 30th Dec, 2020. **Conclusion:** Mr. Abhi may continue till 30th Dec, 2020.

**37. Question**

Mr. Narayan, a Director of KPR Limited who is proceeding on a long foreign tour, appointed Mr. Shankar as an alternate director to act for him during his absence. The Articles of the company provide for appointment of alternate directors. Mr. Narayan claims that he has a right to appoint an alternate director.

**Answer****Appointment of Alternate Director:**

- Sec. 161(2) of the Companies Act, 2013 provides that, the Board of Directors of a company may, if so authorised by its articles or by a resolution passed by the company in general meeting, appoint a person, to act as an alternate director for a director during his absence for a period of not less than 3 months from India.
- A person holding any alternate directorship for any other director in the company or holding directorship in the same company cannot be appointed as alternate director.
- In the present case, Mr. Narayan, a Director of KPR Limited who is proceeding on a long foreign tour, appointed Mr. Shankar as an alternate director to act for him during his absence. The Articles of the company provide for appointment of alternate directors.

**Conclusion:** Appointment is not valid as authority to appoint alternate director vested in BOD.

**38. Question**

The Board of Directors of Sakthi Limited decides to appoint on its Board, Mr. Ravi as a nominee director upon the request of a bank which has extended a long term financial assistance to the company. The Articles of Association of the company do not confer upon the Board any such power. Also, there is no formal agreement between the company and the bank for any such nomination.

### Answer

#### Appointment of Nominee Director:

- Sec. 161(3) of Companies Act, 2013 provides that subject to the articles of a company, the Board may appoint any person as a director nominated by any institution in pursuance of the provisions of any law for the time being in force or of any agreement or by the C.G. or the S.G. by virtue of its shareholding in a Government company.
- In the present case, Board of Directors of Sakthi Limited decides to appoint on its Board, Mr. Ravi as a nominee director upon the request of a bank which has extended a long term financial assistance to the company. The Articles of Association of the company do not confer upon the Board any such power. Also, there is no formal agreement between the company and the bank for any such nomination. **Conclusion:** Decision of Board of Directors to appoint Mr. Ravi as nominee director is not valid as Articles do not confer upon the Board of Directors any such power and as such, there is no agreement between the company and the bank for any such nomination.

### 39. Question

Mr. Single, a director of XYZ Ltd. goes Singapore, for a period of 6 months. Board appoints Mr. Re placement, in his place as an alternate director. Mr. Replacement was also holding directorship in XYZ Ltd. Identify the nature of appointment of Mr. Replacement in XYZ Ltd. as an alternate director.

### Answer

#### Appointment of Alternate Director:

- Sec. 161(2) of the Companies Act, 2013 provides that, the Board of Directors of a company may, if so authorised by its articles or by a resolution passed by the company in general meeting. appoint a person, to act as an alternate director for a director during his absence for a period of not less than 3 months from India.
- A person holding any alternate directorship for any other director in the company or holding directorship in the same company cannot be appointed as alternate director.

- In the present case, Mr. Single, a director of XYZ Ltd. goes Singapore, for a period of 6 months. Board appoints Mr. Replacement, in his place as an alternate director. Mr. Replacement was also holding directorship in XYZ Ltd.

**Conclusion:** Appointment of Mr. Replacement as an alternate director is invalid as he is already a director in same company.

#### 40. Question

The Board of Directors of the Universal Ltd. which is an MNC comprised of directors who were Indian as well as of Foreign Nationals. Mr. "X", who is a Director on the Board is very often on business tour abroad. He approached you being legal expert of the company to know from you the regulatory provisions of the Companies Act, 2013 relating to appointment of Alternate Directors.

Examine the following situations and advise suitably, Mr. X referring to the provisions of the Companies Act, 2013.

- (a) Number of directors for which a person can be appointed as an alternate director.
- (b) Where an alternate director is appointed in place of a director whose term is indefinite, then, what will be the tenure of such alternate director?
- (c) Can an Executive Director/Whole Time Director/Managing Director appoint alternate directors?

#### Answer

##### Appointment of Alternate Director:

- Sec. 161 (2) of the Companies Act, 2013 provides that, the Board of Directors of a company may, if so authorised by its articles or by a resolution passed by the company in general meeting appoint a person, to act as an alternate director for a director during his absence for a period of not less than 3 months from India.
- A person holding any alternate directorship for any other director in the company or holding directorship in the same company cannot be appointed as alternate director.
- An alternate director shall not hold office for a period longer than that permissible to the director in whose place he has been appointed and shall vacate the office if and when the director in whose place he has been appointed returns to India.

- As per Sec 165 of the Companies Act, 2013, no person shall hold office as a director, including any alternate directorship, in more than 20 companies at the same time. However, the maximum number of public companies in which a person can be appointed as a director shall not exceed 10.

**Conclusion:** Based on the provisions stated above, following conclusions may be drawn:

- (a) A person can be appointed as an alternate director only for one director in the same company but maximum 20 different companies and in one Board Meeting, an alternate director shall have one vote only.
- (b) The office of alternate director is separate from the attendance of the original director in the Board Meeting and as per Sec. 161(2) of the Companies Act, 2013, an alternate director is appointed to hold the office of original director during his absence from India. Hence, an alternate director may continue to hold office even if the original director joins the meeting by video conferencing, but the original director will be deemed to have joined only as a invitee and the attendance of the alternate director shall be counted for the purpose of the Board Meeting. This is specific only with respect to matters which shall not be dealt with through video conferencing. In matters where video conferencing is allowed, voting of original director will be counted.
- (c) Tenure of alternate director will be the tenure of director in whose place alternate director is appointed, provided no disqualification arises. As per Sec. 167, the office of director becomes vacant, if he absents himself from all the Board Meetings held during a period of 12 months. Hence if the original director does not return to India for a period of 3-4 years, the office of director held by him shall become vacant as soon as period of 12 months expires during which he has not attended any Board meeting. On vacation of office of director of original director, the office held by alternate director shall also become vacant. However, if original director attends the Board meeting through video conferencing, provisions of Sec. 167 will not be applicable and original as well as alternate director continues.
- (d) An Executive Director/Whole Time Director/Managing Director cannot appoint alternate directors. Appointment of alternate director can only be made through Board.

#### 41. Question

The Board of Directors of a Company appointed Mr. Sarvesh as an additional director on 30th July, 2020. Mr. Sarvesh continued to hold his office till 15th October, 2020. The Company had its annual Jgeneral meeting on

30th October, 2020 which should have held on 30th September, 2020. Whether Mr. Sarvesh can hold office till 15th October, 2020?

**Answer****Tenure of Additional Director**

- As per Sec. 161(1) of the Companies Act, 2013 additional director can hold office upto the date of the next AGM or the last date on which such AGM should have been held, whichever is earlier.
- In the present case, Board of Directors appointed Mr. Sarvesh as an additional director on 30th July, 2020. Mr. Sarvesh continued to hold his office till 15th October, 2020. The Company had its annual general meeting on 30th October, 2020 which should have held on 30th September, 2020.

**Conclusion:** Applying the provisions of Sec. 161(1), it may be concluded that Mr. Sarvesh cannot continue hold office till 15th Oct. 2020, since he can hold the office of directorship only up to the date of the next AGM or the last date on which the AGM should have been held, whichever is earlier. Hence, he can hold office till 30th Sep. 2020.

**42. Question**

State with reference to the relevant provisions of the Companies Act, 2013 whether the following persons can be appointed as a Director of a company:

- (i) Mr. A, who has huge personal liabilities far in excess of his Assets and Properties, has applied to the court for adjudicating him as an insolvent and such application is pending.
- (ii) Mr. B. who was caught red-handed in a shop lifting case two years ago, was convicted by a court and sentenced to imprisonment for a period of eight weeks.
- (ii) Mr. C, a Former Bank Executive, was convicted by a court eight years ago for embezzlement of funds and sentenced to imprisonment for a period of one year.
- (iv) Mr. D is a Director of DLT Limited, which has not filed its Annual Returns pertaining to the Annual General Meetings held in the calendar years 2018, 2019 and 2020.

**Answer****Disqualifications of Directors:**

(i) (Section 164(1)(c) states that a person shall not be eligible for appointment as a director of a company if he has applied to be adjudicated as an insolvent and his application is pending Therefore, Mr. A cannot be appointed as a Director of a Company.

(ii) Section 164(1)(d) states that a person shall not be eligible for appointment as a director of a company if he has been convicted by a court for any offence involving moral turpitude or otherwise and sentenced in respect thereof to imprisonment for not less than 6 months, and a period of 5 years has not elapsed from the date of expiry of the sentence. In the present case, the period of sentence was only eight weeks, L.e, less than six months. Hence, Mr. B does not come under the purview of this disqualification and can be appointed as a director of a company.

(iii) As more than 5 years have elapsed from the expiry of the sentence, Mr. C is no longer disqualified and can be appointed as a director of a company.

(iv) Section 164(2) states that a person who is or has been a director of a company which has not filed the financial statements or annual returns for any continuous period of 3 financial years, then such a person shall not be eligible either to be appointed as a director of other company or reappointed as a director in the same company. In the present case, DLT Limited has failed to file annual returns. Hence, the disqualification for Mr. D is attracted and he cannot be appointed as a director in other company nor can he be reappointed in the same company.

#### 43. Question

Mr. John is a director of MNC Ltd., which had accepted deposits from public. The Financial position of MNC Ltd. turned very bad and it failed to repay the deposits which fell due for payment on 10th April, 2020 and such repayment has not been made till 5th May, 2021. Another company JKL Ltd. wants to appoint the said Mr. John as its director at its AGM to be held on 6th May, 2021. You are required to state with reference to the provisions of the Companies Act, 2013 whether Mr. John can be appointed as a director of JKL Ltd.

#### Answer

##### **Disqualifications of directors for non-filing of statements and non-payment of dues, etc.**

- Section 164(2) of the Companies Act, 2013 provides that a person who is or has been a director of a company which

(a) has not filed financial statements or annual returns for any continuous period of 3 financial years; or (b) has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for one year or more, shall not be eligible to be re-appointed as a director of that company or appointed in other company for a period of five years from the date on which the said company fails to do so.

- In the instant case, MNC Ltd., has failed to repay its deposit on due dates and the default continues for more than one year.

**Conclusion:** Mr. John will not be eligible to be appointed as a director of JKL Ltd.

#### 44. Question

Mr. Ramanathan is a director of Fraudulent Ltd., Honest Ltd. and Regular Ltd. For the financial Year ended on 31st March, 2020, two irregularities were discovered against fraudulent Ltd. Fraudulent Ltd. did not file its financial statements for the year ended 31.3.2020 and failed to pay interest on loans taken from a financial institution for the last three years.

On 5th Jan., 2021 Mr. Ramanathan is proposed to be appointed as additional director of Goodwill Ltd., which company has sought a declaration from Mr. Ramanathan and he also submitted the declaration stating that the disqualification specified in Section 164 of the Companies Act, 2013 is not attracted in his case. Decide under the provisions of the Companies Act, 2013:

- (i) Whether the declaration submitted by Mr. Ramanathan to Goodwill Ltd. is in order?
- (ii) Whether Mr. Ramanathan can continue as a Director in Honest Ltd. and Regular Ltd.?

#### Answer

##### **Disqualifications of directors for non-filing of statements and non-payment of dues, etc.**

- Section 164(2) of the Companies Act, 2013 provides that a person who is or has been a director of a company which

- (a) has not filed financial statements or annual returns for any continuous period of 3 financial years; or
- (b) has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for one year or more,

shall not be eligible to be re-appointed as a director of that company or appointed in other company for a period of five years from the date on which the said company fails to do so,

- In the instant case, Mr. Ramanathan is a director of Fraudulent Ltd, Honest Ltd, and Regular Ltd. For the financial year ended on 31st March, 2020 two irregularities were discovered against Fraudulent Ltd. Fraudulent Ltd, did not file its financial statements for the year ended 31.3.2020 and failed to pay interest on loans taken from a financial institution for the last 3 years.
- As the financial statements were not filed only for one year, no disqualification attaches to him. Further, the non-payment of interest to the financial Institution is no ground for disqualification under section 164(2) of the Act.

**Conclusions:** Applying the provisions of Sec. 164(2), following conclusions may be drawn:

- (i) Declaration of Mr. Ramanathan is in order.
- (ii) Mr. Ramanathan can continue his directorship in all companies as no disqualification attaches to him u/s 164(2) of the Companies Act, 2013.

#### 45. Question

Mr. Dhruv is a Director of M/s. LT Limited and XT Limited respectively. M/s LT Limited did not file its financial statements for the year ended 31st March, 2018, 2019 & 2020 respectively with the Registrar of Companies (ROC) as mandated under the Companies Act, 2013. M/s. LT Limited also did not pay interest on loans taken from a public financial institution from 1st April 2019 and also failed to repay matured deposits taken from public on due dates from 1st April 2019 onwards.

Answer the legality of the following in the light of the relevant provision of the Companies Act, 2013:

- (i) Whether Mr. Dhruv is disqualified under Companies Act, 2013 and if so, whether he can continue as a Director in M/s LT Limited? Further can he also seek reappointment when he retires by rotation at the AGM of M/s. XT limited scheduled to be held in September 2021?
- (ii) Mr. Dhruv is proposed to be appointed as an Additional Director of M/s. MN Limited in June 2021. Is he eligible to be appointed as an Additional Director in M/s. MN Limited? Decide.

#### Answer

##### **Disqualifications of directors for non-filing of statements etc.**

- Section 164(2) of the Companies Act, 2013 provides that a person who is or has been a director of a company which



- (a) has not filed financial statements or annual returns for any continuous period of financial years: or
- (b) has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for one year or more

shall not be eligible to be re-appointed as a director of that company or appointed in other company for a period of five years from the date on which the said company fails to do so.

- In the instant case, Mr. Dhruv is a director of LT Ltd. and XT Ltd. LT Ltd. has committed following irregularities:
  - (i) Non filing of financial statements for year ended 31st March 2018 to 2020 (3 Years):
  - (ii) Non payment of interest on loans taken from financial institution and
  - (iii) Non repayment of matured deposits taken from the public from 1st April 2019.
- Non filing of financial statements and non repayment of matured deposits are covered u/s 164(2)
- Sec. 167(1)(a) of the Companies Act, 2013 provides that the office of a director shall become vacant in case he incurs any of the disqualifications specified in Sec. 164

Proviso to Sec. 167(1)(a) states that if disqualification u/s 164(2) is attracted, the office of the director shall become vacant in all the companies, other than the company which is in default u/s 164(2) **Conclusion:**

Applying the provisions of Sec. 164(3), following conclusions may be drawn:

- (i) Mr. Dhruv will become disqualified u/s 164, however he can continue in LT Ltd, but need to vacate the office in XT Ltd as per requirement of Sec. 167(1)(a). No question of reappointment at the time of retirement by rotation arises, as he is required to vacate the office immediately in XT Ltd. due to provisions of Sec. 167(1)(a)
- (ii) In view of disqualification u/s 164(2), Mr. Dhruv is not eligible to be appointed as additional director in MN Ltd. in June 2021.

#### 46. Question

Mr. Balan is a Director of Green Tea Plantation Limited and True Spicy Agro Products Limited for the year ended 31st March, 2020. Some irregularities were found in the affairs of Green Tea Plantations Limited for mismanagement. Green Tea Plantation Limited did not file the financial statements for the year ended 31st March, 2020. It also failed to pay interest on loans taken from a Nationalized Bank for the last two years. On 5th January, 2021 his name is proposed to be appointed as an additional Director of Standard Agro Products Limited. The company has sought declaration from Mr. Balan and he submitted the declaration that he is not attracted

by the disqualification stated under the provisions of Sec. 164 of the Companies Act, 2013. Decide under the provisions of the Companies Act, 2013:

- (i) Is the declaration submitted by Mr. Balan to Standard Agro Products Limited in order?
- (ii) Can he continue as a Director of Green Tea Plantation Ltd., and True Spicy Agro Products Limited?

**Answer**

**Disqualifications of directors for non-filing of statements and non payment of dues, etc.**

- Section 164(2) of the Companies Act, 2013 provides that a person who is or has been a director of a company which
  - (a) has not filed financial statements or annual returns for any continuous period of 3 financial years; or
  - (b) has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for one year or more, shall not be eligible to be re-appointed as a director of that company or appointed in other company for a period of five years from the date on which the said company fails to do so.
- In the instant case, Mr. Balan is a director of Green Tea Plantation Ltd. and True Spicy Agro Products Ltd. For the financial Year ended on 31st March, 2020, two irregularities were discovered against Green Tea Plantation Ltd. Green Tea Plantation Ltd. did not file its financial statements for the year ended 31.3.2020 and failed to pay interest on loans taken from a nationalized bank for the last 2 years.
- As the financial statements were not filed only for one year, no disqualification attaches to him. Further, the non payment of interest to the nationalised bank is no ground for disqualification under section 164(2) of the Act.

**Conclusions:** Applying the provisions of Sec. 164(2), following conclusions may be drawn:

- (i) Declaration of Mr. Balan is in order.
- (ii) Mr. Balan can continue his directorship in all companies as no disqualification attaches to him u/s 164(2) of the Companies Act, 2013.

**47. Question**

Mr. Influential is already a director of 19 companies out of which 10 are public limited companies and 9 are private companies. He is being appointed as a director of another company named Expensive Remedies Ltd. Advise Mr. Influential in regard to the following:

- (i) Restrictions on the number of directorships to be held by an individual and whether he can accept the new appointment in view thereof.
- (ii) What are the companies to be excluded for the purpose of calculating the ceiling on the appointment of directors in a public company?

**Answer****Number of Directorships:**

- Sec. 165(1) of the Companies Act, 2013 provides that no person shall hold office as director, including any alternate directorship, in more than 20 companies at the same time. Out of the limit of 20, the maximum number of public companies in which a person can be appointed as a director shall not exceed 10.
- Explanation to Sec. 165(1) provides that private companies that is either holding or subsidiary company of a public company shall be included in reckoning the limit of public companies in which a person can be appointed as a director.
- In the present case, Mr. Influential is already a director of 19 companies out of which 10 are public limited companies and 9 are private companies. He is being appointed as a director of another company named Expensive Remedies Ltd.

**Conclusion:** As Mr. Influential is already a director of 10 public companies, he cannot accept the new appointment as director in one more public company.

**(ii) Companies Excluded for the purpose of calculating the ceiling on the appointment of directors in a public company:**

- Explanation I to Sec. 165(1) provides that 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.
- Explanation II to Sec. 165(1) provides that for reckoning the limit of directorships of 20 companies, the directorship in a dormant company shall not be included.
- Sec. 165(1) shall not apply to Sec. 8 companies, which has not committed a default in filing of its financial statements u/s 137 or annual return u/s 92 with the Registrar.

**48. Question**

'X' was appointed as a director for life by the articles of association of a private company incorporate on 1st May 2020. The articles also empowered 'X' to appoint a successor. 'X' appointed, by will Y to succeed him after his death. Can 'G' succeed 'X' as a director after the death of 'X'?

### Answer

#### Assignment of Office of Director:

- Sec. 166(6) of the Companies Act, 2013 provides that a director of a company shall not assign his office and any assignment so made shall be void.
- In the present case, 'X' was appointed as a director for life by the articles of association of a private company incorporate on 1st May 2019. The articles also empowered 'X' to appoint a successor. 'X' appointed, by will 'Y, to succeed him after his death.
- Appointment of a successor cannot be considered as assignment of office.

**Conclusion:** G can succeed as the appointment by X does not amount to assignment.

### 49. Question

Mr. A is director of ABC Ltd. which failed to repay matured deposits from 1st April. 2020 onwards and the default continues. But ABC Ltd. is regular in filing annual accounts and annual returns. Mr. A is also a director of PQR Ltd. and XYZ Ltd. Answer the following questions with reference to the relevant provisions of the Companies Act, 2013:

- Whether Mr. A is disqualified and if so whether he is required to vacate his office of director in PQR Ltd. and XYZ Ltd.
- Is it possible for Board of directors of DEF Ltd. to appoint Mr. A as an additional director at the board meeting to be held on 15th May 2021. Would your answer be different If Mr. A ceased to be a director of ABC Ltd. by resignation on 1st March 2021.

### Answer

#### Disqualifications for Appointment of Director:

- Sec. 164(2) of the Companies Act, 2013 provides that a person who is or has been a director of a company which:
  - has not filed the financial statements or annual returns for any continuous 3 financial years; Or
  - has failed to repay the deposits accepted by it or pay interest thereon on due date or redeem its debentures on due date or pay interest due thereon or pay any dividends declared and such failure

continues for one year or more shall not be eligible to be re-appointed as a director of that company or appointed in other company for a period of 5 years from the date on which the said company fails to do so.

- Sec. 167(1)(a) of the Companies Act, 2013 provides that the office of a director shall become vacant in case he incurs any of the disqualifications specified in Sec. 164.
- Proviso to Sec. 167(1)(a) states that if disqualification u/s 164(2) is attracted, the office of the director shall become vacant in all the companies, other than the company which is in default u/s 164(2).

**Conclusions:** Applying the provisions of Sec. 164(2) and Sec. 167(1)(a), following conclusions may be drawn:

- (i) Mr. A becomes disqualified w.e.f. 1st April 2021 and he need to vacate the office in PQR Ltd. and XYZ Ltd. Though, he may continue in ABC Ltd.
- (ii) Board of Directors of DEF Ltd. cannot appoint Mr. A as an additional director on 15.05.2021 due to disqualification attracted u/s 164(2) for 5 years w.e.f. 01.05.2021.

However, if Mr. A ceased to be a director of ABC Ltd. by resignation on 1st March 2021, he may be appointed as additional director in DEF Ltd.

### 50. Question

Due to internal problems in the working of M/s Infighting Detergents Ltd., Mr. Satyam and Mr. Shivam, Directors, have submitted their resignations and decided to disassociate themselves with the working of the company. Mr. Sundram, the Managing Director, decides to refuse their Resignations. Examine whether the Managing Director can compel Mr. Satyam and Mr. Shivam to continue as per the provisions of the Companies Act, 2013.

### Answer

#### Resignation of Director

- Section 168(1) of the Companies Act, 2013 provides that a director may resign from his office by giving a notice in writing to the company. The Board shall on receipt of such notice take note of the same.
- Section 168(2) of the Companies Act, 2013 provides that the resignation of a director shall take effect from the date on which the notice is received by the company or the date, if any, specified by the director in the notice, whichever is later.
- There is no requirement of acceptance of resignation of directors by the Board or members.

- In the present case, due to internal problems in the working of M/s Infighting Detergents Ltd., Mr. Satyam and Mr. Shivam, Directors, have submitted their resignations and decided to disassociate themselves with the working of the company. Mr. Sundram, the Managing Director, decides to refuse their Resignations.

**Conclusion:** No right given to MD to reject the resignation of a director and hence, he cannot compel Mr. Satyam and Mr. Shivam to continue.

### 51. Question

A company has in its Articles of Association provided for appointment of not less than two thirds of the total number of its directors according to the principle of proportional representation. Can the directors so appointed be removed by the company in general meeting as per the provisions of the Companies Act, 2013?

#### Answer

##### **Removal of Directors appointed by the principle of proportional representation:**

- Sec. 169(1) of the Companies Act, 2013 provides that a company may, by ordinary resolution, remove a director, not being a director appointed by the Tribunal under section 242, before the expiry of the period of his office after giving him a reasonable opportunity of being heard.
- It is also provided that these provisions shall not apply where the company has availed itself of the option given to it u/s 163 to appoint not less than 2/3rd of the total number of directors according to the principle of proportional representation.
- In the present case, a company has in its Articles of Association provided for appointment of not less than 2/3rd of the total number of its directors according to the principle of proportional representation.  
**Conclusion:** Directors elected by the principle of proportional representation cannot be removed in general meeting

### 52. Question

Mr. X is named as a director for life in the articles of association of M/s ABC (P) Limited which was incorporated on 1st April 2012. The Articles of Association of the company also provide that he cannot be removed by the members in general meeting. Some of the members want to remove Mr. X by passing an ordinary resolution in general meeting. State with reference to the relevant provisions of the Companies Act, 2013 whether the proposed action is valid.

#### Answer

##### **Removal of Directors:**

- Sec. 169(1) of the Companies Act, 2013 provides that a company may, by ordinary resolution, remove a director, not being a director appointed by the Tribunal under section 242, before the expiry of the period of his office after giving him a reasonable opportunity of being heard.
- Any provisions in the Articles which is contrary to the statutory provisions is ultra vires the Act and is not having any effect as such.
- Mr. X is named as a director for life in the articles of association of M/s ABC (P) Limited which was incorporated on 1st April 2012. The Articles of Association of the company also provide that he cannot be removed by the members in general meeting. Some of the members want to remove Mr. X by passing an ordinary resolution in general meeting

**Conclusion:** Provisions contained in the Articles of Association are contrary to the provisions of sec. 169(1) and hence the proposed action by shareholders to remove the director is valid subject to compliance of conditions as stated in sec. 169.

### 53. Question

Examine the validity of the following appointments with reference to the provisions of the Companies Act, 2013:

- (i) Mr. Person together with one of his relatives holds 3% of the total voting power of XYZ Ltd. The Board of Directors of the company appointed him as an independent director.
- (ii) ABC Ltd., a listed company having 5,000 small shareholders, upon receiving notice from 400 of such small shareholders has refused to appoint a small shareholders' director under section 151 of the Companies Act, 2013.
- (ii) Mr.D, who fails to get appointed as a director in the general meeting of AJD Limited, subsequently was appointed as an additional director by the Board of Directors of the company.

### Answer

#### Validity of Director's Appointments:

- (i) Sec. 149(6)(e) of Companies Act, 2013 provides that a person who holds together with his relatives 2% or more of the total voting power of the company is not eligible to be appointed as independent director of the company. As Mr. Person together with one of his relatives holds 3% of the total voting power of XYZ Ltd, he cannot be appointed as independent directors. Appointment is invalid.
- (ii) As per section 151 of Companies Act, 2013 read with Rule 7 of Companies (Appointment and Qualification of Directors) Rules, 2014, a listed company, may upon notice of not less than 1000 small shareholders or 1/10th

of the total number of such shareholders, whichever is lower, have a small shareholders' director elected by the small shareholders. In the case application is received by 400 small shareholders only. Hence Refusal of company to appoint small shareholder is in order. However, it may opt to have a director representing small shareholders suo motu.

(ii) Sec. 161(1) of the Companies Act, 2013 provides that the articles of a company may confer on its Board of Directors the power to appoint any person, other than a person who fails to get appointed as a director in a general meeting, as an additional director at any time who shall hold office up to the date of the next annual general meeting or the last date on which the annual general meeting should have been held, whichever is earlier. Appointment of D as additional director is not valid as he fails to get appointed as a director in the general meeting of the company.

#### 54. Question

State the legal positions as to the valid appointment of the directors in the given situations in the light of the Companies Act, 2013

(i) Shiksham Ltd. was formed for prompting the girls education with 15 directors in its Board. Due to expansion of its objective at large scale, the company increased the strength of its directors to 20 without passing SR.

(ii) Mr. Kabir was appointed as an alternate director on behalf of Mr. Robert, as Mr. Robert goes abroad and comes back to India temporarily and leaves country again.

(iii) PQRLtd., who failed to file a financial statement in previous financial year 2019-2020, appointed Mr. Khurana as a director in July 2020.

#### Answer

##### **Determination of validity of director's appointment:**

(i) Sec. 149(1) of the Companies Act, 2013 provides that 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 OnePerson Company. The maximum number of directors shall be 15.

However, a company may appoint more than 15 directors after passing a special resolution.



Limit of Maximum directors and their increase is not applicable to Government Companies and Sec. 8 Companies provided these companies has not committed a default in filing of their financial statements u/s 137 or annual return u/s 92 with the Registrar.

Shiksham Ltd. can appoint 20 directors without passing Special resolution as it is a Sec. 8 company. (ii) As per Sec. 161(2) of the Companies Act, 2013, the alternate director is required to vacate his office as soon as the foreign director comes to India. But in this case, Mr. Robert goes abroad and comes back to India temporarily and leaves country again, thus, becoming unable to transact business. Hence, alternate director (Mr. Kabir) would continue for such temporary period.

(iii) As per section 164(2) of Companies Act, 2013, if a company commits default in filing its financial statements, any person appointed as director, will not be disqualified for first six months from date of his appointment. Hence the appointment of Mr. Khurana as a director is valid upto January 2021.

**Note: It is presumed that PQR Ltd. also fails to file financial statements for previous years 2017 18 and 2018-19.**

### 55. Question

Directors of ABC Ltd. are not holding any shares in MDJ Co, Ltd. Similarly, directors of MDJ Company Limited are not holding any shares in ABC Ltd. But wife of director "A" of ABC Ltd. hold 40% of the paid-up share capital of MDJ Company Limited. Board of directors of ABC Ltd. enter into a contract with MDI Company Limited for the purchase of goods and director did not disclose his indirect interest in MDI Company Limited. Examine whether it has violated any of the provisions of the Companies Act, 2013 and also the validity of the contract.

### Answer

#### Circumstances in which disclosure of Interest by director is necessary:

- Sec. 184(2) of the Companies Act, 2013 provides that every director of a company, who is in any way, whether directly or indirectly, concerned or interested in a contract or arrangement or proposed contract or arrangement entered into or to be entered into with a body corporate in which such director or such director in association with any other director, holds more than 29% shareholding of that body corporate shall disclose the nature of his concern or interest at the meeting of the Board in which the contract or arrangement is discussed and shall not participate in such meeting.

- In the instant case, Directors of ABC Ltd. are not holding any shares in MDJ Co. Ltd. Similarly, directors of MDI Company Limited are not holding any shares in ABC Ltd. But wife of director "A" of ABC Ltd. hold 40% of the paid-up share capital of MDJ Company Limited. Board of directors of ABC Ltd. enter into a contract with MDI Company Limited for the purchase of goods and director did not disclose his indirect interest in MDJ Company Limited.

**Validity of the contract on non-disclosure of interest:** Sec. 184(3) of Companies Act, 2013 provides that a contract or arrangement entered into by the company without disclosure u/s 184(2) or with participation by a director who is concerned or interested in any way, directly or indirectly. in the contract or arrangement, shall be voidable at the option of the company.

**Conclusion:** Provisions of sec. 184(2) has been violated and contract is voidable at the option of ABC Ltd.

#### 56. Question

In the light of the provisions of the Companies Act, 2013 examine whether the following transactions in case of a public company can be termed as loan to directors:

- Sale of company flat to a director at prevailing market price out of which the director pays 50% immediately and contract to pay the balance amount in 10 equal annual instalments.
- Making a deposit with the landlord under license agreement for securing a residential accommodation for the managing director of the company.
- A salary advance of 50,000 to employee who is the wife of the managing director of the company.
- Loan to a firm in which the director of the company is a partner.

#### Answer

##### Loans to directors etc.

As per Sec. 185 of the Companies Act, 2013, no company shall, directly or indirectly, advance any loan, including any loan represented by a book debt to, or give any guarantee or provide any security in connection with any loan taken by,

- any director of company, or of a company which is its holding company or any partner or relative of any such director; or
- any firm in which any such director or relative is a partner.

In accordance with provisions of sec. 185:

- (i) Sale of company flat to a director at prevailing market price out of which the director pays 50% immediately and contract to pay the balance amount in 10 equal annual instalments is a transaction in nature of credit sale and cannot be considered as a transaction of loan.
- (ii) Amount deposited with the landlord under license agreement for securing a residential accommodation for the managing director of the company cannot be considered as a transaction of loan as it is the company and not the director who has entered into the transaction.
- (iii) Salary advance of 50,000 to employee who is the wife of the managing director of the company cannot be considered as a transaction of loan if the advance is paid to the wife of the managing director in her capacity of an employee as per the rules applicable to other employees of the company.
- (iv) Loan to a firm in which a director of the company is a partner will be considered as a transaction of loan covered u/s 185.

**57. Question**

Mr. DRT is a director of PCS Ltd. The said company is having sufficient liquid funds and Mr. DRT is in dire need of funds. In order to mitigate the hardship of Mr. DRT the board of directors of PCS Ltd. wants to lend 5 lakhs to him and 2 lakhs to his wife. State whether such loans can be given and if so under what conditions. What would be your answer if the company PCS LTD, would have been PCS Private Ltd.

**Answer**

Loan to Director and his relative:

- As per Sec. 185 of the Companies Act, 2013, no company shall, directly or indirectly, advance any loan, including any loan represented by a book debt to, or give any guarantee or provide any security in connection with any loan taken by
  - (a) any director of company, or of a company which is its holding company or any partner or relative of any such director; or
  - (b) any firm in which any such director or relative is a partner.
- In the instant case, board of directors of PCS Ltd wants to lend 5 lakhs to Mr. DRT, the director of the company and 2 lakhs to his wife.

**Conclusion:** Granting loan to director or relative of such director is in violation of section 185 of the Companies Act, 2013.

If PCS Ltd. would have been PCS Private Ltd. than provisions of sec. 185 of the Companies Act, 2013 shall not apply over it subject to following conditions:

- (a) no other body corporate has invested any money in share capital of such company,
- (b) borrowings of such company from banks or financial institutions or any body corporate is less than twice of its paid-up share capital or Rs.50 crore, whichever is lower;
- (c) no default in repayment of such borrowings subsist at the time of making transactions u/s 185; and
- (d) company has not committed a default in filing of its financial statements u/s 137 or annual return u/s 92 with the Registrar.

### 58. Question

Decide in the light of the Companies Act, 2013, on the following proposals of loans for consideration before the Honesty Ltd.

- (1) Loan to its director, Mr. A for construction of residential house as a personal loan.
- (2) Loan to Mr. B, its whole time Director.
- (3) Loan to X Ltd. in the ordinary course of business and the rate prescribed is not less than bank rate prescribed by the reserve bank.

### Answer

#### Loans to Directors etc.

As per Sec. 185(1) of the Companies Act, 2013, no company shall, directly or indirectly, advance any loan, including any loan represented by a book debt to, or give any guarantee or provide any security in connection with any loan taken by

- (a) any director of company, or of a company which is its holding company or any partner or relative of any such director; or
- (b) any firm in which any such director or relative is a partner.

As per Sec. 185(3) of the Companies Act, 2013, provisions of Sec. 185(1) shall not apply:

- where any loan is given to a managing or whole-time director
  - as a part of the conditions of service extended by the company to all its employees; or
  - (1) pursuant to any such scheme which is approved by the members by a special resolution.
- where a company in the ordinary course of its business:
  - provides loans or gives guarantees or securities for the due repayment of any loan; and
  - in respect of such loans an interest is charged at a rate not less than the rate of prevailing yield of one year, three years, five years or ten years Government security closest to the tenor of the loan

**Conclusion:** Based on the provisions as stated above, following conclusions may be drawn:

- (1) In the first case it would violate the Sec. 185(1) of the Companies Act, 2013. Honesty Ltd. is not permitted, to advance any loan, or to give any guarantee or provide any security in connection with any loan taken by Mr. A (director) of the company.
- (2) In the second case, as per Sec. 185(3), restrictions imposed in Sec. 185(1), will not apply to giving of loan to Mr. B, the whole-time director if it is given as a part of the conditions of service extended by the company to all its employees.
- (3) In third case, if it is loan given to a company in the ordinary Course of business for due repayment of any loan and lending rate is not less than the bank rate prescribed by the Reserve bank, the restrictions imposed u/s 185(1) will not apply to such transactions.

#### 59. Question

XYZ Limited is an unlisted public company having a paid-up capital of twenty crore rupees as on 31st March, 2017 and a turnover of one hundred fifty crore rupees during the year ended 31st March, 2017. The total number of directors is thirteen.

State the following answers:

- (i) Minimum number of directors appointed as Independent Director in XYZ Limited.
- (ii) What will be the consequences where XYZ Ltd. ceases to fulfill any of the required conditions with respect to appointment of Independent directors for three continuous years?

If suppose XYZ Ltd. (Unlisted public company) is a dormant company, what shall be the law related to the appointment of Independent director?

**Answer:**

According to Rule 4(1) of the Companies (Appointment and Qualification of Directors) Rules, 2014, the following class or classes of companies shall have at least 2 directors as independent directors:

- (1) the Public Companies having paid up share capital of 10 crore rupees or more; or
- (2) the Public Companies having turnover of 100 crore rupees or more; or
- (3) the Public Companies which have, in aggregate, outstanding loans, debentures and deposits, exceeding 50 crore rupees.

In the present case, XYZ Limited is an unlisted public company having a paid-up capital of Rs. 20 crores as on 31st March, 2017 and a turnover of Rs. 150 crores during the year ended 31st March, 2017. Thus, as per the

Companies (Appointment and Qualification of Directors) Rules, 2014, XYZ Limited shall have at least 2 directors as independent directors.

Where a company ceases to fulfil any of 3 conditions for three consecutive years, it shall not be required to comply with these provisions (i.e., related to appointment of Independent directors) until such time as it meets any of such conditions.

(ii) As per Rule 4(2) of the Companies (Appointment and Qualification of Directors) Rules, 2014 the following classes of unlisted public company are not covered under Rule 4(1), namely:-

- (a) a joint venture;
- (b) a wholly owned subsidiary; and
- (c) a dormant company as defined under section 455 of the Act.

Accordingly, XYZ, a dormant company does not require to fulfill the conditions stated in Rule 4(1) for appointment of Independent Directors.

#### 60. Question

Mr. Fortune is holding directorship in the following types of companies:

- (iii) 4 Public companies
- (iv) 10 private companies
- (v) 2 companies registered under section 8 of the Companies Act, 2013.

Mr. Fortune further received offer from 7 public companies, 6 private companies and 2 companies registered under section 8 of the Companies Act, 2013. He wants to take up maximum permissible directorship. His order of preference is as follows:

- (1) Public companies
- (2) Private companies (not being holding or subsidiary of any public company) and
- (3) Companies registered under section 8 of the Companies Act, 2013

Decide the number of companies in which Mr. Fortune can hold the directorship.

#### Answer:

Section 165 of the Companies Act, 2013 provides for the maximum permissible number of directorships that a person can hold. According to this section:

No person, after the commencement of this Act, shall hold office as director, including any alternate directorship, in more than 20 companies at the same time. [Section 165(1)]

Provided that out of the limit of 20, the maximum number of public companies in which a person can be appointed as a director shall not exceed 10. [Proviso to section 165(1)]

However, the limit of directorship of 20 companies shall not include the directorship in a dormant company; as also in a section 8 company.

Private companies that is either holding or subsidiary company of a public company shall be included in reckoning the limit of public companies in which a person can be appointed as a director.

The MCA vide Notification No. 466(E) dated 5th June, 2015, has clarified that section 165(1) of the Companies Act, 2013, shall not apply to section 8 companies.

Based on the above provisions, Mr. Fortune can hold the directorship as follows:

- (i) 6 Public companies. Since the maximum number of public companies in which one can be a director is 10 only.
- (ii) No more private company. Since his total holding has already reached the maximum permissible 20 companies (All inclusive of public and private companies)
- (iii) 2 more companies registered under section 8 of the companies Act, 2013. Since there is no restriction on the number of directorship, a person can hold in the companies registered under section 8 of the Companies Act, 2013.

### 61. Question

Mr. Ram have been appointed as a director in X Ltd. due to his holding of an office as Managing Director (MD) in its holding company, ABC Limited. In due course of time, Mr. Ram was offered by HXL Limited to join the company as a managerial personnel on very good package. He was offered the said position on the term that he has to resign from the ABC Ltd.

Mr. Ram served a notice in writing to the company by mail and through post to his registered office on 1.02.2018. His notice of resignation specified the date 15.02 2018 as the last date in the ABC Ltd. However, due to pressure of HXL Ltd., he joined the company on 13.02.2018.

Analyse, Integrate and apply in terms of the Companies Act, 2013, the legal position of Mr. Ram in the given situations-

- (a) Holding of directorship of Mr. Ram in X Ltd. after ceasing to hold office as MD in ABC Ltd.
- (b) Joining of HXL Ltd on 13. 02.2018.

### Answer

According to section 167(1)(h) of the Companies Act, 2013, the office of a director shall become vacant in case he, having been appointed a director by virtue of his holding any office or other employment in the holding, subsidiary or associate company, ceases to hold such office or other employment in that company. If a person, functions as a director even when he knows that the office of director held by him has become vacant on account of any of the disqualifications specified in sub-section (1), he shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than Rs. 1,00,000 but which may extend to Rs. 5,00,000, or with both. [Section 167(2)].

- As per section 168 a director may resign from his office by giving a notice in writing to the company.
- The Board shall on receipt of such notice take note of the same and intimate Registrar
- The Company shall within 30 Days from the date of receipt of notice of resignation from director, intimate the registrar in FORM DIR 12 and post the information on its website, if any.
- Board shall place the fact of such resignation in the report of Director in the immediate following General Meeting by the Company.
- Besides, Director also forward his resignation to registrar within 30 days of his resignation in FORM DIR – 11.
- The resignation of a director shall take effect from the date on which the notice is received by the company or the date, if any, specified by the director in the notice, whichever is later.

As per the given facts, the legal position of Mr. Ram in the given situations will be as follows:

Holding of directorship of Mr. Ram in X Ltd. is invalid in the light of section 167(1)(h) of the Companies Act, 2013.

As per the facts, Mr. Ram was appointed as director in X Ltd. due to holding of office in its holding company, ABC Ltd. According to the above provisions, office of director in X Ltd. shall become vacant due to cease of its holding of his office or employment in ABC Ltd. So holding of directorship in X Ltd. by Mr. Ram is invalid and he is liable to vacate.

Even if, Mr. Ram functions as a director knowing that the office of director held by him has become vacant on account of the above provision, he shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than Rs. 1,00,000 but which may extend to Rs.

5,00,000, or with both. [Section 167(2)]

According to Section 168 of the Companies Act, 2013, Resignation shall effect from the date on which the notice is received by the company or the date, if any, specified by the director in the notice, whichever is later, i.e.,



15.02.2018. So joining of HXL Ltd. during the notice period i.e. on 13.02.2018, is not valid. As per section 172 of the Companies Act, 2013, if a company contravenes in compliance to the said provision, the company and every officer of the company who is in default shall be punishable with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees.

## 62. Question

a. The composition of the Board of Directors of a listed company as on 31-03-2017 comprised of (i) Mr. A, Director, (ii) Mr. B, Director (iii) Mr. C, Director (iv) Mr. D, Director, (v) Mrs. E, Independent Director, (vi) Mr. F, Independent Director and (vii) Mr. G, Independent Director.

You are required to examine with reference to the provisions of the Companies Act, 2013 the vacations of the offices of Mr. D & Mrs. E and discuss the course of action that can be taken up by the Company in this regard?

b. Discuss the legal position in the given situations with reference to the provisions of the Companies Act, 2013:

(a) Mr. Arthav, a director resigns after giving due notice to the company and he forwards a copy of resignation in e-form DIR-11 to the Registrar of Companies (RoC) within the prescribed time. Besides, the company fails to intimate about the resignation of Mr. Arthav to RoC.

(b) The Board of Directors of Superwood Limited decides to appoint on its Board, Mr. Ramakant as a nominee director upon the request of a bank which has extended a long term financial assistance to the company. The Articles of Association of the company do not confer upon the Board any such power. Also, there is no formal agreement between the company and the bank for any such nomination.

## Answer

1. (i) The provision of the Companies Act, 2013 governing the appointment of Women Director and Independent Directors are as under:

(a) The second proviso to section 149(1) of the Companies Act, 2013 provides that such class or classes of companies as may be prescribed, shall have at least one women director. Rule 3 of Companies (Appointment and Qualification of Directors) Rules, 2014 provides that the following class of companies shall appoint at least one women director –

- (1) every listed company;
- (2) every other public company having-
  - paid-up share capital of one hundred crore rupees or more; or
  - turnover of three hundred crore rupees or more;

It further provides that any intermittent vacancy of a women 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 this case the Company is a listed and under the provisions of the Companies Act, 2013, it is required to have at least 1 Women Director in its Board.

(b) The provision of section 149(4) provides that every listed company shall have at least 1/3rd of the total number of Directors as Independent Directors.

As per the facts stated in the question, composition of board of directors of listed company as on 31-3-2017 comprised of total 7 directors. Out of which 4 were directors and 3 were independent directors. Later Mr. D (Director) and Mrs. E (Independent Director) vacated their offices of director on 15-4-2017. So accordingly, listed company as stated above, shall have at least one women director and one third of the total number of directors as independent directors in the Board. However, on 15-4-2017, total number of directors left were 5 due to vacation of Mr. D and Mrs. E. Further, Rule 3 of the Companies (Appointment and Qualification of Directors) Rules, 2014, provides that if there is an intermittent vacancy of a women director, it 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.

As per the requirement of the above sections, there is compliance of section 149(4) as 1/3rd of the total number of directors comprises of  $(1/3 \times 5) 1.6$  rounded off as 2, which complies with the minimum requirement of 2 independent directors in the board, however, pertaining to women director, Board have to fill up the intermittent vacancy at the earliest but not later than immediate next board meeting or three months from the date of such vacancy whichever is later.

(ii) (a) Resignation of Director (Section 168 of the Companies Act, 2013)

A director may resign from his office by giving a notice in writing to the company. The Board shall on receipt of such notice take note of the same. The company shall within 30 days from the date of receipt of notice of resignation from a director, intimate the Registrar in Form DIR -12 and post the information on its website, if any.

Such director shall also forward a copy of his resignation along with detailed reasons for the resignation to the Registrar within 30 days from the date of resignation in Form DIR-11 along with the prescribed fee. The

resignation of a director shall take effect from the date on which the notice is received by the company or the date, if any, specified by the director in the notice, whichever is later. In the present case, Mr. Arthav, a director resigns after giving due notice to the company and he forwards a copy of resignation in e-form DIR-11 to the RoC within the prescribed time.

If the company fails to intimate about the resignation of Mr. Arthav to RoC, even then the resignation of Mr. Arthav shall take effect from the date on which the notice is received by the company or the date, if any, specified by Mr. Arthav in the notice, whichever is later.

(b) According to section 161 (3) of the Companies Act, 2013, subject to the articles of a company, the Board may appoint any person as a director nominated by any institution in pursuance of the provisions of any law for the time being in force or of any agreement or by the Central Government or the State Government by virtue of its shareholding in a Government company.

The Articles of Association of Superwood Limited do not confer upon the Board of Directors any such power. Hence, the Board cannot appoint Mr. Ramakant as a nominee director even on the request of a bank which has extended a long term financial assistance to the company.

### 63. Question

Mr. Bond and Mr. James were appointed as Directors of Jamesbond Ltd. at the AGM held on 30th September, 2017 by a single resolution. State the relevant provisions of the Companies Act, 2013 and identify is it possible to appoint the above Directors by a single resolution?

#### Answer:

According to Section 162 of the Companies Act, 2013, at a general meeting of a Company, a motion for the appointment of two or more persons as Directors of the Company by a single resolution shall not be moved unless a proposal to move such a motion has first been agreed to at the meeting without any vote being cast against it.

A resolution moved in contravention of above shall be void, whether or not any objection was taken when it was moved.

A motion for approving a person for appointment, or for nominating a person for appointment as a director, shall be treated as a motion for his appointment.

In the instant case, it is not possible to appoint Mr. Bond and Mr. James as Directors of James Bond Ltd. by a single resolution.

#### 64. Question

CTC Limited is an unlisted public company having a paid up capital of Rs. 100 crores as on 31<sup>st</sup> March, 2017. The company made a turnover of Rs. 300 crores for the financial year ended 31st March, 2017. The Articles of Association of the company provides for payment of sitting fee to Directors for each Board Meeting/Committee thereof subject to a maximum of Rs. 40,000 per meeting.

The Board of Directors is comprised of Independent Directors and Women Directors also. The Company is having 7 directors in its Audit Committee. Shri PKV, working as Financial Advisor of the company, was designated as Chief Financial Officer from 1st April, 2015. He retired from service on superannuation on 31st March, 2016, He is in receipt of monthly pension of Rs. 80,000 from the company. It is proposed to appoint Shri PKV as Independent Director of the Company. The Board of Directors proposes to fix sitting fee of Rs. 50,000 per meeting to Independent Director and Rs. 30,000 per meeting to Woman Director, taking into consideration their experience and qualification.

In the light of the provisions of the Companies Act, 2013, advise the Board of Directors in the following matters

- (1) Appointment of Mr. PKV as Independent Director.
- (2) Fixing sitting fee of Rs. 50,000 to Independent Director and Rs. 30,000 to Woman Director.
- (3) Minimum number of Independent Directors.
- (4) Maximum sitting fee to a Director.

Assuming CTC Ltd. is a Government Company, what will be your advise in the matter of appointment of Mr. PKV as Independent Director.

#### Answer

##### 1) Appointment of Mr. PKV as an Independent Director

According to Section 149(6)(e)(i) of the Companies Act, 2013, an Independent Director shall be a person who, neither himself nor any of his relatives holds or has held the position of a Key Managerial Personnel (KMP) or is or has been an employee of the Company or its Holding, Subsidiary or Associate Company in any of the 3 financial years immediately preceding the financial year in which he is proposed to be appointed.

In the instant case, the Company, CTC Limited is proposing to appoint Mr. PKV as an Independent Director who was working as Financial Advisor in the Company and then was designated as Chief Financial Officer for the financial year 2015 -2016. Since, he was an employee and also a Key Managerial Personnel in one of the 3 financial years immediately preceding the financial year in which he is proposed to be appointed, Mr. PKV shall not be appointed as an Independent Director in CTC Limited.

### **(2) Fixing sitting fee to Independent Director and Women Director**

As per Section 197(5) of the Companies Act, 2013 along with the Companies (Appointment and Remuneration of Managerial personnel) Rules, 2014 , a Company may pay a sitting fee to a Director for attending meetings of the Board or Committees thereof, such sum as may be decided by the Board of Directors thereof which shall not exceed one lakh rupees per meeting of the Board or Committee thereof. However, for Independent Directors and Women Directors, the sitting fee shall not be less than the sitting fee payable to other directors.

In the instant case, the Articles of Association of the Company provides for payment of sitting fee to Directors of Rs. 40,000.

Hence, the sitting fee of Rs. 50,000 can be paid to the Independent Director but the sitting fee payable to Woman Director shall not be less than Rs. 40,000. So, the amount of Sitting fee payable to Woman Director has to be increased from Rs. 30,000 (as proposed) to minimum Rs. 40,000.

### **3) Minimum number of Independent Directors**

According to the Rule 4 of the Companies (Appointment and Qualification of Directors) Rules, 2014, the following class or classes of Companies shall have at least 2 directors as Independent Directors:

- (1) The Public Companies having paid up share capital of 10 crore rupees or more; or
- (2) the Public Companies having turnover of 100 crore rupees or more; or
- (3) the Public Companies which have, in aggregate, outstanding loans, debentures and deposits, exceeding 50 crore rupees.

However, in case a Company covered as under the above Rule is required to appoint a higher number of Independent Directors due to composition of its Audit Committee, such higher number of Independent Directors shall be applicable to it.

As per Section 177(2) of the Companies Act, 2013, the Audit Committee shall consist of a minimum of three directors with Independent Directors forming a majority.

In the instant case, CTC Limited shall appoint at least 2 directors as Independent Directors as it is covered under Rule 4 of the above Rules since the Company is having a paid up capital of Rs.100 crores and a turnover of Rs.

300 crores for the financial year ended 31st March, 2017. But since the Company is having an Audit Committee having 7 directors, therefore 4 directors out of 7 must be Independent directors (4 is forming majority).

**(4) Maximum sitting fee to a Director**

As per Section 197(5) of the Companies Act, 2013 along with the Companies (Appointment and Remuneration of Managerial personnel) Rules, 2014, a Company may pay a sitting fee to a Director for attending meetings of the Board or Committees thereof, such sum as may be decided by the Board of Directors thereof which shall not exceed one lakh rupees per meeting of the Board or Committee thereof.

Accordingly, the maximum sitting fee payable to a Director shall not exceed one lakh rupees.

**(5) Appointment of Mr. PKV if CTC Ltd is a government company**

If CTC Ltd. is a Government Company, then also Mr. PKV shall not be appointed as an Independent Director in CTC Limited because, he was an employee and also a Key Managerial Personnel in one of the 3 financial years immediately preceding the financial year in which he is proposed to be appointed

**65. Question**

Mr. Single, a director of XYZ Ltd. goes Singapore, for a period of 6 months. Board appoints Mr. Replacement, in his place as an alternate director. Mr. Replacement was also holding directorship in XYZ Ltd. Identify the nature of appointment of Mr. Replacement in XYZ Ltd as an alternate director.

**Answer:**

According to Section 161(2) of the Companies Act, 2013, the Board of Directors of a company may, if so authorised by its articles or by a resolution passed by the company in general meeting, appoint a person, not being a person holding any alternate directorship for any other director in the company, or holding directorship in the same company, to act as an alternate director for a director during his absence for a period of not less than three months from India.

In the given question, Board appoints Mr. Replacement, in the place of Mr. Single as an alternate director. Mr. Replacement was also holding directorship in XYZ Ltd.

So, as per above provision, Mr. Replacement shall not be appointed as an alternate director due to his holding of directorship in the same company in which he is appointed as an alternate director. So his appointment is invalid.

**66. Question**

ABC Ltd. is a listed company having 50,00,000 equity shares of Rs. 100 each as its paid up capital. Of the total shareholders of the company there are 20000 shareholders who are holding shares of nominal value of not more than Rs. 20000 each. A group of shareholders who had applied for these shares at the time of issue of such shares by the company by issuing prospectus and been allotted these shares, wants to appoint a small shareholder's director to safeguard their interest and to get a proper representation in the company. A total number of 1500 such small shareholders decided to propose Mr. X as their candidate for this post. In the light of the Companies Act, 2013 on the basis of the facts provided, determine the following situations—

- (1) What procedure should be followed by group of shareholders to have Mr. X, a small shareholder director in the Board of Directors of the company?
- (2) What are the provisions related to his (Mr. X) status as an independent director and what exceptions are available to him in relation to his appointment as a director?

Answer:

As per the provisions given in Section 151 of the Companies Act, 2013, a listed company may have one director elected by such small shareholders in such manner and on such terms and conditions as prescribed in Rule 7 of the Companies (Appointment and Qualification of directors) Rules, 2014. "Small Shareholders" means a shareholder holding shares of nominal value of not more than Rs. 20000/- or such other sum as may be prescribed.

(1) The Companies (Appointment and Qualification of directors) Rules, 2014 provides for the procedure for appointment of Small shareholders' director according to which:

(A) A listed company, may upon notice of not less than

- (a) one thousand small shareholders; or
- (b) one-tenth of the total number of such shareholders,

Whichever is lower; have a small shareholders director elected by the small shareholder.

However, a listed company may opt suo moto, to have a director representing small shareholders and in such case the provisions stated in point (B) shall not apply for appointment of such director.

(B) The small shareholders intending to propose a person as a candidate for the post of small shareholder's director shall leave a notice of their intention with the company at least fourteen days before the meeting under their signature specifying the name, address, shares held and folio number of the person whose name is being

proposed for the post of director and of the small shareholders who are proposing such person for the office of director.

However, if the person being proposed does not hold any shares in the company, the details of shares held and folio number need not be specified in the notice.

(C) The notice shall be accompanied by a statement signed by the person whose name is being proposed for the post of small shareholder's director stating- (a) his Director Identification Number;

(b) that he is not disqualified to become a director under the Act; and (c) his consent to act as a director of the company.

(d) A person shall not be appointed as small shareholder's director of a company, if he is not eligible for appointment as a director as per the provisions of the Companies Act, 2013. In compliance with the said provisions Mr. X can be appointed as the small shareholder by the group of shareholders in Board of Directors of ABC Ltd.

(2) Such small shareholders' director shall be considered as an independent director if he fulfills all the conditions/pre requisite to become an independent director as mentioned in Section 149(6) and gives a declaration of his independence in accordance with the provisions of section 149(7) of the Companies Act, 2013.

The appointment of small shareholder's director i.e. Mr. X shall be as per the provisions of Companies Act, 2013, except that—

(a) such director shall not be liable to retire by rotation;

(b) such director's tenure as small shareholder's director shall not exceed a period of three consecutive years; and

(c) on the expiry of the tenure, such director shall not be eligible for re-appointment.

### 67. Question

ABC Limited is an unlisted public Company having a paid up equity share capital of Rs. 20 Crores and a turnover of Rs. 150 Crores as on 31st March, 2018. The total number of Directors on the Board is 13.

Referring to the provisions of the Companies Act, 2013 answer the following:

(i) The minimum number of Independent Directors that the Company should appoint.

(ii) How many Independent Directors are to be appointed in case ABC Limited is a listed Company?

**Answer:**



According to Section 149(4) of the Companies Act, 2013, every listed public company shall have at least one-third of the total number of directors as independent directors.

Any fraction contained in such one-third numbers shall be rounded off as one According to the Rule 4 of the Companies (Appointment and Qualification of Directors) Rules, 2014, the following class or classes of companies shall have at least 2 directors as independent directors:

- (1) the Public Companies having paid up share capital of 10 crore rupees or more; or
  - (2) the Public Companies having turnover of 100 crore rupees or more; or
  - (3) the Public Companies which have, in aggregate, outstanding loans, debentures and deposits, exceeding 50 crore rupees.
- (i) As the paid up share capital of ABC Limited is Rs. 20 Crore and turnover is Rs. 150 crore, the company shall have at least 2 directors as independent directors.
  - (ii) In case ABC Limited is a listed company, it shall have at least 5
  - (iii) directors as independent director (1/3rd of the total number of directors: 1/3rd of 13 is 4.33 rounded off as 5).

#### 68. Question

VGP Ltd. is a listed public Company with a paid up capital of Rs. 100 crores as on 31<sup>st</sup> March, 2018. Mrs. Jasmine, who was one of the promoters of PDS Ltd. (a Joint Venture Company of VGP Ltd.), was appointed as Woman Director on the Board of VGP Ltd. VGP Ltd. has the following proposals :

- (1) To remove Mr. Z, an Independent Director who was re-appointed for a second term.
- (2) To appoint Mr. N, a nominee Director in the Board as an Independent Director.
- (3) To appoint Mrs. Jasmine as 'an Independent-cum-Woman Director.

With reference to the relevant provisions of the Companies Act, 2013, examine:

- (i) The validity the above proposals and the appointment of Woman Director already made.
- (ii) Whether Mr. N, can be appointed as an Independent Director of PDS Ltd.? Is an Independent Director entitled for stock option?

#### Answer

(a) As per the stated facts, VGP Ltd., a listed public company with a paid up capital of 100 crore appointed Mrs. Jasmine (Promoter of PDS Ltd., a joint venture of VGP Ltd.) as woman director on the Board of VGP Ltd. VGP Ltd. made the following proposals:

- (1) Removal of Mr. Z, an Independent Director(ID) who was re-appointed for a second term.

(2) Appointment of Mr. N, a nominee director in the Board as an Independent Director.

(3) Appointment of Mrs. Jasmine as an Independent- cum-woman Director

Following are the answers in the light of the above given facts under the Companies Act, 2013-

(i) With respect to this part of the question, Proposal no. (1) will be valid only on the compliance of the proviso given under section 169(1). According to the said proviso an independent director re-appointed for second term under section 149(10) shall be removed by the company only by passing a special resolution and after giving him a reasonable opportunity of being heard.

W.r.t. proposal nos. (2), it will be invalid as per section 149(6). As per the stated section, in relation to a company, an independent director means a director other than a managing director or a whole-time director or a nominee director.

W.r.t. proposal nos. (3), it will be valid as per requirement of section 149(6) read with Rule 3 of the Companies (Appointment and Qualification of Directors) Rules, 2014. Person so appointed as ID, is or was not a promoter of the company or its holding, subsidiary or associate company.

Since here, Mrs. Jasmine is a promoter of PDS Ltd. which is joint venture co. of VGP Ltd. So, out of the purview of the above disqualification and is in compliance with Rule 3, so she is eligible to be appointed as Independent –cum- Woman director in VGP Ltd.

**Alternate Answer:**

As per Section 2 (6) of the Act, associate company includes a joint venture company, therefore Mrs. Jasmine, a promoter of an associate company cannot be appointed as independent director.

(ii) As per Notification G.S.R. 839(E) dated 5th July, 2017, an unlisted public company which is a joint venture, a wholly owned subsidiary or a dormant company will not be required to appoint Independent Directors. So, Mr. N cannot be appointed as an Independent Director of PDS Ltd.

(iii) As per section 149(9), notwithstanding anything contained in any other provision of this Act, but subject to the provisions of sections 197 and 198, an independent director shall not be entitled to any stock option.

**69. Question**

The Promoters of M/s Frontline Limited, a listed public company propose to have the strength of the Board of Directors as eleven. They also propose to make the Managing Director and Whole Time directors as directors not liable to retire by rotation. Advise on the following matters as per the provisions of the Companies Act, 2013:

(a) Maximum number of persons, who can be appointed as directors not liable to retire by rotation. (b) How many of the remaining directors will have to retire by rotation every year at the Annual General Meeting (AGM)?

For the purpose of increasing the strength, certain nominations were received to nominate candidates for contesting elections. One of the nominations was rejected by the directors as it was received after sending the notice of AGM and that too after the working hours of the last day on which nomination should have been received.

(c) Can the Board of Directors increase the strength of companies' directors to 18 from 11 by appointing additional directors through passing single resolution?

**Answer:**

According to Section 152(6) of the Companies Act, 2013, unless the articles provide for the retirement of all directors at every annual general meeting, not less than two-thirds of the total number of directors of a public company shall be persons whose period of office is liable to determination by retirement of directors by rotation

Directors liable to retire by rotation:  $11 \times \frac{2}{3} = 7.3$  or 8

So, maximum number of persons, who can be appointed as directors not liable to retire by rotation:  $11 - 8 = 3$ .

(a) According to Section 152(6)(c) of the Companies Act, 2013, 1/3rd of such of the Directors for the time being as are liable to retire by rotation, or their number is neither three nor a multiple of three, then, the number nearest to the 1/3 rd shall retire from office. Therefore the Directors liable to retire by rotation are  $11 \times \frac{2}{3}$  i.e. 7.3 or 8.

No. of directors to retire at AGM:  $8 \times \frac{1}{3}$  i.e. 2.67. Hence nearest to 1/3 rd is 3.

(b) According to Section 160 of the Companies Act, 2013, a person who is not a retiring director in terms of Section 152 shall, subject to the provisions of this Act, be eligible for appointment to the office of a director at any general meeting, if he has, not less than 14 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. In the instant case, one nomination was rejected by the directors as it was received after sending the notice of AGM and that too after the working hours of the last day on which nomination should have been received i.e. 14th day. Hence, the contention of the directors are valid.

(C) According to Section 149(1) of the Companies Act, 2013, if the company wants to appoint more than

15 directors, it can do so after passing a special resolution. Hence, the Board of directors of Frontline Limited, before increasing the strength of directors from 11 to 18 by appointing additional directors, have to pass a special resolution.

But, these appointments cannot be done through single resolution. Each director shall be appointed by a separate resolution unless the meeting first agreed that the appointment shall be made by a single resolution and no vote has been cast against such agreement. A resolution moved in contravention of this provision shall be void, whether or not objection thereto was raised at the time it was so moved. [Section 162 of the Act].

### 70. Question

M/s. Bosch and Lawrence Limited, an unlisted company has a paid up equity share capital of Rs. 11 crores as on 31st March, 2013. Mr. Robert was appointed as an Independent Director at the Annual General Meeting of the company held on 29-09-2015 for a period of one year. Again, he was appointed in the subsequent Annual General Meeting held on 28-09-2016 for a period of two years as his second consecutive term. Examine under the provisions of the Companies Act, 2013 whether he can be again appointed in the Annual General Meeting to be held in September 2018 for another period of 2 years to complete his total term of 5 years?

### Answer:

As per Section 149(10) of the Companies Act 2013, an Independent Director shall hold office for a term up to five consecutive years on the Board of a company. He shall be eligible for re-appointment on passing of a special resolution by the company and disclosure of such appointment in the Board's report. As per section 149(11) no independent director shall hold office for more than two consecutive terms. However, such independent director shall be eligible for appointment after the expiration of three years of ceasing to be an independent director. The Ministry of Corporate Affairs in its General Circular 14/2014 dated June 09, 2014 clarified that section 149 (10) of the Act provides for a term of "up to five consecutive years" for an independent director. As such while appointment of an independent director for a term of less than five years would be permissible, appointment of any term (whether for five years or less) is to be treated as one term under section 149(10) of the Act.

Further under section 149 (11) of the Act, no person hold office of independent director for more than 'two consecutive terms'. Such a person shall have to demit office after the consecutive terms even if the total number years of his appointment in such two consecutive terms is less than 10 years. Therefore Mr. Robert cannot be

appointed as an Independent Director at the AGM proposed to be held in 2018. In such case the person completing 'consecutive terms of less than 10 year s' shall be eligible for appointment only after the expiry of the requisite cooling-off period of three years.

### 71. Question

Two (2) out of Ten (10) directors on the board of XYZ Limited have retired by rotation at an Annual General Meeting. These two (2) vacancies or place of retiring directors is not filled up and the meeting has also not expressly resolved 'not to fill the vacancy'. Since the AGM could not complete its business, it is adjourned to a later date. Neither place of retiring directors could be filled up at this adjourned meeting nor did the meeting expressly resolve 'not to fill the vacancy'. Analyse & apply relevant provisions of the Companies Act, 2013 and decide:

- Whether in such a situation the retiring directors shall be deemed to have been reappointed at the adjourned meeting?
- What will be your answer in case at the adjourned meeting, the resolutions for reappointment of these directors were lost?
- Whether such directors can continue in case the directors do not call the Annual General Meeting?

### Answer

In accordance with the provision of the Companies Act, 2013, as contained in section 152(7)(a) which provides that if at the annual general meeting at which a director retires and the vacancy is not so filled up and the meeting has not expressly resolved not to fill the vacancy, the meeting shall stand adjourned to same day in the next week, at the same time and place, or if that day is a national holiday, till the next succeeding day which is not a holiday, at the same time and place.

Section 152(7)(b) further provides that if at the adjourned meeting also, the place of the retiring is not filled up and that meeting also has not expressly resolved not to fill the vacancy, the retiring director shall be deemed to have been re-appointed at the adjourned meeting, unless at the adjourned meeting or at the previous meeting a resolution for the reappointment of such directors was put and lost or he has given a notice in writing addressed to the company and the Board of Directors expressing his desire not to be re- elected or he is disqualified.

Therefore, in the given circumstances answer to the questions as asked shall be:

- In the first case, applying the above provisions, the retiring directors shall be deemed to have been reappointed.
- In the second case, where the resolutions for the reappointment of the retiring directors were lost, the retiring directors shall not be deemed to have been re-appointed.
- Section 152(6)(c) states that 1/3rd of the rotational directors shall retire at every AGM. They retire at the AGM and at its conclusion. Hence, they will retire as soon as the AGM is held.

Further, as per section 96 (dealing with annual General Meeting) of the Companies Act, 2013, every company other than a One Person Company shall in each year hold an Annual General Meeting. Hence, it is necessary for the company to hold the AGM, whereby these directors will be liable to retire by rotation. Further Section 97 states that, if any default is made in holding the annual general meeting of a company under section 96, the Tribunal may, on the application of any member of the company, call, or direct the calling of, an annual general meeting of the company. Such general Meeting shall be deemed to be an annual general meeting of the company under this Act.

## 72. Question

M/s Bright Motors (P) Limited at the Annual General Meeting (AGM) held on 30.09.2016 appointed Mr. Anmol as a Non-Executive Director on the board of the company for a period of three years.

On 2nd October, 2017 Mr. Anmol suffered a severe heart failure and expired. The board of directors of the company on 16th October, 2017 appointed Mr. Prateek to fill the casual vacancy so created. The appointment of Mr. Prateek was made for a term of three years by the board.

Subsequently at the AGM held on 29-09-2018 Mr. Prateek's appointment was not proposed or approved as the board was of the view that it is not required. But the CFO of the company is of the opinion that the board of directors have contravened the provisions of the Companies Act, 2013 in respect of non-approval of the appointment of Mr. Prateek and his office tenure. Decide.

## Answer:

According to section 161(4) of the Companies Act, 2013, if the office of any director appointed by the company in general meeting is vacated before his term of office expires in the normal course, the resulting casual vacancy may, in default of and subject to any regulations in the articles of the company, be filled by the Board of Directors

at a meeting of the Board which shall be subsequently approved by members in the immediate next general meeting.

Provided that any person so appointed shall hold office only up to the date up to which the director in whose place he is appointed would have held office if it had not been vacated.

In the given question, the casual vacancy caused due to death of Mr. Anmol (who was appointed by the company in AGM held on 30.9.2016, for a period of 3 years) is filled by the Board of Directors by appointing Mr. Prateek for a period of three years. However, the appointment of Mr. Prateek for a period of three years is in contravention of above stated provisions as he can hold office only up to the date up to which Mr. Anmol would have held office if it had not been vacated.

Further, as per the provisions of the Act, the appointment of Mr. Prateek ought to be approved by members in the immediate next general meeting. However, the appointment of Mr. Prateek was not even proposed or approved in the AGM held on 29.9.2018. Hence, the appointment of Mr. Prateek is in contravention of the provisions of the Companies Act, 2013. Therefore, the opinion of CFO is correct.

### 73. Question

Mr. Dhruv is a Director of M/s. LT Limited and XT Limited respectively. M/s. LT Limited did not file its financial statements for the year ended 31st March, 2016, 2017 & 2018 respectively with the Registrar of Companies (ROC) as mandated under the Companies Act, 2013. M/s. LT Limited also did not pay interest on loans taken from a public financial institution from 1<sup>st</sup> April, 2017 and also failed to repay matured deposits taken from public on due dates from 1st April, 2017 onwards.

Answer the legality of the following in the light of the relevant provision of the Companies Act, 2013 :

- (i) Whether Mr. Dhruv is disqualified under Companies Act, 2013 and if so, whether he can continue as a Director in M/s LT Limited? Further can he also seek reappointment when he retires by rotation at the AGM of M/s. XT limited scheduled to be held in September, 2019?
- (ii) Mr. Dhruv is proposed to be appointed as an Additional Director of M/s. MN Limited in June 2019. Is he eligible to be appointed as an Additional Director in M/s. MN Limited? Decide.

### Answer:

According to section 164(2) of the Companies Act, 2013, no person who is or has been a director of a company which—

- (a) has not filed financial statements or annual returns for any continuous period of three financial years; or
- (b) has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for one year or more, shall be eligible to be re-appointed as a director of that company or appointed in other company for a period of five years from the date on which the said company fails to do so.

Provided that where a person is appointed as a director of a company which is in default of clause (a) or clause (b), he shall not incur the disqualification for a period of six months from the date of his appointment.

Also, according to section 167(1)(a), the office of a director shall become vacant in case he incurs any of the disqualifications specified in section 164;

Provided that where he incurs disqualification under sub-section (2) of section 164, the office of the director shall become vacant in all the companies, other than the company which is in default under that sub-section.

Thus, in the light of the said provisions of the Act and the facts of the question:

- (i) Yes, Mr. Dhruv is disqualified under the Companies Act, 2013, as M/s LT Limited did not file financial statements for a period of three years. Also, the M/s LT Limited (j) has defaulted in the repayment of matured deposits taken from public since 1st April, 2017 (i.e. the default has continued for more than one year).

Mr. Dhruv can continue as a director in M/s LT Limited as proviso to section 167(1)(a) provides that where the director incurs disqualification under section 164(2), the office of the director shall become vacant in all the companies, other than the company which is in default under that sub-section. Whereas he has to vacate the office of director in M/s XT Limited.

Mr. Dhruv cannot be reappointed (in the AGM to be held in September 2019) as director in M/s. XT Limited.

- (ii) Mr. Dhruv cannot be appointed as an Additional Director (in the AGM to be held in June 2019) of M/s MN Limited because as per section 164(2), he is not eligible to be appointed in other company for a period of five years from the date of such default.

#### 74. Question

The Board of Directors of M/s. Diya Steels and Aluminium Limited, a listed Company having a paid up equity share capital of Rs. 15 crore and preference share capital of Rs. 1 crore and 1100 small shareholders holding equity shares, seeks your advice on the following:

- (i) Is it mandatory for the Company to appoint a Director to represent Small Shareholders?



- (ii) If the Company decides to appoint such a Director, the procedure to be followed by the Company for such appointment and the tenure for which such appointment can be made.
  - (iii) Whether such a Director be considered as an Independent Director?
  - (iv) When does a person appointed as a small shareholders Director vacate his office?
- Advise suitably in the light of the provisions of the Companies Act, 2013 and the rules framed thereunder.

**Answer:**

According to section 151 of the Companies Act, 2013, a listed company may have one director elected by such small shareholders in such manner and with such terms and conditions as may be prescribed.

So, it is not mandatory for the company to appoint a director to represent small shareholders.

**Procedure for appointment:** The Board of Directors of M/s Diya Steels and Aluminium Limited is advised that:

The Companies (Appointment and Qualification of directors) Rules, 2014 provides for the procedure for appointment of Small shareholders' director according to which:

- (1) A listed company, may upon notice of not less than
  - (a) one thousand small shareholders; or
  - (b) one- tenth of the total number of such shareholders, whichever is lower, have a small shareholders' director elected by the small shareholders.

However, a listed company may opt to have a director representing small shareholders suomotu and in such a case the provisions of sub-rule (2), given below, shall not apply for appointment of such director.

- (2) The small shareholders intending to propose a person as a candidate for the post of small shareholders' director shall leave a notice of their intention with the company at least fourteen days before the meeting under their signature specifying the name, address, shares held and folio number of the person whose name is being proposed for the post of director and of the small shareholders who are proposing such person for the office of director.

However, if the person being proposed does not hold any shares in the company, the details of shares held and folio number need not be specified in the notice.

- (3) The notice shall be accompanied by a statement signed by the person whose name is being proposed for the post of small shareholders' director stating- (a) his Director Identification Number;
- (b) that he is not disqualified to become a director under the Act; and (c) his consent to act as a director of the company.

Tenure: A small shareholders' director shall not, for a period of three years from the date on which he ceases to hold office as a small shareholders' director in a company, be appointed in or be associated with such company in any other capacity, either directly or indirectly.

(iii) Small shareholder director as Independent Director: Such director shall be considered as an independent director subject to, his being eligible under sub-section (6) of section 149 and his giving a declaration of his independence in accordance with sub-section (7) of section 149 of the Act.

(iv) Vacation of office by small shareholder director: A person appointed as small shareholders' director shall vacate the office if -

- (a) the director incurs any of the disqualifications specified in section 164;
- (b) the office of the director becomes vacant in pursuance of section 167;
- (c) the director ceases to meet the criteria of independence as provided in sub-section (6) of section 149.

#### 75. Question

On the ground of the conviction for an offence dealing with related party transaction, Mr. Gap was disqualified to hold the directorship in XYZ Ltd. His vacancy was filled up by Mr. Samarth by the Board as a director on 3rd April, 2018 which was subsequently approved by the members in the immediate next general meeting. Unfortunately Mr. Samarth expired on 15<sup>th</sup> May, 2018 after working about 40 days as a director. The Board now wishes to fill up the said vacancy by appointing Mr. Able in the forthcoming meeting of the Board. Advise the Board on the validity of the following appointments as per the provisions under the Companies Act, 2013.

- (i) Holding of Mr. Samarth in place of Mr. Gap
- (ii) Appointment of Mr. Able in place of Mr. Samarth

#### Answer

Section 161(4) of the Companies Act, 2013 provides that if the office of any director appointed by the company in general meeting is vacated before his term of office expires in the normal course, the resulting casual vacancy may, in default of and subject to any regulations in the articles of the company, be filled by the Board of Directors at a meeting of the Board which shall be subsequently approved by members in the immediate next general meeting.

Any person so appointed shall hold office only up to the date up to which the director in whose place he is appointed would have held office if it had not been vacated.

(i) In view of the above provisions, in the given case, the appointment of Mr. Samarth in place of the disqualified director Mr. Gap was in order. In normal course, Mr. Samarth could have held his office as director up to the date to which Mr. Gap would have held the same.

(ii) As per facts, Mr. Samarth expired on 15th May, 2018 and again a vacancy has arisen in the office of director owing to death of Mr. Samarth who was appointed by the board and approved by members to fill up the casual vacancy resulting from disqualification of Mr. Gap. Vacancy arising on the Board due to vacation of office by the director appointed to fill a casual vacancy in the first place, does not create another casual vacancy as section 161 (4) clearly mentions that such vacancy is created by the vacation of office by any director appointed by the company in general meeting. Hence, the Board cannot fill in the vacancy arising from the death of Mr. Samarth. So cannot appoint Mr. Able in the office of Mr. Samarth.

The Board may however appoint Mr. Able as an additional director under section 161 (1) of the Companies Act, 2013 provided the articles of association authorises the board to do so, in which case Mr. Able will hold the office up to the date of the next annual general meeting or the last date on which the annual general meeting should have been held, whichever is earlier.

### 76. Question

You are the CFO and in-charge of legal compliances of large multi-national company in India.

The Board of Directors of the Company are broad based and comprise of competent directors who are Indian as well as Foreign Nationals. Mr. "X", who is a Director (Business Development) on the Board is very often on business tour abroad. He approached you and wants to know from you the regulatory provisions of the Companies Act, 2013 relating to appointment of Alternate Directors. Analyse the following situations and advise suitably, Mr. X referring to the provisions of the Companies Act, 2013.

(a) To how many directors can a person be appointed as an alternate director and how many votes does he have in one Board Meeting.

(b) If the original director joins the Board Meeting through video conferencing without returning to India, then, can the alternate director appointed in his place attend the same board meeting? If yes, whose presence and vote will be counted?

(c) In case of private company, where an alternate director is appointed in place of a nonexecutive director whose term is indefinite, then, what will be the tenure of such alternate director, provide the original director does not return to India for a longer period say 3-4 years?

Can an Executive Director/Whole Time Director/Managing Director appoint alternate directors?

**Answer**

According to Section 161(2) of the Companies Act, 2013, the Board of Directors of a company may, if so authorised by its articles or by a resolution passed by the company in general meeting, appoint a person, not being a person holding any alternate directorship for any other director in the company or holding directorship in the same company, to act as an alternate director for a director during his absence for a period of not less than three months from India.

According to section 165, no person shall hold office as a director, including any alternate directorship, in more than twenty companies at the same time. However, the maximum number of public companies in which a person can be appointed as a director shall not exceed ten. Hence, in the instant case, a person can be appointed as an alternate director for only one director in the same company but maximum twenty different companies.

An alternate director will have only one vote as he can hold alternate directorship for one director only in the same company.

(b) The office of alternate director is separate from the attendance of the original director in the Board Meeting and as per section 161(2) of the Companies Act, 2013, an alternate director is appointed to hold the office of original director during his absence from India. Accordingly, as far as attendance in Board Meeting by the original director is concerned, an alternate director may continue to hold office even if the original director joins the meeting by video conferencing, but the original director will be deemed to have joined only as a invitee and the attendance of the alternate director shall be counted for the purpose of the Board Meeting.

This is specific only with respect to matters which shall not be dealt with through video conferencing. In such matters where video conferencing is allowed, voting of original director will be counted.

(c) According to second proviso to section 161(2), an alternate director shall not hold office for a period longer than that permissible to the director in whose place he has been appointed and shall vacate the office if and when the director in whose place he has been appointed returns to India.

Third proviso says that if the term of office of the original director is determined before he so returns to India, any provision for the automatic re-appointment of retiring directors in default of another appointment shall apply to the original, and not to the alternate director.

Hence, in the instant case, the alternate director shall hold office till the time original director returns to India, even if the period is as long as 3-4 years.

(d) As per section 161(2), the Board of Directors of a company may, if so authorised by its articles or by a resolution passed by the company in general meeting, appoint a person, not being a person holding any alternate directorship for any other director in the company or holding directorship in the same company, to act as an alternate director for a director during his absence for a period of not less than three months from India.

From the above provision, it is clear that an alternate director can be appointed for any director. Hence, an alternate director can be appointed for Executive director/ Whole time Directors / Managing Director however, not by them but by the board of directors.

### 77. Question

Mr. 'K' is a small shareholder director in M/s KGP Tyres Limited from 1st April 2018 and in M/s VSR Cotton Mills Limited from 1st April 2019, in compliance with the relevant provisions of the Companies Act, 2013. M/s KGP Tyres Limited has not paid interest on the public deposits due from 1st July 2018. In the light of the information given above, examine the following under the provisions of the Companies Act, 2013.

- (i) Whether the office of Mr. 'K', small shareholder director, shall become vacant in M/s KGP Tyres Limited and M/s VSR Cotton Mills Limited?
- (ii) If yes, state the period from which the office of the directorship shall become vacant.

### Answer

According to Rule - 7, Companies (Appointment and Qualification of Directors) Rules, 2014, a person shall not be appointed as small shareholders' director of a company, if the person is not eligible for appointment in terms of section 164.

Also, a person appointed as small shareholders' director shall vacate the office if the director incurs any of the disqualifications specified in section 164.

According to Section 167(1)(a), the office of a director shall become vacant in case he incurs any of the disqualification specified in section 164. Provided that when he incurs disqualification under section 164(2), the office of the director shall become vacant in all companies, other than the company which is in default under that sub section [inserted by Companies (Amendment) Act, 2017 w.e.f. 07-05-2018]

According to proviso of section 164(2) of the Companies Act, 2013, where a person is appointed as a director of a company which is in default of clause (a) or clause (b), he shall not incur the disqualification for a period of six months from the date of his appointment.

In the instant case, M/s KGP Tyres Limited has not paid interest on the public deposits due from 1st July, 2018 and disqualification under section 164(2)(b) of the Companies Act, 2013 occurs on a person who is or has been a director of a company which has failed to repay the deposits accepted by it or pay interest thereon and such failure to pay or redeem continues for one year or more. Accordingly, following are the answers:

- (i) Yes, the office of Mr. K shall become vacant in M/s VSR Cotton Mills Limited as he has become disqualified under section 164(2)(b) from 1st July 2019 but not in M/s KGP Tyres Limited.
- (ii) Mr. K's office of the directorship shall become vacant from 1st July, 2019.

#### 78. Question

Mr. 'R' holds directorship in 10 Public Companies and 11 Private Companies as on 31.05.2019. One of the above Private Company is a dormant Company. Apart from the dormant Company, on 30.06.2019 a Private Company (in which Mr. R is holding directorship) has become a subsidiary of a Public Company.

In the light of the provisions of the Companies Act, 2013 examine and decide:

- (i) The validity of holding directorship of Mr. 'R' with reference to number of directorship as on 31 05.2019 and as on 30.06.2019.

Whether a Company has power to specify any lesser number of Companies in which a director of the Company may act as a director?

#### 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. Whereas that 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.

In the instant case, holding of directorship of Mr. R as on 31.05.2019 is valid as he is holding directorship in 10 public companies and in 11 private companies out of which one company is dormant company. So, maximum directorship he is holding in 20 companies.

Holding of directorship of Mr. R as on 30.06.2019 is not valid, as on 30.06.2019 a private company (in which Mr. R is holding directorship) has become a subsidiary of a public company. Accordingly, it means that this private company shall be deemed to be included in the limit of public companies and thereby increasing the number of public companies in which he is holding directorship to 11 and making it invalid.

**(ii)** According to section 165(2), Subject to the provisions of sub-section (1), the members of a company may, by special resolution, specify any lesser number of companies in which a director of the company may act as directors.

### 79. Question

Mr. Thangavel is a Director in 7 Companies with a DIN (Director Identification Number) allotted to him. Again, another DIN was inadvertently allotted to him which was never used for filing any document with any Authority. He desires to surrender the second DIN and keep all his directorship with the first DIN. Advise him the procedure to be followed under the provisions of the Companies Act, 2013 and the Rules made thereunder for surrendering the second DIN inadvertently obtained by him.

### Answer

#### **According to Rule 11 of the Companies (Appointment and Qualification 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 from any person, cancel or deactivate the DIN in case on an application made in Form DIR-5 by the DIN holder to surrender his DIN along with declaration that 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.

### 80. Question

Eternal Ltd., a wholly owned government company consisting of 10 directors in its Board with the subsidiary company, Evergreen Ltd., having 9 directors in its board. Referring to the provisions of the Companies Act, 2013, examine the following situations:

- (i) Number of directors liable to retire by rotation in Eternal Ltd. at an AGM.
- (ii) Number of directors liable to retire in Evergreen Ltd.
- (iii) What will be the legal situation in case Eternal Ltd. is a listed Government Company?

**Answer**

Section 152(6) of the Companies Act, 2013 specifies the legal provision as to the retirement of directors by rotation of public company. According to the said provision, out of retiring directors, 1/3rd of directors must retire every year. However, as per amendment to the Companies Act, 2013, by MCA vide Notification No. 463(E) on 13/6/17, the government companies are exempted from the applicability of Section 152(6) and 152(7) of the Act.

Accordingly, a Government company, which is not a listed company, in which not less than fifty-one per cent of paid up of 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; and a subsidiary of a Government company, referred above, the provision as to retirement by rotation is not applicable.

Following are the answers in the light of the stated provisions:

- (i) Since Eternal Ltd. is a wholly owned Government Company (other than listed company), so section 152(6) in given circumstances is not applicable. None of the directors of Eternal Ltd. will be retired by rotation under section 152(6).
- (ii) Since Evergreen Ltd. is a subsidiary company of Eternal Ltd. so retirement by rotation is also not applicable here. None of the directors of Evergreen Ltd. will be retired by rotation under section 152(6).
- (iii) In case Eternal Ltd. is a listed Government Company, then section 152(6) will be applicable presuming that a company has not committed a default in filing its financial statements under Section 137 or Annual Return under Section 92 with the Registrar. According to it, the Eternal Ltd will be treated as a
- (iv) public company, with 10 directors in its Board, 3 can be non-retiring (v) and out of 7 retiring directors, 2 must retire every year.

**81. Question**

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.

**82. Question**

Prince Ltd. desires to appoint an additional director on its Board of directors. The Articles of the company confer upon the Board to exercise the power to appoint such a director. As such M is appointed as an additional director. In the light of the provisions of the Companies Act, 2013, examine:

- (i) Whether M can continue as director if the annual general meeting of the company is not held within the stipulated period and is adjourned to a later date?
- (ii) Can the power of appointing additional director be exercised at the Annual General Meeting by the members?

- (iii) As the Company Secretary of the company what checks would you make after M is appointed as an additional director?

**Answer:**

1. Section 161(1) of the Companies Act, 2013 provides that the articles of association of a company may confer on its Board of Directors the power to appoint any person, other than a person who fails to get appointed as a director at the general meeting, as an additional director at any time and such director will hold office upto the date of the next annual general meeting or the last date on which such annual general meeting should have been held, whichever is earlier.

- (i) M cannot continue as director till the adjourned annual general meeting, since he can hold the office of directorship only up to the
- (ii) date of the next annual general meeting or the last date on which the annual general meeting should have been held, whichever is earlier. Such an additional director shall vacate his office latest on the date on which the annual general meeting should have been held under Section 96 of the Companies Act, 2013. He cannot continue in the office on the ground that the meeting was not held or it could not be called within the time prescribed.
- (iii) The power to appoint additional directors vests with the Board of Directors and not with the members of the company. The only condition is that the Board must be conferred such power by the articles of the company.
- (iv) As a Company Secretary, I would put the following checks in place in respect of M's appointment as an additional director:
  - (a) He must have got the Directors Identification Number (DIN).
  - (b) He must furnish the DIN and a declaration that he is not disqualified to become a director under the Companies Act, 2013.
  - (c) He must give his written consent in Form DIR-2 on or before his appointment as director and such consent stands filed with the Registrar within 30 days of his appointment.
  - (d) His appointment is made by the Board of Directors.

His name is entered in the statutory records as required under the Companies Act, 2013

**83. Question**

The Board of directors of XYZ Ltd. filled up a casual vacancy caused by the death of Mr. P by appointing Mr. C as a director on 3rd April, 2019 which was subsequently approved by the members in the immediate next general meeting. Unfortunately Mr. C expired on 15th May, 2019 after working about 40 days as a director. The Board now wishes to fill up the casual vacancy by appointing Mrs. C in the forthcoming meeting of the Board. Advise the Board in this regard keeping in view the provisions of the Companies Act, 2013.

**Answer:**

Section 161(4) of the Companies Act, 2013 provides that if the office of any director appointed by the company in general meeting is vacated before his term of office expires in the normal course, the resulting casual vacancy may, in default of and subject to any regulations in the articles of the company, be filled by the Board of Directors at a meeting of the Board which shall be subsequently approved by members in the immediate next general meeting.

Further, any person so appointed shall hold office only up to the date up to which the director in whose place he is appointed would have held office if it had not been vacated.

In view of the above provisions, in the given case, the appointment of Mr. C in place of the deceased director Mr. P was in order. In normal course, Mr. C could have held his office as director up to the date to which Mr. P would have held the same.

However, Mr. C expired on 15th May, 2018 and again a vacancy has arisen in the office of director owing to death of Mr. C who was appointed by the board and approved by members to fill up the casual vacancy resulting from P's demise. Vacancy arising on the Board due to vacation of office by the director appointed to fill a casual vacancy in the first place, does not create another casual vacancy as section 161 (4) clearly mentions that such vacancy is created by the vacation of office by any director appointed by the company in general meeting. Hence, the Board cannot fill the vacancy arising from the death of Mr. C who was appointed to fill a casual vacancy.

The Board may however appoint Mrs. C as an additional director under section 161 (1) of the Companies Act, 2013 provided the articles of association authorise the board to do so, in which case Mrs. C will hold the office up to the date of the next annual general meeting or the last date on which the annual general meeting should have been held, whichever is earlier.

**84. Question**

Mr. John is a director of MNC Ltd., which had accepted deposits from public. The financial position of MNC Ltd. took a southward turn and became bad to worse and ultimately, it failed to repay the deposits which fell due for payment on 10th April, 2018 and such repayment has not been made till 5th May, 2019. Another company JKL Ltd. wants to appoint the said Mr. John as its director at its annual general meeting to be held on 6th May, 2019. You are required to state with reference to the provisions of the Companies Act, 2013 whether Mr. John can be appointed as a director of JKL Ltd.

**Answer**

Section 164 (2) (b) of the Companies Act, 2013 states that where a person is or has been a director of a company which has failed to repay its deposit on due date and such failure continues for one year or more, then such person shall not be eligible to be appointed as a director of any other company for a period of five years from the date on which such company, in which he is a director, failed to repay its deposits.

In the instant case, MNC Ltd., has failed to repay its deposit on due dates and the default continues for more than one year. Hence, Mr. John will not be eligible to be appointed as a director of JKL Ltd

**85. Question**

XYZ Limited is an unlisted public company having a paid-up share capital of twenty crore rupees as on 31st March, 2019 and a turnover of one hundred fifty crore rupees during the year ended 31st March, 2019. The total number of directors is thirteen.

Referring to the provisions of the Companies Act, 2013 answer the following:

- (i) State the minimum number of independent directors that the company should appoint.
- (ii) How many independent directors are to be appointed in case XYZ Limited is a listed company?

**Answer:**

(i) According to Rule 4 of the Companies (Appointment and Qualification of Directors) Rules, 2014, the following class or classes of companies shall have at least 2 directors as independent directors: the Public Companies having paid up share capital of 10 crore rupees or more; or the Public Companies having turnover of 100 crore rupees or more; or the Public Companies which have, in aggregate, outstanding loans, debentures and deposits, exceeding 50 crore rupees.

In the present case, XYZ Limited is an unlisted public company having a paid-up capital of Rs.20 crores as on 31st March, 2019 and a turnover of Rs.150 crores during the year ended 31st March, 2019. Accordingly, as per Rule 4 it must have at least 2 directors as independent directors.

(ii) According to Section 149(4) of the Companies Act, 2013, every listed public company shall have at least one-third of the total number of directors as independent directors. The Explanation to Section 149(4) specifies that any fraction contained in such one-third numbers shall be rounded off as one.

In the present case, XYZ Limited is a listed company and the total number of directors is 13. Hence, in this case, XYZ Limited must have at least 5 directors ( $1/3$  of 13 is 4.33 rounded as 5) as independent directors. Explanation to Rule 4 of the Companies (Appointment and Qualification of Directors) Rules, 2014 clarifies that for the purpose of this Rule the paid up sharecapital or turnover or outstanding loans, debentures and deposits, as the case may be, as existing on the last date of latest audited financial statements shall be taken into account.

In the present case, it is mentioned that paid up capital of XYZ Limited is Rs.20 crore as on 31st March, 2019 and turnover is Rs.150 crore during the year ended 31st March, 2019. It is, therefore, assumed that 31st March, 2019 is the last date of latest audited financial statements.

#### 86. Question

The Board of Directors of the Universal Ltd. which is an MNC comprised of directors who were Indian as well as of Foreign Nationals. Mr. "X", who is a Director on the Board is very often on business tour abroad. He approached you being legal expert of the company to know from you the regulatory provisions of the Companies Act, 2013 relating to appointment of Alternate Directors.

Examine the following situations and advise suitably, Mr. X referring to the provisions of the Companies Act, 2013.

- (a) Number of directors for which a person can be appointed as an alternate director.
- (b) Where an alternate director is appointed in place of a director whose term is indefinite, then, what will be the tenure of such alternate director?
- (c) Can an Executive Director/Whole Time Director/Managing Director appoint alternate directors?

#### Answer

a) According to Section 161(2) of the Companies Act, 2013, the Board of Directors of a company may, if so authorised by its articles or by a resolution passed by the company in general meeting, appoint a person, not being a person holding any alternate directorship for any other director in the company or holding directorship in the same company, to act as an alternate director for a director during his absence for a period of not less than three months from India.

According to section 165, no person shall hold office as a director, including any alternate directorship, in more than twenty companies at the same time. However, the maximum number of public companies in which a person can be appointed as a director shall not exceed ten.

Hence, in the instant case, a person can be appointed as an alternate director for only one director in the same company but maximum twenty different companies.

b) According to second proviso to section 161(2), an alternate director shall not hold office for a period longer than that permissible to the director in whose place he has been appointed and shall vacate the office if and when the director in whose place he has been appointed returns to India.

Third proviso says that if the term of office of the original director is determined before he so returns to India, any provision for the automatic re-appointment of retiring directors in default of another appointment shall apply to the original, and not to the alternate director.

Hence, in the instant case, the alternate director shall hold office till the time original director returns to India.

c) As per section 161(2), the Board of Directors of a company may, if so authorised by its articles or by a resolution passed by the company in general meeting, appoint a person, not being a person holding any alternate directorship for any other director in the company or holding directorship in the same company, to act as an alternate director for a director during his absence for a period of not less than three months from India.

From the above provision, it is clear that an alternate director can be appointed for any director by the board of directors and not by an Executive Director/Whole Time Director/Managing Director for themselves

### 87. Question

(A) The Petitioners were directors in NPP Limited. Due to default in NPP Limited under section 164(2)(a) of the Companies Act, 2013 on the account of non-filing of financial statements for continuous period of three financial years, the said Petitioners were disqualified to be as director in one or the other companies. They came for the legal counselling against their holding of disqualifications as directors in order to challenge before the Tribunal. Following were the position of the petitioners: One of the petitioner, Mr. X, was also holding directorship in GPS Ltd. and CDM Ltd. Whereas the petitioner, Mr. Y was appointed one month before in NPP Ltd.. Whereas Petitioner, Mr. Z, was within a year of commission of default, offered directorship by RSM Ltd.

Advise, in the light of the given facts, the following legal issues:

(a) On the validity of attracting of disqualification of Petitioners in NPP Ltd. and vacation of their directorship.

- (b) What will be consequences of default caused in NPP Ltd. on the holding of Mr. X's directorship in GPS Ltd. and CDM Ltd.
- (c) On the validity of offered directorship to Mr. Z by RSM Ltd.
- (d) Legal position of Mr. Y who was appointed one month before, in NPP Ltd.

**Answer**

As per the section 164 (2) of the Companies Act, 2013, no person who is or has been a director of a company which—

- (a) has not filed financial statements or annual returns for any continuous period of three financial years; or
- (b) has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for one year or more,—shall be eligible to be re-appointed as a director of that company or appointed in other company for a period of five years from the date on which the said company fails to do so.

Provided that where a person is appointed as a director of a company which is in default of clause (a) or clause (b), he shall not incur the disqualification for a period of six months from the date of his appointment. Further section 167 (1) of the Companies Act, 2013 states that the office of a director shall become vacant in case he incurs any of the disqualifications specified in section 164. Provided that where he incurs disqualification under sub-section (2) of section 164, the office of the director shall become vacant in all the companies, other than the company which is in default.

Accordingly following are the answers to the questions:

- (a) In the given case, the petitioners have incurred disqualification under sub-section (2) of section 164, and falling under section 167, whereby the office of the directors shall become vacant in all the companies, except in the defaulted company. The petitioners, being disqualified under section 164(2) have to vacate the directorship in all the other companies except in NPP Ltd.
- (b) On the basis of the section 167(1), Mr. X has to vacate directorship in GPS Ltd. and CDM Ltd.
- (c) Offer of directorship to Mr. Z by RSM Ltd. was within a year of commission of default, so it's not valid. As per section 164(2), disqualified director shall not be eligible to be appointed in other company for a period of five years from the date on which the said company committed the default.
- (d) Petitioner, Mr. Y was appointed one month before in NPP Ltd. which is in default, he shall not incur the disqualification for a period of six months from the date of his appointment as he is freshly appointed.

**88. Question**

(A) GSTL Ltd., a listed company, has total number of 20 directors on its board. Following is the composition given as under:

6 directors are independent directors as per the provisions of the Companies Act, 2013,  
3 directors are nominee directors appointed by State Bank of India (the financial institution from whom GSTL has taken financial assistance) and 2 directors are nominee directors appointed by Finance Limited to represent its interest (a financial institution with whom the company has long-term lease agreement of land).

Advise Board of Director as to computation of total number of directors who are rotational directors and total number of directors who are liable to retire by rotation.

**Answer**

As per Section 152(6) of the Companies Act, 2013, unless the articles provide for the retirement of all directors at every annual general meeting, not less than two-thirds of the total number of directors of a public company shall be persons whose period of office is liable to determination by retirement of directors by rotation; and save as otherwise expressly provided in this Act, be appointed by the company in general meeting.

The remaining directors in the case of any such company shall, in default of, and subject to any regulations in the articles of the company, also be appointed by the company in general meeting. Explanation— For the purposes of this sub-section, “total number of directors” shall not include independent directors, whether appointed under this Act or any other law for the time being in force, on the Board of a company. Any person appointed as a nominee director being nominated by any institution in pursuance of the provisions of any law or any agreement (financial institution that has been created by the Act of Parliament) cannot be considered as a director liable to retire by rotation.

In the above question, **Total number of Directors** = 20 – 6 (Independent Directors) – 3 (Nominee Directors appointed by State Bank of India) = 11

The nominee directors appointed by Finance Limited to represent its interest (a financial institution with whom the company has long-term lease agreement of land) are not deducted from total number of directors because Finance Limited is not the financial institution set up under the Act of Parliament. Total number of directors who



are rotational directors =  $11 \times \frac{2}{3} = 7.33 = 8$  (not less than  $\frac{2}{3}$ rd) Total number of directors to retire by rotation =  $8 \times \frac{1}{3} = 2.6 = 3$  (nearest to  $\frac{1}{3}$ rd)

Therefore, the total number of directors who are rotational directors and total number of directors who are liable to retire by rotation are 8 and 3 respectively.

### 89. Question

(a) Mr. Ramakant, the non-independent director of Superb Industries Limited (SIL) is planning to go abroad for 4 months for resolving of some family issues related to her daughter. The Board of Directors of SIL proposed to appoint Mr. Subh as an alternate director in the company in place of Mr. Ramakant.

Following were the legal issues in the given situation:

- (1) Mr. Subh does not satisfy the eligibility criteria to become Independent Director of SIL as given under section 149(6) of the Companies Act, 2013.
- (2) Mr. Ramakant returned to India within 2 months before the scheduled arrival.
- (3) Mr. Subh (in addition to Mr. Ramakant), to be included in the "total number of directors" used for calculating rotational directors under sec 152(6).

Examine in the given scenario, the aforementioned legal issues in the light of the Companies Act, 2013.

### Answer

As per Section 161(2) of the Companies Act, 2013, the Board of Directors of a company may, if so authorised by its articles or by a resolution passed by the company in general meeting, appoint a person, not being a person holding any alternate directorship for any other director in the company, to act as an alternate director for a director during his absence for a period of not less than three months from India. Provided that no person shall be appointed as an alternate director for an independent director unless he is qualified to be appointed as an independent director under the provisions of this Act. Provided further that an alternate director shall not hold office for a period longer than that permissible to the director in whose place he has been appointed and shall vacate the office if and when the director in whose place he has been appointed returns to India.

Provided also that if the term of office of the original director is determined before he so returns to India, any provision for the automatic re-appointment of retiring directors in default of another appointment shall apply to the original, and not to the alternate director.

In the above question, Mr. Ramakant was going abroad for personal cause of family issue related his daughter, does not effect on the appointment of alternate director. Even if Mr. Subh does not satisfy the eligibility criteria

to become Independent Director of SIL, it does not affect on his appointment as Alternate Director because Mr. Ramakant, the original director is also not an Independent Director. Since Mr. Ramakant has returned to India within 2 months before his scheduled arrival, Mr. Subh shall vacate the office on return of Mr. Ramakant (Original Director) to India.

Therefore, Mr. Subh can be appointed as alternate director of SIL and he shall vacate his office on returning of Mr. Ramakant to India. The alternate director, Mr. Subh, shall not be included in the “total number of directors” for the purpose of section 152(6), as alternate director is holding alternate directorship in place of the original director. Further as per the above provisos given under section 161(2), it is clearly stated that if the term of office of the original director is determined before he so returns to India, any provision for the automatic re-appointment of retiring directors in default of another appointment shall apply to the original, and not to the alternate director. For this very purpose, Mr. Subh, will not be included in the “total number of directors” as rotational director under section 152(6) of the Companies Act, 2013.

### 90. Question

ABC Ltd. is incorporated in December, 2010 under the Companies Act, 1956. For the year ended on 31st March, 2020 and 31st March, 2021, the financial and other relevant information of the company were as under:

The Company Secretary apprised the Board, of requirement of appointment of Independent Director (ID). Few candidates were shortlisted, out of which 2 candidate were nominated and got approval of the shareholders in the General Meeting. The appointment of both the IDs were approved for a tenure of one year only.

Enumerate in the given situation, the following issues in the light of the Companies Act, 2013:

**(A)** Whether ABC Ltd. was required to appoint Independent Director (ID) based on the information as on 31st March, 2020.

**(B)** In the given case, the tenure of the appointment of both the IDs is for one year only. Comment upon the validity of the term of appointment of the Independent Directors.

### Answer

**(A)** As per Section 149 read with the Rule 4(1)(iii) of the Companies (Appointment and Qualifications of Directors) Rules, 2014, which provides that the following class or classes of companies shall have at least two directors as independent directors –

- (i) the Public Companies having **paid-up share capital** of ten crore rupees or more; or
- (ii) the Public Companies having **turnover** of one hundred crore rupees or more; or

(iii) “the Public Companies which have, in aggregate, outstanding **loans**, debentures and deposits, **exceeding fifty crore rupees**”.

Here, the words used in the law is ‘exceeding 50 crore rupees’, whereas the banks borrowings in the given case is **only Rs. 50 crore** and **not exceeding Rs. 50 crore**. Hence, no need to appoint ID on the basis of information as on 31st March, 2020.

Further, the words used in the said Rule is ‘**Outstanding Loans**’ and **not the ‘Sanctioned limit’**. The limit is Rs. 60 crore, but the outstanding loans is only Rs. 50 crore.

Therefore, in line with the stated legal provision, there is no need to appoint Independent Directors as on 31/3/2020.

**(B)** According to Section 149(10) read as ‘Subject to the provisions of section 152, an independent director shall hold office for a **term up to five consecutive years** on the Board of a company, and shall be eligible for re-appointment on passing of a special resolution by the company and disclosure of such appointment in the Board's report.

**Further, Vide MCA General Circular No. 14/ 2014 dated 9th June, 2014, under Para (iii) Section 149(10)**, it has been clarified that section 149(10) of the Act provides for a term of “**upto five consecutive years**” for an ID. As such while appointment of an ID for a term of less than five years would be permissible, appointment for any term (whether for five years or less) is to be treated as a one term under section 149(10). Therefore, the tenure of the appointment of both the IDs for one year only, will be considered as valid.

### 91. Question

XYZ Ltd. is a newly incorporated listed company formed on 01.01.2021. At present there are 10 directors and 1500 shareholders. Turnover as on 31.03.2021 is Rupees 320 crores.

(1) There are no women directors as on 31.03.2021 Discuss how far the company can continue its operation without any women directors on board.

(2) 150 Small shareholders of the company gave the notice to appoint a director representing them. Can they appoint Mr. A who is already a small shareholders director in 2 other companies. However those other companies are not in conflict with the business of XYZ Ltd. Would your answer be different if Mr. A has no other directorship?

(3) Can XYZ Ltd. appoint another 6 more directors on board? Would your answer be different if XYZ Ltd. was a company where 52% of the paid up share capital was held by State Government?

**Answer**

(1) As per the Rule 3 of the Companies (Appointment and Qualification of Directors) Rules 2014, following classes 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) turnover of three hundred crore rupees or more;

A company, which has been incorporated under the Act and is covered under provisions of second proviso to sub-section (1) of section 149 shall comply with such provisions within a period of six months from the date of its incorporation. In the given case, XYZ is a listed company and hence has to mandatorily have a woman director on Board. However, because the period of 6 months from date of commencement has not expired, it can continue its operation till 30th June, 2021 without a woman Director on board.

(2) According to Section 151 of the Companies Act, 2013, a listed company may have one director appointed by the small shareholders. Rule 7 of the Companies (Appointment and Qualification of Directors) Rules, 2014 prescribes requirements with respect to the appointment of small shareholder director through serving upon notice of not less than one thousand small shareholders or one-tenth of the total number of such shareholders, whichever is lower. Maximum number of directorship held by SSD – No person shall hold the position of small shareholder's director in more than 2 companies at the same time. Also, the second company in which he is appointed should not be in a business which is conflicting or competing in nature. In the given case, number of shareholders who served the notice for appointment of SSD, is 150 (1/10th of 1500). The fact that other businesses are not in conflict or competing in nature is irrelevant as the limit of directorship in two companies have already exceeded. Hence Mr. A is not eligible.

If Mr. A was not a small shareholder's director in any other company, then Mr. A is eligible to become small shareholder's director in XYZ Limited.

(3) Section 149 of the Companies Act, 2013 requires every company to constitute a Board of Directors. According to which, maximum number of Directors shall be 15 which can be increased by passing a special resolution.

If XYZ Ltd. appoints 6 more directors in the BoD, the maximum limit of 15 directors in a company will be exceeded. However, by passing a special resolution, XYZ Ltd. can appoint additional directors.

However, if 52% of XYZ Ltd. was held by the State Government, it becomes a Government Company and as the provisions of the Act, a Government Company is exempted from the application of the Section 149(1)(b) requiring a company to have maximum fifteen directors. Subject to that, it has not defaulted in filing its Financial Statements under section 137 or Annual return under section 92 with the registrar.

## 92. Question

The Board of Directors of the UN Ltd., which is a MNC, comprising of directors who are Indian as well as of Foreign Nationals, Mr. X, who is a Director on the Board is very often on business tour abroad. He approached you, being legal expert of the Company, to know the regulatory provisions of the Companies Act, 2013 relating to appointment of Alternate Directors.

Examine the following situations and advise, Mr. X suitably as per the provisions of the Companies Act, 2013.

(i) Number of directors for which a person, say Mr. Y can be appointed as an Alternate Director.

(ii) If Mr. Y is appointed as an alternate director in place of a director whose term is indefinite, then, what will be the tenure of Mr. Y? **Answer**

(i) According to Section 161(2) of the Companies Act, 2013, the Board of Directors of a company may, if so authorized by its articles or by a resolution passed by the company in general meeting, appoint a person, not being a person holding any alternate directorship for any other director in the company or holding directorship in the same company, to act as an alternate director for a director during his absence for a period of not less than three months from India.

Further, section 165 provides that no person shall hold office as a director, including any alternate directorship, in more than twenty companies at the same time. However, the maximum number of public companies in which a person can be appointed as a director shall not exceed ten.

Hence, in the instant case, Mr. Y can be appointed as an alternate director for only one director in the same company but shall not hold office as a director, including alternate directorship in maximum twenty different companies.

(ii) According to second proviso to section 161(2), an alternate director shall not hold office for a period longer than that permissible to the director in whose place he has been appointed and shall vacate the office if and when the director in whose place he has been appointed returns to India.

Third proviso says that if the term of office of the original director is determined before he so returns to India, any provision for the automatic reappointment of the retiring directors in default of another appointment shall apply to the original and not to the alternate director.

Hence, in the instant case, the alternate director shall hold office till the time original director returns to India. In this case, Y will hold office till the time original director returns to India.

### 93. Question

As on 31-3-2021, Mr. K. Muthusamy is holding directorship in 4 listed Companies, 4 unlisted Public Companies and 4 Private Limited Companies. He has obtained two Director Identification Number (DINs) allotted to him inadvertently. Out of the 12 directorships, he holds 10 with the DIN allotted to him first and the rest with the DIN allotted to him later. He wants to surrender one of his DINs, but to keep all his 12 Directorships. In the light of the relevant provisions of the Companies Act, 2013, examine the following:

- (i) Which DIN sourced by Mr. K. Muthusamy be surrendered?
- (ii) What procedure he needs to follow and what actions will be done by the Central Government in this regard?
- (iii) In what way can he keep all his 12 Directorships with one DIN?

### Answer

(i) Prohibition on obtaining more than one DIN: According to Section 155, no individual, who has already been allotted a DIN under section 154, shall apply for, obtain or possess another DIN. Mr. K. Muthusamy can hold the DIN which was allotted to him first and he can surrender the DIN which was allotted to him subsequently.

(ii) Rule 11 of the Companies (Appointment and Qualification of Directors) Rules, 2014 lays down the procedure for cancellation or surrender or deactivation and re-activation of DIN.

Accordingly, 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 prescribed fee 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 DINs shall be merged with the validly retained number.

(iii) To keep all the 12 directorships with one DIN: In compliance with Rule 11 by Mr. K Muthusamy, on surrender of 2nd DIN, data related to both the DINs shall be merged with the valid DIN. Thereby all 12 directorships shall migrate with DIN 1.

#### 94. Question

Decide in the light of the Companies Act, 2013, on the following proposals of loans for consideration before the Honesty Ltd.

- 1) Loan to its director, Mr. A for construction of residential house as a personal loan.
- 2) Loan to Mr. B, its whole time Director.
- 3) Loan to X Ltd. in the ordinary course of business and the rate prescribed is not less than bank rate prescribed by the reserve bank.

#### Answer

Section 185 of the Companies Act, 2013 contains provisions which impose restrictions on the loans, etc. being given to directors, etc. According to the provision:

As per sub-section (1), a company is not permitted to advance any loan, or to give any guarantee or provide any security in connection with any loan taken by,—

(a) any director of company, or of a company which is its holding company or any partner or relative of any such director; or

(b) any firm in which any such director or relative is a partner. Further sub-section (3) states that above provision shall not apply:

(a) where any loan is given to a managing or whole-time director—

(i) as a part of the conditions of service extended by the company to all its employees; or (ii) pursuant to any such scheme which is approved by the members by a special resolution.

(b) where a company in the ordinary course of its business:

-provides loans or gives guarantees or securities for the due repayment of any loan; and

-in respect of such loans an interest is charged at a rate not less than the rate of prevailing yield of one year, three years, five years or ten years Government security closest to the tenor of the loan.

Accordingly, following are the answers to the stated problems:

(1) In the first case it would violate the section 185(1) of the Companies Act, 2013. Honesty Ltd. is not permitted, to advance any loan, or to give any guarantee or provide any security in connection with any loan taken by Mr. A (director) of the company.

(2) In the second case, as per section 185(3), restrictions imposed in section 185(1), will not apply to giving of loan to Mr. B, the whole time director if its given as a part of the conditions of service extended by the company to all its employees.

(3) In third case, if it is loan given to a company in the ordinary Course of business for due repayment of any loan and lending rate is not less than the bank rate prescribed by the Reserve bank, the restriction imposed under section 185(1) will not apply to such transactions.





## 15. BOARD COMPOSITION AND ITS POWERS

### 1. Question

Logical Solutions Ltd., a listed company, is having a Corporate Social Responsibility (CSR) committee constituted with the following members :

Rohan — Whole-time director & Chairman of CSR committee and Board

Sohan — Non-executive director

Mohan — Independent director

Can company constitute a Nomination and Remuneration committee consisting of same three members of CSR committee with same composition ? Discuss.

### Answer

According to section 178 of Companies Act, 2013 The Board of Directors of every listed public company shall constitute the Nomination and Remuneration Committee consisting of three or more non-executive directors out of which not less than one-half shall be independent director. The chairperson of the company (whether executive or non-executive) may be appointed as a member of the Nomination and Remuneration Committee but shall not chair such Committee.

In present case the CSR Committee cannot serve as Nomination and Remuneration committee as the composition is different.

### 2. Question

Draft an appropriate resolution to authorise the Board to borrow for company's business upto a limit beyond paid-up share capital and free reserves. Assume facts and figures.

### Answer

Special Business

**To consider and, if thought fit, to pass with or without modification(s), the following resolution as Special Resolution:**

“RESOLVED THAT pursuant to the provisions of Section 180(3)(c) and other applicable provisions, if any, of the Companies Act, 2013, and subject to such approval as may be necessary, consent of the company be and is hereby accorded to the Board of directors of the company for borrowing, from time to time, such sum of money as may not exceed Rs. .... (Rupees ..... ), for the purpose of the business of the company,

notwithstanding that the moneys to be borrowed together with the monies already borrowed (apart from temporary loans obtained from the company's bankers in the ordinary course of business) will exceed the aggregate of the paid-up capital of the company and its free reserves, that is to say, the reserves not set apart for any specific purpose, provided that the total amount upto which the monies may be borrowed by the Board of directors of the company shall not exceed the aggregate of the paid-up capital and free reserves of the company by more than the sum of '..... (Rupees ..... ) at any one time.

Resolved further that the Board be and is hereby authorized to do all the acts, deed and things as it may in its absolute discretion deem necessary and appropriate to give effect to the above resolution".

### Explanatory Statement

The shareholders of the company had, at the extraordinary general meeting of the company held on ....., passed a special resolution under Section 180 (3) for borrowing the maximum amount of Rupees ....., upto which the Board of directors of the company could borrow funds from financial institutions and banks in excess of the company's paid-up capital and free reserves. However, in view of the increased business activities of the company, the said ceiling of Rupees ( . ) has been found to be inadequate. Your directors are of the opinion that the ceiling of borrowings by the Board be raised to rupees .....

Hence the proposed resolution for consideration and approval by the members of the company. None of the directors is concerned or interested in the proposed resolution.

### 3. Question

Fashion Ltd. holds a general meeting for passing a special resolution regarding appointment of Shyamlal 72 years as Managing Director of the company. Out of the 50 members present in the meeting 25 voted in favour, 15 against and 10 members did not cast their vote. Can company appoint Shyamlal as Managing Director of the company ? Discuss.

### Answer

According to Section 196(3) of the Companies Act, 2013 no company shall appoint or continue the employment of any person as managing director, whole-time director or manager who is below the age of twenty-one years or has attained the age of seventy years. Further appointment of a person who has attained the age of seventy

years may be made by passing a special resolution in which case the explanatory statement annexed to the notice for such motion shall indicate the justification for appointing such person. In case where no such special resolution is passed but votes cast in favour of the motion exceed the votes, if any, cast against the motion and the Central Government is satisfied, on an application made by the Board, that such appointment is most beneficial to the company, the appointment of the person who has attained the age of seventy years may be made.

A person who has attained the age of seventy may be appointed as the managing director of the company after passing special resolution. In the present case the special resolution was not passed.

Mr. Shyamal may be appointed as the Managing Director since the votes cast in favour exceed the vote cast against the resolution and Central Government approval may be obtained by the Board of Directors of the Company to appoint him as managing director. If the Central Government is satisfied the approval may be granted.

#### 4. Question

DEF Ltd. has made profit for last 3 consecutive financial years as under :

| Year    | ₹ in Crore |
|---------|------------|
| 2017—18 | 100        |
| 2016—17 | 150        |
| 2015—16 | 200        |

Considering the provisions of Companies Act 2013, state whether :

- DEF Ltd. can contribute ₹33.75 crore directly to a political party by a bearer cheque ?
- What is the limit on the maximum amount that can be contributed by a company to a political party ?
- Would your answer be different, if DEF Ltd. is a “Government Company” and donation is given by an “account payee cheque” ?

#### Answer

(i) According to Section 182 of the Companies Act, 2013, a company, other than a government company and a company which has been in existence for less than three financial years, may contribute any amount directly to any political party, on obtaining approval from the Board of Directors in their meeting. Further the contribution under this section shall not be made except by an account payee cheque drawn on a bank or an account payee bank draft or use of electronic clearing system through a bank account. Therefore as per above provision DEF Limited cannot contribute Rs.33.75 Crore directly to a political party through a bearer cheque. (ii) As per section

182 of the Companies Act, 2013, a company, other than a Government company and a company which has been in existence for less than three financial years, may contribute any amount directly or indirectly to any political party. Hence DEF Ltd can contribute any amount to a Political Party.

(iii) According to Section 182 of the Companies Act, 2013 Government Company are not allowed to make contribution to the political party. Considering DEF Limited as a Government Company, it cannot make any contribution to a political party even by way of an account payee cheque.

### 5. Question

State the situations under which a company is required to constitute the Audit Committee ?

#### Answer

Section 177(1) of the Companies Act, 2013 read with Rule 6 of the Companies (Meeting of the Board and its Powers) Rules, 2014, provides that the Board of directors of the following companies are required to constitute an Audit Committee of the Board - (i) Every listed public companies;

- (ii) All public companies with a paid up share capital of 10 crore rupees or more;
- (iii) All public companies having turnover of 100 crore rupees or more;
- (iv) All public companies, having in aggregate, outstanding loans or borrowings or debentures or deposits exceeding 50 crore rupees or more.

The paid up share capital or turnover or outstanding loans or borrowings or debentures or deposits, as the case may be, as existing on the date of last audited financial statements shall be taken into account for the purpose.

### 6. Question

Prism Ltd. which has 50 preference shareholders called a preference shareholders meeting for amending the terms of these shares. 'A' was the only preference shareholder who attended the meeting. He, however held the proxies from all other preference shareholders. He took the chair, conducted the meeting and passed a resolution for amending the terms of the issue of these shares. Examine the validity of the meeting and the resolution passed.

#### Answer

Under section 103 (1) of the Companies Act, 2013, unless the articles of the company provide for a larger number, in case of a public company, five members personally present shall be the quorum for a meeting of the company, if the number of members as on the date of meeting is not more than one thousand.

The case given in the question corresponds to the decision in *Sharp vs. Dawes* wherein it was held that “the word meeting prima facie means coming together of more than one person.” In this given case, only one shareholder was present and it was held that the meeting was not validly held.

Further in *East Vs. Bennet Brothers Ltd. (1911)* it has been held that in case of a meeting of a particular class of members if all the shares of that particular class are held by one person, then that one person shall form the quorum.

In the given case, therefore, the applicable quorum will be 5 members and since all the shares are not held by one person but there are 50 members, no quorum is therefore present. The meeting and the resolution passed there shall not be valid. Proxy shall not be counted for quorum.

### 7. Question

Moon Oil Exploration Ltd. (MOEL) was incorporated on 1st June 2007 and the company made a considerable amount of profit in the past years :

| Financial Year | Net Profit ` |
|----------------|--------------|
| 2016 –17       | 25 Crore     |
| 2017–18        | 10 Crore     |
| 2018–19        | 12 Crore     |

- (i) In the current financial year 2019-20, the company wants to contribute to a political party. How much can it contribute ?
- (ii) If MOEL had contributed to political parties earlier to the year 2017, how much could it have contributed at the maximum during those years ?
- (iii) The Chairman of MOEL directed its account manager to pay a political party’s office an amount of `50 Lakh by cheque as part payment to the party, can he do so ?
- (iv) The Board of directors authorised a payment to the National Defence Fund too but wanted to not show it in profit and loss account. Is it possible to do so ?
- (v) A sum of `2 lakh was spent by MOEL on an advertisement in a tract published by a political party ? How it is to be treated in the accounts of the company?

**Answer**

- (i) According to Section 182 of the Companies Act, 2013, a company, other than a government company and a Company which has been in existence for less than three financial years, may contribute any amount directly or indirectly to any political party.

The Finance Act, 2017 amended section 182 of the Companies Act, 2013, accordingly the limit on the maximum amount that can be contributed by a company to a political party has been removed. Hence a company now can contribute any percentage without any limit.

- (ii) Further, prior to the amendment to Section 182 by the Finance Act, 2017, the limit of contribution to political parties was 7.5% of the average net profits during the three immediately preceding financial years.

Hence, earlier to 2017, it can have contributed only 7.5% of average net profits at the maximum.

- (iii) As per Section 182(1) of the Companies Act, 2013 the contribution must be authorised by board in its meeting by resolution and such resolution shall be deemed to be the justification in law for making of such contribution.

As per Section 182(3A) of the Companies Act, 2013, further, contribution under this section shall not be made except by an account payee cheque drawn on a bank or an account payee bank draft or use of electronic clearing system through a bank account.

Accordingly, the chairman cannot direct the payment to be made unless he is duly authorised by a Board resolution passed at a meeting and the payment is to be made through account payee cheque/Bank Draft or through electronic clearing system only.

- (iv) As per Section 183 of the Companies Act, 2013 the Board is authorised to contribute such amount as it thinks fit to the National Defence Fund or any other fund approved by the Government for the purpose of National Defence.

Further, the company is required to disclose in its profit and loss account the total amount or amounts contributed by it during the financial year.

Accordingly, it is not possible to avoid the disclosure in the Profit and loss account about the amount of the contribution made to the National Defence Fund.

- (v) If the expenditure incurred on advertisement in any publication souvenir, brochure, tract, pamphlet or the like is deemed as political contribution if such publication is by or on behalf of political party or if not, then for the advantage to such political party for a political purpose.

Hence, this amount to be treated as political contribution and shown in profit and loss account under the head political contribution.

### 8. Question

Destinations 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 Destinations Ltd 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.

### 9. Question

Warner Ltd. is an Indian company with a net profit of ` 4, 7, 6 and 7 crores respectively in the last four years. Net profit for each of last four years included a dividend of ` 1 crore received from WB Ltd. which is an Indian



company. Discuss whether Warner Ltd. is required to spend on CSR activities ? If yes, how much it should spend ? If no, state the reasons for it.

**Answer**

As per section 135 of the Companies Act 2013, the CSR provision is applicable to companies which fulfills any of the following criteria during the immediately preceding financial year:

- Companies having net worth of rupees five hundred Crore or more, or
- Companies having turnover of rupees one thousand Crore or more or
- Companies having a net profit of rupees five Crore or more

Explanation to section 135 provides that for the purposes of this section "net profit" shall not include such sums as may be prescribed, and shall be calculated in accordance with the provisions of section 198.

The Section 198 of the Companies Act, 2013 read with CSR Rules have clarified the manner in which a company's net profit will be computed to determine if it fits into the 'spending' norm. In order to determine the 'net profit', dividend income received from another Indian company (which are duly covered under and complying with the provisions of Section 135 of the Companies Act, 2013) or profits made by the company from its overseas branches have been excluded. Moreover, the 2% CSR is computed as 2% of the average net profits made by the company during the preceding three financial years.

Here, assuming that WB Ltd is duly covered under Section 135 of Companies Act, 2013 and is also complying with the said provisions, the dividend received by Warner Ltd from WB Ltd shall be deducted from the Net Profit of Warner Ltd so as to compute "net profit" & "average net profit" for the purpose of Section 135 of Companies Act, 2013.

Hence, based on above assumption, Warner Ltd's net profit shall be considered as rupees 7 Crore minus 1 Crore (dividend from another Indian company) = rupees 6 Crore in the preceding financial year, thus making it liable to comply with Section 135. It will therefore be required to spend on CSR Activities

The CSR amount to be spent/created is 2% of Rupees 6 crores + 5 crores + 6 crores = 17/3 = rupees 5.67 Crore (average profit of the preceding three years) i.e. 2% of Rs. 5.67 Crore being Rs. 11.33 Lakhs.

**10. Question**

You are a company secretary in a company. The Board of Directors want to know the details that should be entered in the Register of Renewed and Duplicate share certificates and the period for which such register should be maintained. Clarify the Board in this regard.

**Answer**

As per Section 46 of the Companies Act, 2013 read with Rule 6 of Companies (Share Capital and Debentures) Rules, 2014, every company with a share capital should, from the date of its registration, maintain a register of renewed and duplicate certificates.

The word 'renewed' includes consolidation and sub-division of shares and issue of certificate in lieu thereof. Particulars of every share certificate issued shall be recorded in a Register of Renewed and Duplicate Share Certificates. Such register shall be maintained in Form No. SH-2 indicating against the name(s) of the person(s) to whom the certificate is issued, the number and date of issue of the share certificate in lieu of which the new certificate is issued, and the necessary changes indicated in the Register of Members by suitable cross-references in the "Remarks" column. Such register shall be kept at the registered office of the company or at such other place where the Register of Members is kept.

The register shall be preserved permanently and shall be kept in the custody of the Company Secretary of the company or any other person authorized by the Board for the purpose. All entries made in the Register of Renewed and Duplicate Share Certificates shall be authenticated by the company secretary or such other person as may be authorized by the Board for purposes of sealing and signing the share certificate. The register is not open for inspection.

**11. Question**

RPK Ltd. is an unlisted company having ` 9 crore as paid up capital and ` 52 crore as long term loan. The directors of the company would like to know from you the answers for the following questions :

- (1) Would the company be liable to constitute an audit committee ?
- (2) If the company is listed after a fresh issue of shares to the tune of ` 50 crore, in such a situation, would the company be liable to constitute Audit Committee?
- (3) What is the quorum for meetings and number of meetings to be held in a year by the audit committee ?

**Answer**

- (1) Section 177(1) of the Companies Act, 2013 read with Rule 6 of the Companies (Meetings of the Board and its Powers) Rules, 2014, provides that the Board of directors of following companies are required to constitute an Audit Committee of the Board-
- (i) Every listed Public companies;
  - (ii) All public companies with a paid up capital of 10 Crore rupees or more;
  - (iii) All public companies having turnover of 100 Crore rupees or more;
  - (iv) All public companies, having in aggregate, outstanding loans or borrowings or debentures or deposits exceeding 50 Crore rupees or more.

Accordingly RPK Ltd. is liable to constitute the audit committee as its long term loan is more than the prescribed limit of Rs. 50 Crore.

- (2) Yes, the company is liable to constitute an audit committee as it will then become a listed company.
- (3) Para 2.2 of the Secretarial Standard-1 provides that Committee shall meet as often as necessary subject to the minimum number and frequency prescribed by any law or any authority or as stipulated by the board.

Para 3.5 of the Secretarial Standard -1, unless otherwise stipulated in the Act or the Articles or under any other law, the Quorum for meeting of any Committee constituted by the Board shall be as specified by the Board. If no such Quorum is specified, the presence of all the members of any such Committee is necessary to form the Quorum.

Accordingly, RPK Ltd. In case of unlisted public companies, minimum number of meetings and quorum may be decide by the Board of Directors.

## 12. Question

Examine the validity of the following statements :

- (i) 'Every listed public company must have an independent woman director.'
- (ii) "Every listed public company must have a small shareholders' director.'

## Answer

According to Regulation 17 of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, the Board of Directors of the top 500 listed entities shall have at least one independent woman director by April 1, 2019 and the Board of Directors of the top 1000 listed entities shall have at least one independent woman director by April 1, 2020.

The top 500 and 1000 entities shall be determined on the basis of market capitalisation, as at the end of the immediate previous financial year.

**Thus, every listed public company is not required to appoint independent woman director, but the listed entities falling under the above bracket must have an independent women director.**

According to Section 151 of the Companies Act, 2013 r/w Rule 7 of the Companies (Appointment and Qualifications of Directors) Rules, 2014, a listed company may have one director elected by small shareholders upon notice by not less than one thousand small shareholders or one-tenth of the total number of such small shareholders, whichever is lower. However, a listed company may opt to have a director representing small shareholders suo-motu.

**Thus, appointment of small shareholders by listed company is optional.**

### 13. Question

Dhanvantri is the Chairman of the Risk Management Committee of Advanced Solutions Ltd. A meeting of this Committee of Directors has been scheduled to be held on 5th December, 2019 at 3.00 p.m. At 3.10 p.m. though the requisite quorum is present, Dhanvantri is not present. Can the meeting be still held or requires to be adjourned? Answer with reference to the relevant provisions.

### Answer

Regulation 72 of Table F of Schedule I to the Companies Act, 2013 provides that if at the meeting of Committee, the Chairman is not present within five minutes after the time appointed for holding the meeting, the members present may choose one of their members to be Chairman of the Meeting.

In the instant case, the Chairman of the Risk Management Committee is not present within the 5 minutes of the scheduled time of the meeting and the requisite quorum is present. Hence, the members present may elect any one among them to act as the Chairman of the meeting and hold the meeting.

### 14. Question

Amit is having directorship of the following companies:

|                                                                  |                     |                   |
|------------------------------------------------------------------|---------------------|-------------------|
| Nature of Companies                                              | Number of Companies | Public companies  |
| (including 2 dormant companies)                                  | 8                   |                   |
| Private companies (including 2 subsidiaries of public companies) | 10                  |                   |
| Alternate director (in a private company)                        | 1                   | Section 8 company |

Indicate how many more directorships Amit can undertake in public or private companies.

**Answer**

According to Section 165(1) of the Companies Act, 2013, no person, can hold office as a director, including any alternate directorship, in more than twenty companies at the same time. For reckoning the limit of directorships in twenty companies, the directorship in a dormant company is excluded.

Further, out of the above twenty companies, the maximum number of Public Companies in which a person can be appointed as a director cannot be more than ten. For reckoning the limit of ten Public Companies, directorship in Private Companies that are either holding or subsidiary company of a Public Company shall also need to be included.

In the given case, Amit is holding a directorship in:

- 8 Public Companies (including 2 Dormant Companies);
- 10 Private Companies (including 2 subsidiaries of Public Companies);
- Alternate Director (in a Private Company);
- Section 8 Company

Accordingly, in Public Company presently he is holding 8 directorship and in Private Company 9 directorship.

Hence, total number of directorships he is already holding is 17 (since, directorship in Section 8 Company is excluded, from reckoning the limit of directorship of 20 companies).

**Thus, Amit can take up directorship in 2 more Public Companies and 1 more Private Company.**

**15. Question**

Rohan is a well-known banker and holds directorship in 22 companies as on 30th September, 2020. The companies include 10 public companies, 11 private companies (including MNP Pvt. Ltd., a dormant company) and 1 company registered under section 8 of the Companies Act, 2013. Recently, on 20th December, 2020, ABC Ltd. in which Rohan is not a director acquired 100% shares in MNP Pvt. Ltd. In this context, answer the following

- Whether the directorships held by Rohan as on 30th September, 2020 are valid ?
- Can Rohan continue to hold directorship in all 22 companies after acquisition made by ABC Ltd. ?
- Company Secretary of ABC Ltd. has proposed to restrict number of directorship of the directors in ABC Ltd.

Whether the proposal given by the Company Secretary is tenable in light of the provisions of the Companies Act, 2013 ? (5 marks)

**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 20 companies at the same time. Whereas the maximum number of public companies in which a person can be appointed as a director shall not exceed 10.

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. Further, for reckoning the limit of directorships of 20 companies, the directorship in a dormant company and section 8 companies shall not be included.

The members of a company may, by special resolution, specify any lesser number of companies in which a director of the company may act as directors.

- (i) In the present case, holding of directorship of Rohan as on 30th September, 2020 is valid as he is holding directorship in 10 public companies and in 11 private companies out of which one company is dormant company and one company is registered under section 8 of the Companies Act, 2013. So, maximum directorship he is holding is in 20 companies.
- (ii) Upon MNP Pvt. Ltd. becoming subsidiary of ABC Ltd. (a public company) directorship in MNP Pvt. Ltd. shall also be included within the limit of 10 public companies.

Accordingly, if Rohan acts as director in more than 10 public companies, then same will be in contravention of Section 165 of the Companies Act, 2013.

- (iii) According to section 165(2) of the Companies Act, 2013 subject to the provisions of Section 165 (1), the members of a company may, by special resolution, specify any lesser number of companies in which a director of the company may act as directors. So, the proposal of Company Secretary is tenable.

## 16. Question

Board of directors of Charity Ltd. wants to understand from you applicability of the provisions relating to CSR to companies including requirements to constitute CSR committee. Inform the Board.

### Answer

Section 135 of the Companies Act, 2013 pertaining to Corporate Social Responsibility stipulates that:

- (i) every company having net worth of Rs.500 crore or more; or (ii) every company having turnover of Rs.1000 crore or more; or (iii) every company having net profit of Rs.5 crore or more. during the immediately preceding

financial year shall constitute a Corporate Social Responsibility Committee of the Board consisting of 3 or more directors, out of which at least 1 director shall be an independent director. However, where a company is not required to appoint an independent director under Section 149(4) of the Companies Act, 2013, it shall have in its Corporate Social Responsibility Committee 2 or more directors. Further, as per Rule 5 of the Companies (Corporate Social Responsibility Policy) Rules, 2014, a private company having only 2 directors on its Board shall constitute its CSR Committee with 2 such directors. With respect to a foreign company covered under these rules, the CSR Committee shall comprise of at least 2 persons of which 1 person shall be as specified under clause of section 380(1) of the Companies Act, 2013 and another person shall be nominated by the foreign company.

The role of the Corporate Social Responsibility Committee is—

- (a) to formulate and recommend to the Board, a Corporate Social Responsibility Policy which shall indicate the activities to be undertaken by the company in areas or subject, specified in Schedule VII of the Companies Act, 2013;
- (b) to recommend the amount of expenditure to be incurred on the activities referred to in clause (a) above; and
- (c) to monitor the Corporate Social Responsibility Policy of the company from time to time.

After taking into account the recommendations of the CSR Committee, the Board shall approve the CSR Policy for the company.

### 17. Question

Approval of the Audit Committee to a related party transaction can be granted by passing a circular resolution. Discuss.

### Answer

Section 188(1) of the Companies Act, 2013 prohibits the Board from dealing with an item of business pertaining to a contract or arrangement with a related party through a circular resolution. However, the law is silent on dealing with any item of business by the Audit Committee through a circular resolution.

Here, the intention of the Legislature is required to be gathered from the language used; which means that attention should be paid to what has been said as also to what has not been said. As a consequence, though it cannot be added that the law imposes any restriction, the principle applicable on meetings of the Board would be applicable to the meetings of the Audit Committee too, while dealing with items of business on related party transactions.

As per the Secretarial Standard on Meetings of the Board of Directors (SS-1), the Audit Committee should discuss related party transactions which are not in the ordinary course of business or which are not on arm's length basis at its meetings and not through circulation. However, there is no bar on omnibus approval of limits being passed by a circular resolution by the Audit Committee.

### 18. Question

X Ltd. is a listed company having 565 shareholders as on 31st December, 2019. The Board of Directors ask you about the formation of Stakeholders Relationship Committee. Is it necessary to constitute Stakeholders Relationship Committee ? Will your answer be same if X Ltd is an unlisted company ? What should be the composition of this committee ?

### Answer

As per section 178(5) of the Companies Act, 2013, the Board of Directors of a company which consists of more than one thousand shareholders, debenture-holders, deposit-holders and any other security holders at any time during a financial year shall constitute a Stakeholder Relationship Committee consisting of a chairperson who shall be a non-executive director and such other members as may be decided by the Board. Further, as per Regulation 20 of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 every listed entity shall constitute a Stakeholders Relationship Committee to specifically look into various aspects of interest of shareholders, debenture holders and other security holders. The chairperson of this committee shall be a non-executive director.

In view of the above provisions, a listed company even if having less than 1000 shareholders is required to constitute a Stakeholder Relationship Committee. In case X Ltd. is an unlisted company, it is not required to constitute a Stakeholder Relationship Committee under Companies Act, 2013.

As per SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, at least three directors, with at least one being an independent director, shall be members of the Committee and in case of a listed entity having outstanding SR equity shares, at least two thirds of the Stakeholders Relationship Committee shall comprise of independent directors.

### 19. Question

In compliance to the Companies Act, 2013, at least one-woman director shall be on the Board of such class or classes of companies as may be prescribed. Riya is keen to hold the office of woman director in a company. She has selected some companies in which there is a vacancy for a woman director.



| Name of the company | Listing status | Paid up share capital (in `) as per the latest audited financial statements | Turnover (in `) as per the latest audited financial statements |
|---------------------|----------------|-----------------------------------------------------------------------------|----------------------------------------------------------------|
| Maya Ltd.           | Unlisted       | 50 Crore                                                                    | 100 crore                                                      |
| Manna Ltd.          | Listed         | 100 crore                                                                   | 150 crore                                                      |
| Mopin Ltd.          | Unlisted       | 150 crore                                                                   | 350 crore                                                      |

Guide Riya in selecting the companies which are mandatorily required to appoint a woman director as per the Companies Act, 2013. Also explain as to when a company is required to appoint independent woman director ?

### Answer

As per section 149(1) read with Rule 3 of Companies (Appointment and Qualification of Directors) Rules, 2014 following class of companies must have at least one woman director:

- All listed companies
- Public company-
  - with paid up capital of Rs. 100 crore or more; or
  - with turnover of Rs. 300 crore or more. Applying the above provision, it can be suggested that:
    - ✦ Maya ltd. is not compulsorily required to appoint woman director as its paid-up capital is less than Rs. 100 crore and turnover is less than Rs. 300 crore.
    - ✦ Manna ltd. is compulsorily required to appoint at least one woman director as it is a listed company.
    - ✦ Mopin ltd. is compulsorily required to appoint at least one woman director as its paid-up capital is more than Rs. 100 crore and turnover is more than Rs. 300 crore.

Based on above discussion, it can be advised to Riya that Manna ltd. and Mopin ltd. are mandatorily required to appoint at least one woman director.

According to Regulation 17 of SEBI (LODR) Regulations, 2015-Board of directors of top 500 listed companies shall have at least one independent woman director by 1st April, 2019 and Board of directors of the top 1000 listed companies shall have at least one independent woman director by 1st April, 2020. The top 500 and 1000 listed companies shall be counted on the basis of market capitalization, as at the end of the immediate previous financial year.

**20. Question**

The Board of directors of Well Ltd., wants to contribute `60,000 to a charitable trust during the financial year 2022-2023. During the financial year 2021-2022, the company suffered losses; however, during the financial years 2019-20 and 2020-21 the net profits were `12,00,000 and `5,00,000 respectively. The directors are contemplating to contribute the said amount in spite of the losses. In this connection, state whether the directors can do so ? Whether contribution towards Gratuity Fund for employees of the company can be considered as contribution to charitable trust under the Companies Act, 2013 ? Suitable assumptions can be made.

**Answer**

As per section 181 of the Companies Act, 2013, company can contribute to bona- fide charitable funds or other funds which are not directly connected to business of company upto 5% of its average net profits during the preceding three financial years.

If the contribution is proposed for more than this limit, prior approval in General Meeting is required.

In present case, we assume Well Ltd. has incurred Loss of Rs. 2,00,000 during the financial year 2021-22

| Year    | Average Profits/Loss |
|---------|----------------------|
| 2019-20 | 12,00,000            |
| 2020-21 | 5,00,000             |
| 2021-22 | -2,00,000            |

Average net profits =  $12,00,000 + 5,00,000 - 2,00,000 / 3 = \text{Rs. } 5,00,000$  5% of Average Net Profits = 5% of 5,00,000 = Rs. 25,000

Pursuant to Section 181, if contribution to charitable trust is more than 5% of average net profits for three financial years , it requires prior approval in General Meeting.

Hence, in the above case, where Well Ltd. wants to contribute more than Rs. 25000

i.e. Rs. 60,000 (in the present case) to charitable fund, the directors have to ensure that:

a) Prior approval by ordinary resolution in the general meeting is obtained to make contribution to charitable fund.

b) The trust is bonafide.

Contribution towards Gratuity Fund for employees of company cannot be considered as contribution towards charitable fund or trust. Gratuity Fund is directly related to business of company or welfare of employees.

**21. Question**

With the scenarios described below, examine whether any of the following companies is required to constitute Audit Committee as per provisions of the Companies Act, 2013 ?

| Name of Company   | Paid up capital (Rs. in crore) | Turnover (Rs. in crore) | Aggregate outstanding loan, debenture and deposits (Rs. in crore) |
|-------------------|--------------------------------|-------------------------|-------------------------------------------------------------------|
| A Ltd. (Unlisted) | 8                              | 75                      | 55                                                                |
| B Ltd. (Listed)   | 10                             | 75                      | 11                                                                |
| C Pvt. Ltd.       | 8                              | 110                     | 11                                                                |
| D Ltd. (Unlisted) | 10                             | 51                      | 5                                                                 |

**Answer**

Section 177 of the Companies Act, 2013 read with Rule 6 of the Companies (Meetings of the Board and its Powers) Rules, 2014 provides that the Board of directors of following companies are required to constitute an Audit Committee of the Board:

- Every listed company;
- All public companies with paid up capital of Rs. 10 crore or more; or
- All public companies having turnover of Rs. 100 crore or more; or
- All public companies, having in aggregate outstanding loans, debentures and deposits exceeding Rs. 50 crore or more

In view of the above provisions, it can be suggested that:

- A Ltd. is required to constitute Audit Committee as it has aggregate outstanding loans, deposit and debenture of Rs. 55 crore (in excess of Rs. 50 crore).
- B Ltd. is required to constitute Audit Committee as it is a listed company.
- C Pvt. Ltd. is not required to constitute Audit Committee as it is a private company.
- D Ltd. is required to constitute Audit Committee as it has a paid up capital of Rs. 10 crore.

**22. Question**

Explain briefly the provisions of the Companies Act, 2013 regarding constitution of "Audit Committee". MNC Ltd. constituted an audit committee as required by the said Act. The committee in its report dated 30th April 2021 has pointed out various irregularities in the financial transactions entered into by the company. The management

of the company does not agree with the contents of the audit committee report. Explain the action that can be taken in this regard.

### Answer

#### Constitution of Audit Committee:

- As per Section 177(1) of the Companies Act, 2013 the Board of Directors of every listed public company and such other class or classes of companies, as may be prescribed, shall constitute an Audit Committee.
- Rule 6 of the Companies (Meetings of Board and its Powers) Rules, 2014 provides that the Board of directors of every listed public company and a company covered under rule 4 of the Companies (Appointment and Qualification of Directors) Rules, 2014 shall constitute an Audit Committee' and a 'Nomination and Remuneration Committee of the Board.'
- Companies prescribed under Rule 4 of the Companies (Appointment and Qualification of Directors) Rules, 2014, are:
  - the Public Companies having paid up share capital of 10 crore or more; or
  - the Public Companies having turnover of 100 crore or more: or
  - the Public Companies which have, in aggregate, outstanding loans, debentures and deposits. exceeding 50 crore.
- As per Sec. 177(2) the Audit Committee shall consist of a minimum of 3 directors with independent directors forming a majority. Majority of members of Audit Committee including its Chairperson shall be persons with ability to read and understand the financial statement.

#### Action on irregularities pointed by the Audit Committee:

The recommendations of the Audit Committee are binding on the Board to take appropriate corrective actions. Sec. 177(5) of the Companies Act, 2013 provides that in case the Board of Director refuses to accept the recommendations of the Audit Committee, it bound to disclose the same with the reasons for non-acceptance, in its report to the members of the company under section 134(3) which relates to the Directors Report on Financial Statements to the members of the company.

### 23. Question

M/s. Dream Works Limited (an unlisted company) without any public deposits as per the audited financial statements of the company as at March, 31st 2021 given you the following information:

|                       |                                                 |
|-----------------------|-------------------------------------------------|
| Paid up Share Capital | 20 Crores                                       |
| Gross Turnover        | 500 Crores                                      |
| Bank Borrowings       | 40 Crores (from a Nationalized Bank)            |
| Other Borrowings      | 40 Crores (from a Public Financial Institution) |

Mr. Gupta, a Chartered Accountant employed in the finance and audit department of the company wants to form a Vigil Mechanism for directors and employees of the company.

- (1) Advise whether it is mandatory for M/s Dream Works Limited to formulate a Vigil Mechanism under the provisions of the Companies Act, 2013 and rules framed thereunder.
- (2) Are there any penalties that could be imposed on the company for not formulating the Vigil Mechanism?

### Answer

#### Vigil mechanism:

(a) As per Section 177(9) of the Companies Act, 2013, every listed company and such class of companies as may be prescribed shall establish a Vigil mechanism for their directors and employees.

Rule 7 of the Companies (Meetings of Board and its Powers) Rules, 2014 has prescribed the following class or classes of companies that shall constitute Vigil mechanism:

- (1) the Companies which accept deposits from the public;
- (2) the Companies which have borrowed money from banks and public financial institutions in excess of 50 crore.

In the present case, Dream Works Limited does not have any public deposits. They have borrowings from banks and public financial institutions of 80 crores which is in excess of 50 crores.

**Conclusion:** Company is mandatorily required to form a Vigil Mechanism for directors and employees of the company as it falls within the criteria specified under Rule 7.

**(b) Penalty:** As per Section 178(8), in case of contravention of provisions of Section 177 and Sec. 178, the company shall be punishable with fine which shall not be less than 1 lakh but which may extend to 5 lakh.

Every officer of the company who is in default shall also be punishable with imprisonment for a term which may extend to 1 year or with fine which shall not be less than 25,000 but which may extend to 1 lakh or with both.

### 24. Question

A is the Director of M & Co. Ltd. A has borrowed 50 lacs on reasonable terms from X for company's benefit and business. A has no power to borrow. What will be the legal position? Please explain.

**Answer**

**Restrictions on powers of Board:**

- As per Sec. 179(3) of the Companies Act, 2013, the Board of Directors of a company shall exercise certain powers on behalf of the company by means of resolutions passed at meetings of the Board, including therein is to borrow monies.
- To borrow money is within the implied authority of a director and so the outsiders dealing with the company are entitled to assume that every director is authorised to borrow money on behalf of the company.
- In the present case, money has been borrowed and used for the benefit of the company and its legitimate business purposes.

**Conclusion:** Company cannot repudiate the liability on the ground that the director 'A' has no power to borrow.

**25. Question**

Big Ben Ltd., a reputed public company, had advanced certain sum of money to one of its Directors, namely, Mr. Tanmay on certain terms and conditions and fixing the time limit for repayment thereof. Now, Mr. Tanmay has approached the Company with a request to extend the time limit for repayment of balance of loan amounting to? 12.00 lacs by another six months.

You are required to state with reference to the provisions of the Companies Act, 2013, the answer to the following:

- (i) Who is authorized to grant the extension as requested by Mr. Tanmay?
- (ii) Draft an appropriate notice for the meeting where such extension may be granted.

**Answer**

**Powers of Board of Directors:**

**(i) Extension of time for repayment of debt by a director:**

As per provisions of Section 180(1)(d) of the Companies Act, 2013, the Board of Directors of Big Ben Ltd., a public company cannot give time for the repayment of any debt due by Mr. Tanmay, a director of the company except with the consent of the Company by way of a Special Resolution passed in a General

Meeting

Accordingly, the Company in a General Meeting is authorized to grant the extension as requested by Mr. Tanmay by passing special resolution.

**(ii) Notice for calling the General Meeting of the company:****BIG BEN LIMITED**

Registered Office:

**NOTICE FOR EXTRAORDINARY GENERAL MEETING**

NOTICE is hereby given that an Extraordinary General Meeting of the members of the company will be held at the Registered office of the Company on the day of 2021 at 11.00 A.M. to transact the following business:

To Pass, with or without modification, the following resolution as a Special Resolution:

"RESOLVED THAT pursuant to the provision of section 180(1)(d) of the Companies Act, 2013, consent be and is hereby accorded to the company for extending the time for the repayment of the balance amount of 12.00 Lacs advanced to Mr. Tanmay, a Director of the company, by a further period of six months ending on 2021."

FOR & ON BEHALF OF THE BOARD

Dated: Company Secretary **Notes:**

- (1) A member entitled to attend and vote at the Meeting is entitled to appoint a proxy to attend and vote instead of himself and such proxy need not be a member of the Company. Proxies in order to be valid must be deposited atleast 48 hours prior to commencement of the Meeting.
- (2) Explanatory Statement pursuant to section 102(1) of the Companies Act, 2013 is annexed hereto.

**26. Question**

The Balance Sheet of International Operators Ltd. as at 31-03-2021 disclose the following position:

|                     | Rs. In Crores |
|---------------------|---------------|
| Share Capital       | 100           |
| Reserves & Surplus  | 300           |
| Secured Loans       | 150           |
| Unsecured Loans     | 100           |
| Current Liabilities | 70            |

Mr. X, the Managing Director of the company approaches the Royal Bank for a secured loan of? 600 crores to finance the new projects to be taken up shortly. The Bank seeks your advise whether it can grant the loan of 600 crores on the application of Mr. X. Advise the Royal Bank having regard to the provisions of the Companies Act, 2013.

**Answer****Power of Board to borrow money:**

- As per sec. 180(1)(c) of the Companies Act, 2013, the Board of Directors of a company shall not borrow the money without obtaining the approval of shareholders in a general meeting through a special resolution, where the money to be borrowed, together with the money already borrowed by the company will exceed aggregate of its paid-up share capital, free reserves and securities premium, apart from temporary loans obtained from the company's bankers in the ordinary course of business.
- Accordingly, the maximum borrowing which the Board of Directors can borrow, without obtaining approval of the shareholders in a general meeting, is calculated as follows:

| Particulars                                                                                                           | Rs.       |
|-----------------------------------------------------------------------------------------------------------------------|-----------|
| Paid-up Share Capital                                                                                                 | 100 Crore |
| General Reserve (being free reserve)                                                                                  | 300 Crore |
| Securities Premium                                                                                                    | -         |
| Aggregate of paid-up capital, free reserve and Securities premium                                                     | 400 Crore |
| Less: Existing borrowing<br>(Secured & unsecured Loan-assumed to be long term)                                        | 250 Crore |
| Amount upto which the Board of Directors can further borrow without the approval of shareholders in a general meeting | 150 Crore |

**Conclusion:** Proposal of the company to borrow 600 crores exceed the paid-up share capital and free reserves of the company to the tune of 200 crores (i.e. 600 crores- 400 crores 200 crores) without taking into account the existing loan. Thus, Royal Bank should advise Mr. X, the Managing Director of the company to get the approval of the shareholders of the company before considering the request of the company for a loan of 600 crores.

## 27. Question

Following is data relating to Prince Company Limited:

| Particulars                        | Rs.        |
|------------------------------------|------------|
| Authorised Capital (Equity Shares) | 100 crores |
| Paid-up Share Capital              | 40 crores  |
| General Reserves                   | 20 crores  |
| Debenture Redemption Reserve       | 10 crores  |
| Provision for Taxation             | 5 crores   |
| Loan (Long Term)                   | 10 crores  |
| Short Term Creditors               | 3 crores   |



Board of Directors of the company by a resolution passed at its meeting decided to borrow an additional sum of 90 crores from the company's Bankers. You being the company's financial advisor, advise the Board of Directors the procedure to be followed as required under the Companies Act, 2013.

### Answer

#### Borrowing by the Company (Section 180 of the Companies Act, 2013):

- As per sec. 180(1)(c) of the Companies Act, 2013, the Board of Directors of a company shall not borrow the money without obtaining the approval of shareholders in a general meeting through a special resolution, where the money to be borrowed, together with the money already borrowed by the company will exceed aggregate of its paid-up share capital, free reserves and securities premium, apart from temporary loans obtained from the company's bankers in the ordinary course of business.
- Accordingly, the maximum borrowing which the Board of Directors can borrow, without obtaining approval of the shareholders in a general meeting, is calculated as follows:

| Particulars                                                                                                           | Rs.      |
|-----------------------------------------------------------------------------------------------------------------------|----------|
| Paid-up Share Capital                                                                                                 | 40 Crore |
| General Reserve (being free reserve)                                                                                  | 20 Crore |
| Securities Premium                                                                                                    | -        |
| Aggregate of paid-up capital, free reserve and Securities premium                                                     | 60 Crore |
| Less: Existing borrowing (long term)                                                                                  | 10 Crore |
| Amount upto which the Board of Directors can further borrow without the approval of shareholders in a general meeting | 50 Crore |

- Debenture Redemption Reserve is not considered since it is kept apart for specific purpose of debenture redemption.
- In the present case, the directors by a resolution passed at its meeting decide to borrow an additional sum of 90 Crore from the company bankers.

**Conclusion:** Borrowing of 7 90 Crore will be beyond the powers of the Board of directors. Thus, the management is required to convene the general meeting and pass a special resolution by the members in the meeting as required u/s 180(1)(c) of the Companies Act, 2013.

**28. Question**

The Board of directors of Very Well Ltd., are contributing every year to a charitable organization a sum of? 60,000. In a particular year, the company suffered losses and the directors are contemplating to contribute the said amount in spite of the losses. In this connection, state whether the directors can do so?

**Answer****Contribution to Charitable funds:**

- As per section 181 of the Companies Act, 2013, the Board of Directors of a company may contribute to bona fide charitable and other funds upto 5% of its average net profits during the 3 financial years immediately preceding, the financial year. For contribution above this limit, prior permission of the company in general meeting shall be required.
- In the instant case, the Board of directors of Very Well Ltd., are contributing every year to a charitable organization a sum of 60,000. In a particular year, the company suffered losses and the directors are contemplating to contribute the said amount in spite of the losses.

**Conclusion:** Board may contribute upto 5% of average net profit of preceding 3 years. For any contribution above this limit, prior permission of the company in general meeting shall be required.

**29. Question**

The Board of Directors of LM Limited propose to donate? 3,00,000 to a school established exclusively for the benefit of children of employees and also donate ? 50,000 to a political party during the financial year ending 31st March, 2021. The average net profits during the 3 immediately preceding financial years is 40,00,000. Examine with reference to the provisions of the Companies Act, 2013 whether the proposed donations are within the power of the Board of Directors of company.

**Answer****(a) Contribution to a school established exclusively for employee's children:**

- As per section 181 of the Companies Act, 2013, the Board of Directors of a company may contribute to bona fide charitable and other funds upto 5% of its average net profits during the 3 financial years immediately preceding, the financial year. For contribution above this limit, prior permission of the company in general meeting shall be required.

- In the instant case, the Board of Directors of LM Limited propose to donate 3,00,000 to a school established exclusively for the benefit of children of employee.
- Donation made to a school exclusively established for the benefit of employees is a staff welfare expense and cannot be considered as contribution to charitable fund. Hence, provisions of sec. 181 are not attracted.

**Conclusion:** Proposed donation of 3,00,000 to a school is well within the powers of Board as restriction of sec. 181 will not be applicable, being donation to a school exclusively for benefit of children of employees will not amount to contribution to a charitable fund.

**(b) Donation to Political parties:**

- As per sec. 182 of Companies Act, 2013, a government company or any other company which has been in existence for less than 3 financial years cannot contribute any amount directly or indirectly to any political party.
- In other cases, contribution in any financial year can be made if a resolution authorising the making of such contribution is passed at a Board Meeting and such resolution shall, subject to the other provisions of this section, be deemed to be justification in law for the making of the contribution authorised by it.

**Conclusion:** Board is empowered to make the proposed donation subject to satisfaction of conditions prescribed u/s 182.

### 30. Question

M/s Jai Industries Limited earned net profit for the last three years as under:

| Financial Year | Net Profit ( in Crores) |
|----------------|-------------------------|
| 2017 - 18      | 30                      |
| 2018 - 19      | 40                      |
| 2019-20        | 50                      |

During the financial year 2020-21, the Board of Directors of the company contributed to a Charitable Fund Rs. 1.25 crore in July, 2020. Again, in January 2021, the Board of Directors passed resolution to contribute to another Charitable Fund Rs. 1.00 crore.

Decide the validity of the decision of the Board of Directors regarding the contribution on both the Occasions with reference to the provisions of the Companies Act, 2013.

**Answer**

**Contribution to Charitable Funds:**

- As per section 181 of the Companies Act, 2013 the Board of Directors of a company may contribute to bona fide charitable and other funds upto 5% of its average net profits during the 3 financial years immediately preceding, the financial year. For contribution above this limit, prior permission of the company in general meeting shall be required.
- In the instant case, the average Net Profit of M/s Jai Industries Limited in the 3 immediately preceding financial years is 40 Crores  $[30+40+50/3]$ .
- Board may contribute 5% of 40 Crores, i.e. 2 Cr without obtaining permission of the company In general meeting. For Contribution above? 2 Cr., Board has to take the prior permission of the company in general meeting.

**Conclusion:** Donation made in July 2021, Le. 1.25 Crore is in accordance with sec. 181. However, resolution passed in Jan. 2021 is not proper as aggregate donation, Le. 7 2.25 Crores exceeds 5% of average net profit.

### 31. Question

Sewak Cycles Limited is a company incorporated four years ago. It has earned profits amounting 25 lakhs, \* 8 lakhs and 11 lakhs respectively during the last three financial years. The Board of Directors of the company propose to donate a sum of 7 50,000 to a political party. Examine with reference to the provisions of the Companies Act, 2013, whether the proposed donation is within the powers of the Board of Directors of the company.

### Answer

#### Contribution to Political Parties:

- As per sec. 182 of Companies Act, 2013, a government company or any other company which has been in existence for less than 3 financial years cannot contribute any amount directly or indirectly to any political party.
- In other cases, contribution in any financial year can be made if a resolution authorising the making of such contribution is passed at a Board Meeting and such resolution shall, subject to the other provisions of this section, be deemed to be justification in law for the making of the contribution authorised by it.
- Every company shall disclose in its profit and loss account the total amount contributed by it under this section during the financial year to which the account relates.

- Contribution shall not be made except by an account payee cheque drawn on a bank or an account payee bank draft or use of electronic clearing system through a bank account or through any instrument under a notified scheme.

**Conclusion:** As company was in existence for period more than 3 financial years, company may contribute any amount to political parties subject to satisfaction of conditions prescribed above.

### 32. Question

State with reference to the provisions of the Companies Act, 2013 whether the following companies can make donations to political parties and if so the conditions to be complied with in this regard.

- (i) ABCD Ltd., a Government company registered in 1991, wants to donate a sum of Rs. 10 lakhs.
- (ii) EFG Ltd., a public company registered in 2016, wishes to contribute a sum of Rs.5 lakhs.
- (iii) RST Ltd., a company incorporated in the year 2017, decides to contribute a sum of Rs. 3 lakhs.
- (iv) Rama Ltd, wants to make political contribution of? 2,000 in cash.

### Answer

#### Contribution to Political Parties:

- As per Sec 182 of Companies Act, 2013, a government company or any other company which has been in existence for less than 3 financial years cannot contribute any amount directly or indirectly to any political party
  - In other cases contribution in any financial year can be made if a resolution authorising the making of such contribution is passed at a Board Meeting and such resolution shall, subject to the other provisions of this section, be deemed to be justification in law for the making of the contribution authorised by it.
  - Every company shall disclose in its profit and loss account the total amount contributed by it under this section during the financial year to which the account relates.
  - Contribution shall not be made except by an account payee cheque drawn on a bank or an account payee bank draft or use of electronic clearing system through a bank account or through any instrument under a notified scheme. Conclusion: Considering the provisions of Sec. 182 as stated above, following conclusions may be drawn
- (i) ABCD Ltd, is not allowed to make donations to political parties as it is a Government company.

- (ii) EFG Ltd., can contribute sum of 5 lakhs subject to compliance of conditions as stated in Sec.182.
- (iii) RST Ltd, can contribute sum of 3 lakhs subject to compliance of conditions as stated in Sec. 182  
(It is assumed that contribution is being made in financial year 2021-22) (iv) Rama Ltd., cannot make political contribution in cash.

### 33. Question

The Balance Sheet of RML Limited contains the following information about its financial position as on 31st March, 2021:

|                                     |                |                                                                         |                |
|-------------------------------------|----------------|-------------------------------------------------------------------------|----------------|
| 10,00,000 Equity shares of 100 each | Rs.10.00 crore | Reserves & Surplus which includes revaluation reserve of Rs. 2.00 crore | Rs.12.00 crore |
|-------------------------------------|----------------|-------------------------------------------------------------------------|----------------|

|                                         |     |
|-----------------------------------------|-----|
| Credit Balance in Profit & Loss Account | Rs. |
| 2.00 crore                              |     |

|                                       |     |
|---------------------------------------|-----|
| Secured Loan from a Nationalized Bank | Rs. |
| 8.00 crore                            |     |

Net Profit in the last three years were: 31.3.2018 1.20 crore, 31.3.2019 1.50 crore and 31.3.2020-1.80 crore.

- (i) The Board of Directors decide to borrow an additional sum of? 10.00 crore for the expansion. Decide whether the company is eligible to borrow the additional funds and the limit thereof.
- (ii) The Board also decide to make donation to two major political parties totalling Rs.10,00,000. Comment on the validity of the action of the Board and the maximum amount of donation which the company can contribute.

### Answer

#### (i) Borrowing by the Company (Section 180 of the Companies Act, 2013):

- As per Sec. 180(1)(c) of the Companies Act, 2013, the Board of Directors of a company shall not borrow the money without obtaining the approval of shareholders in a general meeting through a special resolution, where the money to be borrowed, together with the money already borrowed by the company will exceed aggregate of its paid-up share capital, free reserves and securities premium, apart from temporary loans obtained from the company's bankers in the ordinary course of business.
- Accordingly, the maximum borrowing which the Board of Directors can borrow, without obtaining approval of the shareholders in a general meeting, is calculated as follows:

| Particulars           | Rs.      |
|-----------------------|----------|
| Paid up Share Capital | 10 Crore |

|                                                                                                                       |          |
|-----------------------------------------------------------------------------------------------------------------------|----------|
| Reserves and Surplus (Excluding Revaluation Reserve)                                                                  | 10 Crore |
| Credit Balance in Profit and Loss Account                                                                             | 2 Crore  |
| Aggregate of paid up capital and free reserve                                                                         | 22 Crore |
| Less: Existing borrowing (long term)                                                                                  | 8 Crore  |
| Amount upto which the Board of Directors can further borrow without the approval of shareholders in a general meeting | 14 Crore |

- In the present case, the directors decide to borrow an additional sum of Rs.10 Crore for the expansion.

**Conclusion:** Borrowing up to 14 Crore is within the powers of Board. Borrowing in excess of 14 Crore will require a special resolution.

**(ii) Contribution to Political Parties:**

- As per Sec. 182 of Companies Act, 2013, a government company or any other company which has been in existence for less than 3 financial years cannot contribute any amount directly or indirectly to any political party.
- In other cases, contribution in any financial year can be made if a resolution authorising the making of such contribution is passed at a Board Meeting and such resolution shall, subject to the other provisions of this section, be deemed to be justification in law for the making of the contribution authorised by it.

**Conclusion:** Considering the provisions of Sec. 182 as stated above, decision to make donation of 10 Lacs to political parties is valid subject to compliance of other conditions.

### 34. Question

State the legal positions as to the valid appointment of the directors in the given situations in the light of the Companies Act, 2013-

- Shiksham Ltd. was formed for prompting the girls education with 15 directors in its Board. Due to expansion of its objective at large scale, the company increased the strength of its directors to 20 without passing SR.
- Mr. Kabir was appointed as an alternate director on behalf of Mr. Robert, as Mr. Robert goes abroad and comes back to India temporarily and leaves country again.
- PQR Ltd., who failed to file a financial statement in previous financial year 2017- 2018, appointed Mr. Khurana as a director in July 2018.

**Answer**

(i) As per section 149(1) of the Companies Act, 2013, every public company must have at least three directors. A private limited company should have minimum two directors. A one person company (OPC) will have minimum one director. Maximum directors can be 15. Maximum number of directors can be increased beyond 15 by passing a special resolution.

However, MCA vide Notification dated 5-6-2015 issued under section 462 of Companies Act, 2013, the upper limit of 15 directors is not applicable to section 8 (licensed i.e. non-profit) companies.

Therefore, increase in the strength of directors to 20 in the Shiksham Ltd. without passing SR is valid.

(ii) As per section 161(2) of the Companies Act, 2013, the alternate director will vacate his office as soon as the foreign director comes to India. Thus, return of Original director (Mr. Robert) to India would serve. However, if Mr. Robert goes abroad and comes back to India temporarily and leaves country again, thus, becoming unable to transact business, alternate director (Mr. Kabir) would continue for such temporary period.

(iii) As per section 164(2) of Companies Act, 2013, PQR Ltd. is a defaulted company as it failed to file financial statement in the financial year 2017-2018. If a company is a defaulting company, any person appointed as director immediately, as per the amendment w.e.f. 7.5.2018, will not be disqualified for first six months after joining i.e., from date of his appointment. Hence the appointment of Mr. Khurana as a director is valid upto January 2019.

### 35. Question

One of the Objects Clauses of the Memorandum of Association of Info Company Limited conferred upon the company power to sell its undertaking to another company with identical objects. Company's Articles also conferred upon the directors whereby power was conferred upon them to sell or otherwise deal with the property of the company.

At an Extraordinary General Meeting of the company, members passed an ordinary resolution for the sale of its assets on certain terms and authorized the directors to carry out the sale.

Directors refused to comply with the wishes of the members where upon it was contended on behalf of the members that they were the principals and directors being their agents, were bound to give effect to their (members') decisions.

Examining the provisions of the Companies Act, 2013, answer the following:

Whether the contention of members against the non-compliance of members' decision by the directors is tenable?



Whether it is possible for the members usurp the powers which by the Articles are vested in the directors by passing a resolution in the general meeting?

**Answer**

**Powers of Board:** In accordance with the provisions of the Companies Act, 2013, as contained under Section 179(1), the Board of Directors of a company shall be entitled to exercise all such powers and to do all such acts and things, as the company is authorized to exercise and do:

Provided that in exercising such power or doing such act or thing, the Board shall be subject to the provisions contained in that behalf in this Act, or in the memorandum or articles, or in any regulations not inconsistent therewith and duly made there under including regulations made by the company in general meeting.

Provided further that the Board shall not exercise any power or do any act or thing which is directed or required, whether under this Act or by the members or articles of the company or otherwise to be exercised or done by the company in general meeting.

Section 180(1) of the Companies Act, 2013, provides that the powers of the Board of Directors of a company which can be exercised only with the consent of the company by passing of a special resolution. Clause (a) of Section 180(1) defines one such power as the power to sell, lease or otherwise dispose of the whole or substantially the whole of the undertaking of the company or where the company owns more than one undertaking of the whole or substantially the whole or any of such undertakings.

Therefore, the sale of the undertaking of a company can be made by the Board of Directors only with the consent of members of the company accorded vide a special resolution.

Even if the power is given to the Board by the memorandum and articles of the company, the sale of the undertaking must be approved by the shareholders in general meeting by passing a special resolution. Therefore, the correct procedure to be followed is for the Board to approve the sale of the undertaking clearly specifying the terms of such sale and then convene a general meeting of members to have the proposal approved by a special resolution.

In the given case, the procedure followed is completely incorrect and violative of the provisions of the Act. The shareholders cannot on their own make out a proposal of sale and pass an ordinary resolution to implement it through the directors.

The contention of the shareholders is incorrect in the first place as it is not within their authority to approve a proposal independently of the Board of Directors. It is for the Board to approve a proposal of sale of the

undertaking and then get the members to approve it by a special resolution. Accordingly the contention of the members that they were the principals and directors being their agents were bound to give effect to the decisions of the members, is not correct.

Further, in exercising their powers the directors do not act as agent for the majority of members or even all the members. The members therefore, cannot by resolution passed by a majority or even unanimously supersede the powers of directors or instruct them how they shall exercise their powers. The shareholders have, however, the power to alter the Articles of Association of the company in the manner they like subject to the provisions of the Companies Act, 2013.

### 36. Question

Dharma Ltd. in the light of prospective developments in the infrastructure of company decided to have borrowing on long term basis from financial Institutions. In the Board Meeting held on 15th September, 2020, following proposal of borrowing 2,00,00,000 from Financial institutions on long-term basis was also presented for consideration. As per the given information, in the light of relevant provisions of the Companies Act, 2013, examine the eligibility of the amount up to which the Board can borrow from Financial institution and the state on the validity of the said proposal.

Following were the Balance Sheets of last three years of Dharma Ltd., containing following facts and figure of financial information :

| Particulars                                                                                                                                          | ₹           |
|------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| Paid up Capital                                                                                                                                      | 85,00,000   |
| General Reserve (being free reserve)                                                                                                                 | 60,00,000   |
| Credit Balance in Profit & Loss Account (to be treated as free reserve)                                                                              | 20,00,000   |
| Securities Premium                                                                                                                                   | 3,00,000    |
| Aggregate of paid-up capital, free reserves and securities premium                                                                                   | 1,68,00,000 |
| Total borrowing power of the Board of Directors of the company, i.e., 100% of the aggregate of paid-up capital, free reserves and securities premium | 1,68,00,000 |
| Less: Amount already borrowed as secured loans                                                                                                       | 40,00,000   |
| Amount up to which the Board of Directors can further borrow                                                                                         | 1,28,00,000 |

| Particulars | As at 31.03.2018 Rs. | As at 31.03.2019 Rs. | As at 31.03.2020 Rs. |
|-------------|----------------------|----------------------|----------------------|
|             |                      |                      |                      |

|                                                    |                  |                  |                  |
|----------------------------------------------------|------------------|------------------|------------------|
| <b>Paid up capital</b>                             | <b>60,00,000</b> | <b>60,00,000</b> | <b>85,00,000</b> |
| <b>General Reserve</b>                             | <b>50,00,000</b> | <b>52,50,000</b> | <b>60,00,000</b> |
| <b>Credit Balance in Profit &amp; Loss Account</b> | <b>6,00,000</b>  | <b>8,50,000</b>  | <b>20,00,000</b> |
| <b>Securities Premium</b>                          | <b>3,00,000</b>  | <b>3,00,000</b>  | <b>3,00,000</b>  |
| <b>Secured Loans</b>                               | <b>20,00,000</b> | <b>25,00,000</b> | <b>40,00,000</b> |

**Answer**

**Borrowing from Financial Institutions:** As per Section 180(1)(c) of the Companies Act, 2013, the Board of Directors of a company, without obtaining the approval of shareholders in a general meeting, can borrow money including moneys already borrowed up to an amount which does not exceed the aggregate of paid up capital of the company, free reserves and securities premium.

Such borrowing shall not include temporary loans obtained from the company's bankers in the ordinary course of business. Here, free reserves do not include the reserves set apart for specific purpose.

Since the decision to borrow is taken in a meeting held on 15th September, 2020, the figures relevant for this purpose are the figures as per the Balance Sheet as at 31.03.2020. According to the above provisions, the eligibility of Board of Directors of Dharma Ltd. to borrow up to an amount is calculated as follows: Dharma Ltd. is entitled to borrow Rs.1,28,00,000 through board of directors. As in the given case proposal of borrowing was Rs, 2,00, 00, 000 which is more than eligibility to borrow, therefore, Dharma Ltd, have to seek approval of shareholders in general meeting. As the proposal of borrowing Rs. 2,00,00,000 from Financial institutions on long-term basis was presented for consideration in Board Meeting without approval of shareholders in general meeting, therefore said proposal is invalid.

**37. Question**

Queen Construction Company Ltd. acquired 60 % of the equity paid up share capital of ABC Ltd. Queen Construction Ltd. has planned to expand its operation for which additional fund is required. The Board of Directors decided to avail additional exposure of Rs. 10 crore from the Bank. The following data is furnished as on 30th June, 2017.

|                                                                                              | Rs. In crores |
|----------------------------------------------------------------------------------------------|---------------|
| Authorised Equity Share Capital                                                              | 25            |
| Issued and Subscribed Equity Share Capital                                                   | 22            |
| Paid up Equity Share Capital                                                                 | 20            |
| Capital Reserve                                                                              | 2             |
| Revaluation Reserve                                                                          | 1             |
| General Reserve                                                                              | 3             |
| Open cash credit Limit (for working Capital requirement) with the Bank repayable in 3 months | 5             |
| Loan obtained under the Hire Purchase agreement for acquiring vehicles.                      | 1             |
| Long term Borrowing from Banks and other parties                                             | 15            |

ABC Ltd. approached Queen Construction Ltd. to grant a loan of Rs. 25 Lakhs and stand as guarantor for repayment of loan Rs. 10 Lakhs to be sanctioned by a Bank.

The two loans (25 Lakhs plus 10 Lakhs) will be utilized by ABC Ltd. for its principal business activities.

You being the Financial Advisor of the company, advise the Board of Directors about the procedure to be followed to avail additional exposure of Rs. 10 Crore from the Bank. Also evaluate whether the loan guarantee given by Queen construction Ltd. to ABC Ltd. is valid according to Section 185 of the Companies Act, 2013.

**Answer:**

**Borrowing by the Company (Section 180 of the Companies Act, 2013)** As per Section 180(1)(c) of the Companies Act, 2013, the Board of Directors of a Company, without obtaining the approval of shareholders in a general meeting through a special resolution, can borrow the funds including funds already borrowed upto an amount which does not exceed the aggregate of paid up capital of the company and its free reserves and Securities premium .

Such borrowing shall not include temporary loans obtained from the company's bankers in the ordinary course of business.

Here Free reserves shall not include the reserves set apart for specific purpose.

According to the above provisions, the Board of Directors of Queen Construction Ltd. can borrow, without obtaining approval of the shareholders in a general meeting, upto an amount calculated as follows:

| Particulars                                                                                                                                 | Rs. In Crores |
|---------------------------------------------------------------------------------------------------------------------------------------------|---------------|
| Paid up Equity Share Capital <b>(A)</b>                                                                                                     | 20            |
| General Reserve (being free reserve) <b>(B)</b>                                                                                             | 3             |
| Capital Reserve (Not a free reserve)                                                                                                        | -             |
| Revaluation Reserve (Not a free reserve)                                                                                                    | -             |
| Aggregate of paid up capital and free reserve <b>(A)+(B)</b>                                                                                | 23            |
| Total borrowing power of the Board of Directors of the company, i.e., 100% of the aggregate of paid up capital and free reserves <b>(C)</b> | 23            |
| Less: Amount already borrowed as Long term loan <b>(D)</b>                                                                                  | 16            |
| Amount upto which the Board of Directors can further borrow without the approval of shareholders in a general meeting. <b>(C) – (D)</b>     | 7             |

In the present case, the Directors of Queen Construction Limited by a resolution passed at its meeting decide to borrow an additional sum of Rs. 10 Crores from the bank. Hence, the borrowing will be beyond the powers of the Board of directors.

Thus, the Management of Queen Construction Limited., should take steps to convene the general meeting and pass a special resolution by the members in the meeting as stated in Section 180(1)(c) of the Companies Act, 2013. Then, the borrowing will be valid and binding on the company and its members. According to Section 185 of the Companies Act, 2013, no Company shall, directly or indirectly, advance any loan, including any loan represented by a book debt, to any of its directors or to any other person in whom the director is interested or give any guarantee or provide any security in connection with any loan taken by him or such other person.

However, the above sub-section shall not apply to any guarantee given or security provided by a holding company in respect of loan made by any bank or financial institution to its subsidiary Company. [Section 185(1)(c)]. It is also provided that the loans made under this clause are utilized by the subsidiary company for its principal business activities.

In the instant case, Queen Construction Ltd. acquired 60% of the equity paid up share capital of ABC Ltd. Hence, ABC Ltd. is a subsidiary company of Queen Construction Ltd. [as per Section 2(87)]

Hence, as per Section 185(1)(c), granting of loan of Rs. 25 Lakhs by Queen Construction Ltd to ABC Ltd is not valid but providing of guarantee for repayment of loan of Rs. 10 lakhs to be sanctioned by bank is valid.

### 38. Question

Srajan Ltd., a company incorporated in July 2015. The Board of Directors of Srajan Ltd., proposed to donate Rs. 2,00,000 to a school established exclusively for the benefit of the employees of the company. Besides, also proposed to donate Rs.1 lac to a political party during the financial year ending March 31, 2018. The net profit during the financial year 2017 -2018, was Rs.35,00,000.

Evaluate the given below situations in the light of the stated facts under the relevant provisions of the Companies Act, 2013-

- Whether the proposed political donation made by the Srajan Ltd., are within the powers of the Board of Directors of the company
- Whether the contribution by Srajan Ltd. to school established for the benefit of an employee is charitable contribution.

### Answer:

**Political Contribution:** As per section 182, a company, other than a Government company and a company which has been in existence for less than three financial years, may contribute any amount directly or indirectly to any political party:

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

Every company shall disclose in its profit and loss account the total amount contributed by it under this section during the financial year to which the account relates.

In the given case BoD of Srajan Ltd. proposed political contribution of 1 Lac for the financial year 20172018. As per the above provision, any amount can be contributed by Srajan Ltd. through the resolution passed at a

meeting of the Board of Directors authorising the making of such contribution. Such resolution shall, subject to the other provisions of this section, be deemed to be justification in law for the making of the contribution authorised by it. So, the political contribution proposed is well within the powers of the Board. Such a proposal shall be passed at a meeting through the resolution authorising such contribution and full disclosure of the name of political party and amount contributed shall be made in the profit and loss account.

**(ii) Charitable Contribution:** As per the facts, the Board of Directors of Srajan Ltd., proposed to donate Rs. 2,00,000 to a school established exclusively for the benefit of the employees of the company. As per section 181 of the Companies Act, 2013, the Board of Directors of a company may contribute to bona fide charitable and other funds. A contribution by a company is said to be charitable contribution if it is made without any object of availing any benefit for the company or for its employees and such contribution does not have any direct relation with the business of the company.

Since, here the contribution proposed is for the school which is exclusively for the benefit of the employees' children. Therefore, it cannot be considered as charitable within the meaning of section 181.

### 39. Question

The Articles of Association of M/s. DEF Limited (Non-Government Company) restricts the Company to contribute to National Defence Fund in any financial year for a sum not exceeding Rs. 5 lakhs. The Articles is silent about contribution to bonafide Charitable Fund and to a Political Party. The Company earned net profit during the last five financial years as under:

| Financial Year | Net Profit (Rs. in Lakhs) |
|----------------|---------------------------|
| 2018-19        | 45                        |
| 2017-18        | 25                        |
| 2016-17        | 20                        |
| 2015-16        | 15                        |
| 2014-15        | 10                        |

The Board of Directors proposes to contribute in July 2019 for the first time during the financial year 2019-20:

- (i) Rs. 7 Lakhs to National Defence Fund
- (ii) Rs. 3 Lakhs to a bonafide Charitable Fund
- (iii) Rs. 5 Lakh to a Political Party

The Company Seeks your advice on the following matters in respect of each of the above proposals under the provisions of the Companies Act, 2013.

- (i) The appropriate approving authority;
- (ii) The quantum of contribution that can be made;
- (iii) The mode of payment of such contribution

#### Answer

##### (i) Appropriate approving authority

- (a) **In case of National Defence Fund:** As per section 183(1), the Board of Directors of any company or any person or authority exercising the powers of the Board of Directors of a company, or of the company in general meeting, may, contribute such amount as it thinks fit to the National Defence Fund or any other Fund approved by the Central Government for the purpose of national defence.
- (b) **In case of Bonafide Charitable Fund:** As per section 181(1), the Board of Directors of a company may contribute to bona fide charitable and other funds. However, prior permission of the company in general meeting shall be required for such contribution in case any amount the aggregate of which, in any financial year, exceed five per cent of its average net profits for the three immediately preceding financial years.
- (c) **In case of Political Party:** As per section 182(1), a company may contribute any amount directly or indirectly to any political party. However, no such contribution shall be made by a company unless a resolution authorising the making of such contribution is passed at a meeting of the Board of Directors and such resolution shall, subject to the other provisions of this section, be deemed to be justification in law for the making of the contribution authorised by it.

##### Quantum of contribution

- **In case of National Defence Fund: As per section 183,** the Board of Directors of any company or any person or authority exercising the powers of the Board of Directors of a company, or of the company in general meeting, may, notwithstanding anything contained in sections 180, 181 and 182 or any other provision of this Act or in the memorandum, articles or any other instrument relating to the company, contribute such amount as it thinks fit to the National Defence Fund or any other Fund approved by the Central Government for the purpose of national defence.



Hence, the company can contribute Rs. 7 Lakhs to National Defence Fund inspite of restriction by the company to contribute in any financial year for a sum not exceeding Rs. 5 lakhs as the Section 183 prevails over Articles of the company and there is no limit on such contribution.

- **Bonafide Charitable Fund:** According to section 181, the Board of Directors of a company may contribute to bona fide charitable and other funds. However, prior permission of the company in general meeting shall be required for such contribution in case any amount the aggregate of which, in any financial year, exceed five per cent of its average net profits for the three immediately preceding financial years.

Average Net profit: Rs.30 Lakhs  $[(45+25+20)/3]$  5% of average net profit: Rs.1.5 Lakhs

Since, the amount of contribution exceeds five per cent of its average net profits for the three immediately preceding financial years, hence it requires prior permission of the company in general meeting for contributing Rs. 3 Lakhs to a bonafide Charitable Fund.

- **Political party:** Section 182 specifies that a company other than a Government company and a company which has been in existence for less than three financial years, may contribute any amount directly or indirectly to any political party.

Hence, the company can contribute Rs.5 Lakhs to a political party. **Mode of payment of such contribution:**

- **National Defence fund:** No mode of payment is provided under section 183.
- **Bonafide Charitable Fund:** No mode of payment is provided under section 181.
- **Political Party:** According to Section 182(3A), notwithstanding anything contained in sub- section (1), the contribution under this section shall not be made except by an account payee cheque drawn on a bank or an account payee bank draft or use of electronic clearing system through a bank account. However, a company may make contribution through any instrument, issued pursuant to any scheme notified under any law for the time being in force, for contribution to the political parties.

#### 40. Question

The Board of Directors of Stepping Stones Publications Ltd. resolved to borrow a sum of 15 crores from a nationalized bank at a Board meeting held on 15.1.2019. One of the directors, who opposed the said borrowing as not in the interest of the company has raised an issue that the said borrowing is outside the borrowing powers of the Board. The Company seeks your advice and the following data is given for your information:

- (i) Share Capital Rs. 5 crores
- (ii) Reserves and Surplus Rs. 5 crores
- (iii) Secured Loans Rs. 15 crores

Unsecured Loans Rs. 5 crores Advise the management of the company

**Answer**

According to the provisions of Section 180(1)(c) of the Companies Act, 2013, the powers of the Board are not uncontrolled and there are restrictions on the borrowing powers to be exercised by the Board of Directors.

According to the said section, the borrowings should not exceed the aggregate of the paid-up share capital, free reserves and securities premium.

While calculating the limit, the temporary loans obtained by the company from its bankers in the ordinary course of business will be excluded. However, from the figures available in the present case, the proposed borrowing of Rs. 15 crore will exceed the limit calculated as per the given information. Thus, the proposed borrowings are beyond the powers of the Board of directors.

In view of the above position, the management of Stepping Stone Publications Ltd., should take steps to pass a special resolution authorising to borrow the proposed amount of Rs. 15.00 crores, so that the requirement of Section 180(1)(c) is satisfied.

Only thereafter, the proposed borrowing can be availed of.

**41. Question**

The Board of Directors of Very Well Ltd., is contributing every year to a charitable organization a sum of Rs. 60,000. In a particular year, the company suffered losses and the directors are contemplating to contribute the said amount in spite of the losses. In this connection, state whether the directors can do so?

**Answer**

Under section 181 of the Companies Act, 2013, the Board of Directors of a company is authorized to contribute to bona fide charitable and other funds. However, in case the aggregate amount of such contribution in any financial year exceeds five per cent. of its average net profits for the three immediately preceding financial years, prior permission of the company in general meeting shall be required.

The section does not make it mandatory for the company to have a profit for making a charitable contribution in any financial year. As the amount of donation is restricted to the average of immediately previous 3 years' profits,

it is possible for a company suffering a loss to make contribution provided it is made to a bona fide charitable fund and the average of the three immediately preceding financial years' profits (including current losses) is positive.

In the present case, even though the company has incurred a loss it can contribute to the charitable fund only if it is a bona fide charitable fund and the amount is up to 5% of the average of the immediately preceding three years' profits (including current losses).

In case the contribution exceeds the limit, the prior approval of the members must be taken at a general meeting of the company.

#### 42. Question

The Board of Directors of LM Ltd., incorporated in April, 2017, proposes to donate Rs. 50,000 to a political party for the F.Y. 2019-20. The average net profits determined in accordance with the provisions of the Companies Act, 2013 during the two immediately preceding financial years are Rs. 20,00,000. Advise, whether the proposed donation is within the powers of Board of Directors of the company?

#### Answer:

As per section 182(1) of the Companies Act, 2013 any company may contribute any amount directly or indirectly to any political party except a government company and a company which has been in existence for less than three financial years.

In the given case, LM Ltd. happens to be a company which has been in existence for less than three financial years. Hence, it is not permitted to donate any amount to the concerned political party for the F.Y. 2019-20.

#### 43. Question

Sea Hawk Cycles Limited is a company incorporated four years ago. It has earned profits amounting to Rs. 5 lakhs, Rs. 8 lakhs and Rs. 11 lakhs respectively during the last three financial years. The Board of Directors of the company proposes to donate a sum of Rs. 50,000 to a political party. Whether the proposed donation is within the powers of Board of Directors of the company.

#### Answer

According to section 182(1) of the Companies Act, 2013, a company except a Government Company and a company which has been in existence for not less than three financial years, can make political contributions,

directly or indirectly, to any political party. Further, the contribution shall be made by a company only after passing a resolution at a meeting of the Board of Directors authorizing such contribution.

In view of the above provisions, Sea Hawk Cycles Limited can contribute the said amount of Rs. 50,000 to the concerned political party. However, it needs to pass a board resolution authorising making of such contribution at a meeting of the Board of Directors

#### 44. Question

An Audit Committee of a listed company constituted under Section 177 of the Companies Act, 2013, submitted its report containing the recommendations in respect of certain matters to the Board. The Board, however, did not accept the recommendations. In the light of the situation, analyze whether:

- (a) The Board is empowered not to accept the recommendations of the Audit Committee.
- (b) If so, what alternative course of action, would the Board resort to?

#### Answer:

(a) According to Section 177(8) of the Companies Act, 2013, the Board's Report shall, under the provisions of Section 134 (3) which is laid before the general meeting where the financial statements of the company are placed before the members, disclose the composition of the Audit Committee and where the Board has not accepted any recommendations of the Audit Committee, the same shall also be disclosed along with the reasons therefor.

Hence, the Board is empowered not to accept the recommendations of the Audit Committee but only under genuine circumstances and supported by legitimate reasons for non-acceptance.

(b) If the Board does not accept the recommendations of the Audit Committee, it shall disclose the same in its report under section 134 (3) which is placed before the general meeting of the company



## 16. MEETINGS OF BOARD AND ITS COMMITTEES

### 1. Question

Articles of Reality Ltd. provides that directors participating through audio-visual means in its Board meetings shall always be counted for quorum. Examine the validity of this provision with reference to the Companies Act, 2013.

### Answer

According to section 173 of Companies Act, 2013 read with Rule 3 and 4 of Companies (Meetings of Board and its powers) Rules, 2014, a director participating in a meeting through video conferencing or other audio visual means shall be counted for the purpose of quorum, unless he is to be excluded for any items of business under Rule 4.

According to Rule 4 the following matters shall not be dealt with in any meeting held through video conferencing or other audio visual means.

- (i) the approval of the Annual Financial Statements;
  - (ii) the approval of the Board's report;
  - (iii) the approval of the prospectus;
  - (iv) the Audit Committee Meetings for consideration of financial statement including consolidated financial statement, if any, to be approved by the Board under sub section (1) of section 134 of Companies Act, 2013; and
  - (v) the approval of the matter relating to amalgamation, merger, demerger, acquisition and takeover.
- Provided that in case where there is quorum in a meeting through physical presence of directors, any other director may participate through video conferencing or other audio visual means.

### 2. Question

A Board meeting of a listed public company was called at shorter notice to transact an urgent business. None of the Independent directors could attend the meeting. Examine the validity of resolution(s) passed at the meeting referring to the provisions of the Companies Act, 2013.

### Answer

According to section 173(3) of the Companies Act, 2013 a meeting of the Board may be called at shorter notice to transact urgent business subject to the condition that at least one independent director, if any, shall be present at the meeting. In case of absence of independent directors from such a meeting of the Board, decisions taken at such a meeting shall be circulated to all the directors and shall be final only on ratification thereof by at least one independent director, if any.

Accordingly all decisions taken at the meeting needs to be circulated to all the directors and shall be final only on ratification of atleast one independent director.

### 3. Question

Director, Ravi, was appointed on 1st July, 2018. On 2nd July, 2018 he wrote to Managing Director of the company to inspect the minutes of the board meeting held on 1st August, 2017. The Managing Director refused as he was not a director at that time. Ravi attended a meeting held on 1st September, 2018 and resigned on 3rd October, 2018. On 4th October, 2018 he wrote to the Managing Director to send him a copy of the signed minutes of the meeting held on 1st September, 2018. Again, the Managing Director refused. Are the actions of Managing Director valid under Companies Act, 2013/Secretarial Standards ? Comment.

### Answer

According para 7.7.1. of Secretarial Standard on Board Meeting a Director is entitled to inspect the Minutes of a Meeting held before the period of his Directorship. Further para 7.7.2 provides that a Director is entitled to receive a copy of the signed Minutes of a Meeting held during the period of his Directorship, even if he ceases to be a Director.

Hence the actions of managing director are not valid. Claim of Mr. Ravi for inspecting the Minutes of a Meeting held before the period of his Directorship and for receiving a copy of the signed Minutes of a Meeting held during the period of his Directorship is valid.

### 4. Question

Prepare an Agenda items for a Board Meeting with a minimum of any eight items to be discussed.

### Answer

Agenda Items for meeting of the Board of Director of the Company Scheduled to be held on (day), (Date) at (Venue ) at (Time) (meeting No.) 2019-20 (Any 8 items

| Item | Particulars                       |
|------|-----------------------------------|
| 1    | To grant leave of absence, if any |

- 2 Appointment of Chairman of the Meeting
- 3 To confirm minutes of last Board/ Committee Meeting held in financial year 2018-19.
- 4 To take note of Disclosure of Interest by Directors pursuant to Section 184 (1).
- 5 To take note of Declaration given by Independent Director to meet the criteria of Independence under section 149(7) of Companies Act, 2013
- 6 To consider and approve CSR policy (Name of the Policy)
- 7 To consider and approve appointment of the Company Secretary
- 8 To take note of Statement containing investor complaint under regulation 13(3) of SEBI ( LODR) Regulations, 2015.
- 9 Noting of Compliance Report on corporate governance under regulation 27(2) of SEBI ( LODR) Regulations, 2015.
- 10 Appointment Secretarial Auditor of the Company for the financial year 2019- 20.
- 11 Appointment Internal Auditor of the Company for the financial year 2019-20.
- 12 To approve & consider Audited Financial Statements for the year ended 2018-19.
- 13 To take note of Statutory Auditors Report on the Financial Statements of the Company for the year ended 2018-19.
- 14 To take note any other item(s).

### 5. Question

Jolly Retails Ltd. issued a notice for the meeting of its Board of directors scheduled for on 5th June 2019 at its corporate office. One of the directors intimated that he would be participating in the meeting through video conferencing. The Secretary contended that the meeting cannot be participated through video conferencing and that the concerned director cannot insist that the company should provide video conferencing facilities for attending the board meeting. Is the contention of the Secretary tenable as per the provisions of the Companies Act, 2013 ? Discuss with relevant case laws, if any.

### Answer

Section 173(2) of the Companies Act, 2013 states the participation of directors in a meeting of the Board may be either in person or through video conferencing or other audio visual means, as may be prescribed, which are



capable of recording and recognizing the participation of the directors and of recording and storing the proceedings of such meetings along with date and time.

The second proviso of section sub section 2 of section 173 states that where there is quorum in a meeting through physical presence of directors, any other director may participate through video conferencing or other audio visual means in such meeting on any matter specified under the first proviso. (Inserted by the

Companies (Amendment) Act, 2017, w.e.f 7-5-2018)

Rule 4 of the Companies (Meeting of Board and its Powers) Rules, 2014, which states the matter not to be dealt with in a meeting through video conferencing or other audio visual means has been amended by the Companies (Amendment) Act, 2017, by the inclusion of the proviso that where there is a quorum in a meeting through physical presence of directors, any other director may participate through video conferencing or other audio visual means (inserted w.e.f. 7-5-2018). One of the matters specified in this rule is the approval of the prospectus.

In this case of Achintya Kumar Barua vs. Ranjit Barthkur ([2018] 91 taxmann.com 123 (NCL-AT)) the NCLAT has held that, even one of the director so desires, a company is bound to provide facilities to directors to participate in board meetings by video conferencing.

With the above amendment and the Tribunal decision, Jolly Retail Ltd. is bound to provide the necessary video conferencing facilities to the director.

#### 6. Question

Referring to the provision of Companies Act, 2013 advise the directors of a company in the following matters :

- (i) The company wishes to obtain approval of the financial statement in a meeting held through video conferencing.
- (ii) Due to urgency, the company wants to get its prospectus approved in a meeting held through video conferencing.

#### Answer

Rule 4 of the Companies (Meetings of Board and its Powers) Rules, 2014 provides that the following matters, which shall not be dealt with in any meeting held through video conferencing or other audio visual means:

- (i) the approval of the annual financial statements;
- (ii) the approval of the Board's report;

- (iii) the approval of the prospectus;
- (iv) the Audit Committee Meetings for consideration of financial statement including consolidated financial statement, if any, to be approved by the Board under sub-section (1) of Section 134 of the Act; and (v) the approval of the matter relating to amalgamation, merger, demerger, acquisition and takeover.

Accordingly, the company cannot obtain approval of the financial statements from directors in a meeting held through video conferencing (ii) the company cannot get its prospectus approved in a meeting held through video conferencing.

### 7. Question

JKJ Ltd. has 10 directors on its Board. A Board meeting was convened on 19- 10-2019 in which two of the directors participated in-person and one director through video conferencing. Two directors were interested in the agenda and hence, did not participate in the meeting. The auditor claimed that the quorum was not present for the meeting to be valid. Do you agree with the auditor ? Justify your answer in reference to provisions of the Companies Act, 2013.

### Answer

As per Section 174 of Companies Act, 2013 the quorum for Board Meeting Requirement is as under:

- Quorum for Board Meeting is 1/3rd of its Total strength or two directors, whichever is higher
- A Director participating through video conferencing/audio visual modes will also be counted for quorum
- Any fraction of a member will be rounded off as one
- “Total strength” shall not include directors whose places are vacant In JKJ Board meeting held on 19.10.19, the quorum is:
  - Total Strength =  $10 \times \frac{1}{3}$  is = 3.33 So, it is rounded off to 4 Directors. Hence, Directors required for Quorum is 4 Directors.

Since two directors attended in person and one director through video conferencing there was an absence of quorum. The claim of the Auditor is correct.

### 8. Question

In a Board of Directors meeting of a private company held on 15th November, 2019 all the directors present, unanimously decided that the next meeting of the Board of Directors would be held on 29th November, 2019

at the registered office of the company. As a Company Secretary do you think a notice of the meeting of the Board of Directors need be sent to ensure legal compliance?

**Answer**

According to Section 173(3) of the Companies Act, 2013, a meeting of the Board shall be called by giving not less than seven days' notice in writing to every director at his address registered with the company and such notice shall be sent by hand delivery or by post or by electronic means.

As per Secretarial Standard-1, the Notice of the meeting of the Board shall be given even if meetings are held on pre-determined dates or at pre-determined intervals. Therefore, in the instant case even if the directors have agreed unanimously to hold the meeting on November 29, 2019, then also the Company Secretary need to send the Notice, Agenda and the Notes thereon separately for each Meeting in the aforesaid manner to ensure legal compliance.

**9. Question**

The Chairman of the Board of Directors of Jagruti Printers Ltd. has sent a draft of Resolution along with necessary papers to all the ten directors of the company to get it passed through a resolution by circulation. The last date for signifying the assent or dissent is 20th November, 2019. On 15th November, 2019, six directors communicated their assent while on 17th November, 2019 the remaining 4 directors requested that the resolution must be decided at a meeting. Referring to the relevant provisions of the Companies Act, 2013, decide whether the resolution can be deemed to have been passed or requires to be decided at a Board of Directors meeting?

**Answer**

Section 175 of the Companies Act 2013 provides that, no resolution shall be deemed to have been duly passed by the Board of Directors by circulation, unless the resolution has been circulated in draft, together with the necessary papers, if any, to all the directors at their addresses registered with the company in India, by hand delivery or by post or by courier, or through electronic means which may include e-mail or fax and has been approved by a majority of the directors, who are entitled to vote on the resolution.

However, where not less than one-third of the total number of directors of the company for the time being require that any resolution under circulation must be decided at a meeting, the Chairman shall put the resolution to be decided at a meeting of the Board.

In the given case, majority directors had communicated their assent but subsequently before the due date more than one-third directors have requested that the resolution must be decided at a board meeting. Hence, the resolution sought to be passed by circulation will be required to be passed only at a Board meeting.

### 10. Question

The Board of Directors of Passion Ltd. has passed board resolutions for the following items. Examine the validity of resolution as a secretarial auditor of the company :

- (a) To invest the funds of the company for `15 Lakh in ABC Mutual funds;
- (b) To remit, or give time for the repayment of, any debt due from a director;
- (c) To invest otherwise in trust securities the amount of compensation received by it as a result of any merger or amalgamation;
- (d) To take over a company or acquire a controlling or substantial stake in another company;

### Answer

- (a) As per Section 179(3)(e) of the Companies Act, 2013, the Board of Directors of a company shall exercise the powers to invest the funds of the company of Rs. 15 Lakhs in ABC Mutual funds by means of resolutions passed at meetings of the Board;
- (b) As per Section 180(1)(d) of the Companies Act, 2013, the Board of Directors of a company shall exercise the power to remit, or give time for the repayment of, any debt due from a director only with the consent of the company by a special resolution;
- (c) As per Section 180(1)(b) of the Companies Act, 2013, the Board of Directors of a company shall exercise the power to invest otherwise in trust securities, the amount of compensation received by it as a result of any merger or amalgamation with the consent of the company by a special resolution;
- (d) As per Section 179(3)(j) of the Companies Act, 2013, the Board of Directors of a company shall exercise the powers to take over a company or acquire a controlling or substantial stake in another company by means of resolutions passed at meetings of the Board.

**11. Question**

R is a newly qualified CS and seeks your advice on passing of Resolution by Circulation. Advise him suitably as to the procedure to be followed in this regard.

**Answer**

A company may pass the resolutions through circulation. As per Section 175 of the Companies Act, 2013, no resolution shall be deemed to have been duly passed by the Board or by a committee thereof by circulation, unless the resolution has been circulated in draft form together with the necessary papers to all the directors or members of committee at their addresses registered with the company in India by hand delivery or by post or by courier or through electronic means which may include E-mail or fax.

The said resolution must be approved by majority of directors or members who are entitled to vote. However, where not less than one-third of the total number of Directors of the company for the time being require that any resolution under circulation must be decided at a meeting, the chairperson shall put the resolution to be decided at a meeting of the Board. The resolution passed through circulation be noted at a subsequent meeting of the Board or the committee and made part of the minutes of such meeting.

As per Secretarial Standard – 1, the decision of the Directors shall be sought for each Resolution separately. Not more than seven days from the date of circulation of the draft of the Resolution shall be given to the Directors to respond and the last date shall be computed accordingly. An additional two days shall be added for the service of the draft Resolution, in case the same has been sent by the company by speed post or by registered post or by courier. Passing of Resolution by circulation shall be considered valid as if it had been passed at a duly convened meeting of the Board. This shall not dispense with the requirement for the Board to meet at the specified frequency.

The Resolution is passed when it is approved by a majority of the Directors entitled to vote on the Resolution, unless not less than one-third of the total number of Directors for the time being require the Resolution under circulation to be decided at a Meeting.

The Resolution, if passed, shall be deemed to have been passed on the earlier of:

- (a) the last date specified for signifying assent or dissent by the Directors, or
- (b) the date on which assent has been received from the required majority, provided that on that date the number of Directors, who have not yet responded on the resolution under circulation, along with the Directors who have expressed their desire that the resolution under circulation be decided at a Meeting of

the Board, shall not be one third or more of the total number of Directors; and shall be effective from that date, if no other effective date is specified in such Resolution.

### 12. Question

X is a company secretary of XYZ Ltd. He is of the opinion that the notice, agenda and notes on agenda of the board meeting should be send only to the alternate director and not to the original director of the company. Advice in this matter.

### Answer

As per Section 173, the notice of Board meeting is to be sent in writing to every director at his address registered with the company.

SS-1 provides that the Notice, Agenda and Notes on Agenda shall be sent to the Original Director also at the address registered with the company, even if these have been sent to the Alternate Director. However, the mode of sending Notice, Agenda and Notes on Agenda to the original director shall be decided by the company.

Hence it is advisable to send the Notice, Agenda and Notes on Agenda both to original and alternate director of the company.

### 13. Question

Rajdeep, a director of the company, intimated his willingness to participate in the Board meeting scheduled to be held in August, 2021 through video conferencing. He declared his intention for participation in the scheduled Board meeting through video conferencing mode to company in July, 2021. The Chairman of the company has informed Rajdeep that he has to inform at least 3 months in advance to participate in the Board meeting through video conferencing. Considering the applicable provisions of the Companies Act, 2013, decide whether the action of the Chairman is valid ? Can Rajdeep attend the Board meeting scheduled to be held in August, 2021 through video conferencing ?

### Answer

The provisions for conducting Board meeting through video conferencing has been specified in Rule 3 of the Companies (Meetings of Board and its Powers) Rules, 2014.

Director can attend Board meeting electronically. At the beginning of calendar year, director may intimate his intention to participate in Board meeting through video conferencing. Such declaration shall be valid for one year. If he does not intimate, it shall be presumed that the director shall attend the Board meeting in person.

Para 1.3.4 of Secretarial Standard on Board Meeting states that, the notice of the Board meeting shall inform the directors regarding the option available to them to participate through video conferencing mode or other audio-visual means, and shall provide all the necessary information to enable the directors to participate through video conferencing mode or other audio-visual means.

A director intending to participate through video conferencing or audio-visual means shall communicate his intention to the Chairperson or the Company Secretary of the company. If the director intends to participate through video conferencing or other audio-visual means, he shall give prior intimation to that effect sufficiently in advance so that company is able to make suitable arrangements in this behalf.

It was held in case of Rupak Gupta vs. UP Hotels Ltd., Sub Rule 3(3)(e) of Companies (Meeting of Board and its Powers) Rules, 2014 does not intend to say that if an intimation to participate in a meeting through electronic mode is not given at the beginning of the year, the directors are not entitled to participate in any meeting through electronic mode. Therefore, the director does not give intimation at beginning of the calendar year, he can attend through video conference and preventing him from appearing through video conferencing is improper.

Accordingly, one can say that the action of the Chairman is not valid. Rajdeep can participate in the Board meeting through video conferencing.

#### 14. Question

ABC Limited, a public limited company was incorporated on 1st April, 2020. The company has conducted four Board meetings during the financial year 2020-21 i.e. on 6th April, 2020, 28th August, 2020, 30th September, 2020 and 30th March, 2021.

- (i) Has the company contravened the provisions of the Companies Act, 2013 in respect of the conduct of the meetings?
- (ii) Will your answer differ if the company was incorporated under Section 8 of the Companies Act, 2013?

**Answer****Conduct of Board Meeting:**

- As per Sec. 173(1) of the Companies Act, 2013, every company shall hold the first meeting of the BOD within 30 days of the date of its incorporation and thereafter hold a minimum number of 4 meetings of its BOD every year in such a manner that not more than 120 days shall intervene between two consecutive meetings of the Board.
- However, the C.G. had notified that in case of Sec. 8 companies which has not committed a default in filing of its financial statements u/s 137 or annual return u/s 92 with the Registrar, Sec. 173(1) shall apply only to the extent that the BOD of such companies shall hold at least 1 meeting within 6 calendar months.
- In the present case, ABC Ltd. was incorporated on 1st April, 2020 and conducted 4 Board meetings during the financial year 2020-21 on 6th April, 2020, 28th August, 2020, 30th September 2020 and 30th March 2021.
- **Conclusions:** Considering the provisions of Sec. 173(1), following conclusions may be drawn:
  - (i) Company has contravened the provisions of Sec. 173(1) of the Companies Act, 2013 in respect of the conduct of the subsequent board meetings. The gap between 2 consecutive board meetings i.e. the meeting held on 6th April, 2020 and 28th August, 2020 is 143 days which is more than 120 days and similarly the gap between the meeting held on 30th Sep. 2020 and 30th March 2021 is 181 days which is again more than 120 days.
  - (ii) In the case of company incorporated u/s 8 of the Companies Act, 2013, since the board meetings have been conducted within every 6 calendar months, so there is no contravention of the provision related to holding of board meetings.

**15. Question**

XYZ Ltd. is a foreign collaborator in ABC Ltd. incorporated in India under the Companies Act, 2013. The foreign collaborator holds 49% of the shareholding. The Board meetings of ABC Ltd are usually held in India and sometimes meetings of the Board are called at a very short notice for which there is a provision in the Articles of Association that during such situations notices of the meetings of the Board can be sent by e-mail. State in this connection whether such a provision in the Articles of Association of a foreign collaborated company is valid.

**Answer**



**Requirements of Notice of Board Meetings:**

- As per Sec. 173(3) of the Companies Act, 2013, a meeting of the Board shall be called by giving not less than 7 days' notice in writing to every director at his address registered with the company and such notice shall be sent by hand delivery or by post or by electronic means.
- Proviso to Sec. 173(3) provides that a meeting of the Board may be called at shorter notice to transact urgent business subject to the condition that at least one independent director, if any, shall be present at the meeting.

**Conclusion:** From the examination of provisions of Sec. 173(3), it can be concluded that the notice of a Board meeting may be sent by e-mail. However, shorter notice is legally permitted with the condition being the presence of the quorum and at least one independent director. The provision of the Articles in this regard is not relevant as the position is amply clear in the Act itself.

**16. Question**

A director goes abroad for a period of more than 3 months and an alternate director has been appointed in his place u/s 161(2). During the period of absence of the original director, a board meeting was called. In this connection, with reference to the provisions of the Companies Act, 2013, advise whom should the notice of Board meeting be given to the "original director" or to the "alternate director"?

**Answer****Requirements of Notice of Board Meetings:**

- Section 161(2) of the Companies Act, 2013 provides that the Board of Directors of a company may, if so authorised by its articles or by a resolution passed by the company in general meeting, appoint a person, not being a person holding any alternate directorship for any other director in the company, to act as an alternate director for a director during his absence for a period of not less than 3 months from India.
- Section 173(3) provides that a meeting of the Board shall be called by giving at least a 7 days' notice in writing to every director to his registered address with the company and such notice shall be sent by hand delivery or by post or by electronic means.

- In the present case, a director goes abroad for a period of more than 3 months and an alternate director has been appointed in his place u/s 161(2). During the period of absence of the original director, a board meeting was called.

**Conclusion:** There is no legal precedence whether the notice of the meeting is to be sent to the original director or the alternate director. But as matter of prudence the notice of the meeting may be served to both the alternate director as well as the original director who is for the time being outside India.

### 17. Question

ABC Ltd. has 12 directors on its Board and has the following clause in its Articles of Association: "The questions arising at any meeting of the Board of Directors or any Committee thereof shall be decided by a majority of votes, except in cases where the Companies Act, 2013 expressly provides otherwise." In one of the meetings of the Board of Directors of ABC Ltd., 8 directors were present. After completion of discussion on a matter, voting was done. 3 directors voted in favour of the motion, 2 directors voted against the motion while 3 directors abstained from voting.

You are required to state with reference to the provisions of the Companies Act, 2013 whether the motion was carried or not. It is clarified that the motion being voted upon was not concerning a matter which requires consent of all the directors present in the meeting.

### Answer

#### Voting at a Board Meeting:

Regulation 68 of Table F of Schedule I to the Companies Act, 2013 provides that save as otherwise expressly provided in the Companies Act, 2013, questions arising at any meeting of the Board shall be decided by a majority of votes.

- In the present case, similar clause exists in the Articles of Association of ABC Ltd. 8 directors out of a total strength of 12 directors were present and out of those 8 directors only 5 directors have exercised their votes. In such a case, only those directors who are present and vote on a motion are considered for determining

whether the motion is carried or not. That means out of the 5 directors who voted on the motion are to be considered. Directors who did not vote will not be counted as either having voted in favour or against. Their votes will be disregarded.

**Conclusion:** Since number of directors who voted in favour of the motion being 3, is higher than the number of directors who voted against the motion being 2, the motion is carried or is considered to be passed by majority.

### 18. Question

Examine with reference to the provisions of the Companies Act, 2013 whether notice of a Board Meeting is required to be sent to the following persons:

- (i) Alternative Director;
- (ii) An interested Director;
- (iii) A Director who has expressed his inability to attend a particular Board Meeting;
- (iv) A Director who has gone abroad (for less than 3 months).

### Answer

#### Notice of Board meeting:

**(i) Alternate Director:** Sec. 173(3) of the Companies Act, 2013 makes it mandatory for every director to be given proper notice of every board meeting. There is no legal precedence whether the notice of the meeting is to be sent to the original director or the alternate director. But as matter of prudence the notice of the meeting may be served to both the alternate director as well as the original director who is for the time being outside India.

**(ii) Interested director:** In case of an Interested Director, notice must be given to him even though he is precluded from voting at the meeting on the business to be transacted. It is immaterial whether a director is interested or not.

**(iii) A Director who has expressed his inability to attend a particular Board Meeting:** In terms of section 173(3) even if a director states that he will not be able to attend the next Board meeting. notice must be given to that director.

**(iv) A director who has gone abroad:** A director who has gone abroad is still a director. Therefore, he is entitled to receive notice of board meetings during his stay abroad.

### 19. Question

You are the CFO and in-charge of compliances of a listed entity. The Company is professionally managed and has earned a niche in the market for its robust management practices. Mr. Edward, an eminent American business man, currently living in Germany, joined the Company as an Executive Director. On assuming his mantle, he being a foreign director residing abroad, approached you to specifically understand the relevant provisions of the Companies Act, 2013 relating to participation of directors in Board Meetings conducted through Video Conferencing in respect of the following matters:

- (i) What shall be the venue of Board Meeting through video conference?
- (ii) How the statutory registers placed at the scheduled venue of the meeting shall deemed to have been signed by the directors participating through electronic mode?
- (iii) Whether meetings can be convened through audio/tele conferencing i.e. without video facility? You are required to provide correct legal-position to the above queries after examining and evaluating the provisions of the Companies Act, 2013.

**Answer****Conduct of Board Meetings:**

Rule 3 of the Companies (Meetings of Board and its Powers) Rules, 2014, requires the company to comply with the procedure in case of Board Meetings through video conferencing or other audio visual means.

**(i) Venue of Board meetings:**

With respect to every meeting conducted through video conferencing or other audio-visual means authorised under these rules, the scheduled venue of the meeting as set forth in the notice convening the meeting, shall be deemed to be the place of the said meeting and all recordings of the proceedings at the meeting shall be deemed to be made at such place.

**(ii) Signing of Statutory Registers:**

The statutory registers which are required to be placed in the Board meeting as per the provisions of the Act shall be placed at the scheduled venue of the meeting and where such registers are required to be signed by the

directors, the same shall be deemed to have been signed by the directors participating through electronic mode, if they have given their consent to this effect and it is so recorded in the minutes of the meeting.

**(iii) Conducting meetings through audio conferencing:**

As per Sec. 173(2) of Companies Act, 2013, the participation of directors in a meeting of the Board may be either in person or through video conferencing or other audio-visual means, as may be prescribed. "Video conferencing or other audio-visual" means audio-visual electronic communication facility employed which enables all the persons participating in a meeting to communicate concurrently with each other without an intermediary and to participate effectively in the meeting.

Hence, meetings cannot be convened through audio/teleconferencing i.e. without video facility.

**20. Question**

Discuss the following situations with respect to the quorum.

(a) There are 9 directors in a company and out of which 2 offices of the directors have fallen vacant. (b) There are 15 directors in a company and during discussion of a particular item, 13 of the directors are said to be 'interested' within the meaning of section 184(2) of the Companies Act, 2013

**Answer**

**Requirements as to quorum of a Board Meeting:**

(a) As per Sec. 174(1) of the Companies Act, 2013, the quorum for a meeting of the Board of Directors of a company shall be 1/3rd of its total strength or 2 directors, whichever is higher. For this purpose, any fraction of a number shall be rounded off as one and total strength shall not include directors whose places are vacant.

In the present case, quorum shall be higher of 1/3rd of 7, i.e. 2.33, rounded off as 3 or 2 directors. Therefore, 3 directors would constitute the quorum for the Board meetings.

(b) As per Sec. 174(3) of the Companies Act, 2013 if at any time the number of the interested directors exceeds or is equal to 2/3rd of the total strength of the Board of Directors, the number of the directors who are non-interested but present at the meeting, not being less than 2 shall constitute the quorum. In the present case, there are in all 15 directors and the Board meeting commences with all the 15 directors. During the meeting, an item comes up for discussion in respect of which 13 happen to be "interested" directors. In this case, in spite of the excess of the interested directors being more than 2/3rd, the prescribed minimum number of non-interested

directors constituting the quorum, namely, 2 are present at the meeting and can transact the particular item of business.

### 21. Question

A meeting of the Board of 'No Holiday Ltd' was held on a national holiday on account of Ganesh Chaturthi, the day being Sunday. However due to lack of quorum, the proceedings of the meeting could not be held and therefore the Chairman of the meeting decided with the consent of the majority that the Board meeting be adjourned to next week on the same day. Whether the meeting of the Board can be held on a Sunday.

### Answer

#### Board Meeting to be held on Sunday:

- As per sec. 173(3) of the Companies Act, 2013, a meeting of the Board shall be called by giving not less than 7 days' notice in writing to every director at his address registered with the company and such notice shall be sent by hand delivery or by post or by electronic means. It further provides for the board meeting to be held on shorter notice to transact urgent business subject to the condition that at least one independent director, if any, shall be present at the meeting.
- Therefore, board meeting may be held at any place on any day including a national holiday if agreed by the directors.
- As per Sec. 174(4), when a board meeting is adjourned due to lack of quorum, the adjourned meeting can be held on the same day at the same time and place in the next week or if that day is a national holiday, till the next succeeding day, which is not a national holiday, at the same time and place, unless the Articles provide otherwise.

**Conclusion:** Since the section specifies of exclusion of only national holiday, so adjourned meeting can be held on Sunday.

### 22. Question

The Board of directors of ABC Ltd. met thrice in the year 2020 and the 4th Meeting, though called, could not be held for want of quorum.

Examine with reference to the relevant provisions of the Companies Act, 2013, Whether any provisions of the Companies Act, 2013 have been contravened?

Or

PQR Limited held 3 board meetings till 30th Sep., 2020 during the calendar year 2020. The next board meeting was due to be held on 27th December, 2020 but for want of quorum the meeting could not be held. A group of shareholders complained that the Company has violated the provisions of section 173 of the Companies Act, 2013 in not holding the required number of board meetings. State whether PQR Limited has violated the provisions given in Sec. 173 of the Act.

**Answer**

**Requirements as to Board Meetings:**

- As per Sec. 173(1) of the Companies Act, 2013, every company shall hold the first meeting of the BOD within 30 days of the date of its incorporation and thereafter hold a minimum number of 4 meetings of its BOD every year in such a manner that not more than 120 days shall intervene between two consecutive meetings of the Board.
- As per Sec. 174(4), when a board meeting is adjourned due to lack of quorum, the adjourned meeting can be held on the same day at the same time and place in the next week or if that day is a national holiday, till the next succeeding day, which is not a national holiday, at the same time and place, unless the Articles provide otherwise.
- In case of adjournment of the meeting, it shall be deemed to have been held on the date on which it was started and not on the date when the adjourned meeting was held.

**Conclusion:** Provisions of section 173 shall not be deemed to have been contravened merely by reason of the fact that a meeting of the Board which had been called in compliance with the terms of that Section could not be held for want of a quorum. Holding of the adjourned meeting though in the next year will be treated as continuation of the 4th meeting of the previous year and will therefore not count in the meetings held in the next year but in the previous year.

Note: It is assumed here that adjourned meeting is duly held. If it is assumed that in adjourned meeting also, quorum was not present, meeting stand cancelled and it can be concluded that Sec. 173(1) has been violated.

**23. Question**

One of the Objects Clauses of the Memorandum of Association of Info Company Limited conferred upon the company power to sell its undertaking to another company with identical objects. Company's Articles also conferred upon the directors whereby power was conferred upon them to sell or otherwise deal with the property of the company. At an Extraordinary General Meeting of the company, members passed an ordinary resolution for the sale of its assets on certain terms and authorized the directors to carry out the sale. Directors refused to comply with the wishes of the members where upon it was contended on behalf of the members that they were the principals and directors being their agents, were bound to give effect to their (members') decisions.

Examining the provisions of the Companies Act, 2013, answer the following:

Whether the contention of members against the non-compliance of members' decision by the directors is tenable?

Whether it is possible for the members usurp the powers which by the Articles are vested in the directors by passing a resolution in the general meeting?

**Answer:**

**Powers of Board:** In accordance with the provisions of the Companies Act, 2013, as contained under Section 179(1), the Board of Directors of a company shall be entitled to exercise all such powers and to do all such acts and things, as the company is authorized to exercise and do.

Provided that, in exercising such power or doing such act or thing, the Board shall be subject to the provisions contained in that behalf in this Act, or in the memorandum or articles, or in any regulations not inconsistent therewith and duly made there under including regulations made by the company in general meeting.

Provided further that the Board shall not exercise any power or do any act or thing which is directed or required, whether under this Act or by the members or articles of the company or otherwise to be exercised or done by the company in general meeting.

Section 180 (1) of the Companies Act, 2013, provides that the powers of the Board of Directors of a company which can be exercised only with the consent of the company by a special resolution. Clause (a) of Section 180



(1) defines one such power as the power to sell, lease or otherwise dispose of the whole or substantially the whole of the undertaking of the company or where the company owns more than one undertaking of the whole or substantially the whole or any of such undertakings.

Therefore, the sale of the undertaking of a company can be made by the Board of Directors only with the consent of members of the company accorded vide a special resolution.

Even if the power is given to the Board by the memorandum and articles of the company, the sale of the undertaking must be approved by the shareholders in general meeting by passing a special resolution. Therefore, the correct procedure to be followed is for the Board to approve the sale of the undertaking clearly specifying the terms of such sale and then convene a general meeting of members to have the proposal approved by a special resolution.

In the given case, the procedure followed is completely incorrect and violative of the provisions of the Act. The shareholders cannot on their own make out a proposal of sale and pass an ordinary resolution to implement it through the directors.

The contention of the shareholders is incorrect in the first place as it is not within their authority to approve a proposal independently of the Board of Directors. It is for the Board to approve a proposal of sale of the undertaking and then get the members to approve it by a special resolution. Accordingly, the contention of the members that they were the principals and directors being their agents were bound to give effect to the decisions of the members is not correct.

Further, in exercising their powers the directors do not act as agent for the majority of members or even all the members. The members therefore, cannot by resolution passed by a majority or even unanimously supersede the powers of directors or instruct them how they shall exercise their powers. The shareholders have, however, the power to alter the Articles of Association of the company in the manner they like subject to the provisions of the Companies Act, 2013.

#### 24. Question

When does a Director required to disclose his / her interest to the Company as per Section 184 of the Companies Act, 2013? What are the consequences of non- disclosure?

**Answer:**

According to Section 184(1) of the Companies Act, 2013 every Director shall disclose his concern or interest in any Company or companies or bodies corporate, firms, or other association of individuals which shall include the shareholding, in such manner as may be prescribed in Rule 9 of the companies (Meetings of Board and its Powers):

**When to Make general disclosure of Interest: Every director shall disclose his interest**

- (a) At the First meeting of the Board in which he participates as a director, and
- (b) Thereafter, at the first meeting of the Board in every financial year, or
- (c) Whenever there is any change in the disclosures already made, then at the first Board meeting held after such change.

**Consequences of non-disclosure [Section 184(3) and 184(4)]:**

- (a) **Voidable at the option of company:** A contract or arrangement entered into by the company without disclosing or with participation by a director who is concerned or interested in any way, directly or indirectly, in the contract or arrangement, shall be voidable at the option of the company.
- (b) **Penalty:** If a director of the company contravenes the provisions of section 184, such director shall be punishable
  - with imprisonment for a term which may extend to one year or
  - with fine which may extend to one lakh rupees,
  - or with both.

**25. Question**

The board meeting of MNO Ltd. was held on 10th May, 2020 at Chennai at 11A.M. At the time of starting the board meeting the number of director's present were 7. The total number of directors were 10. The board transacted ten items in the board meeting. At 12 noon after the completion of four items in the agenda 4 directors left the meeting. Examine the validity of these transactions explaining the relevant provisions of the Companies Act, 2013.

**Answer**

**Requirements as to quorum of a Board Meeting:**

- As per Sec. 174(1) of the Companies Act, 2013, the quorum for a meeting of the Board of Directors of a company shall be 1/3rd of its total strength or 2 directors, whichever is higher. For this purpose, any fraction of a number shall be rounded off as one and total strength shall not include directors whose places are vacant.
- Quorum need to be present at the time of transacting each and every business.
- In the present case, the board meeting of MNO Ltd. was held on 10th May, 2020 at Chennai at 11A.M. At the time of starting the board meeting the number of director's present were 7. The total number of directors were 10. The board transacted 10 items in the board meeting. At 12 noon after the completion of four items in the agenda 4 directors left the meeting.
- Quorum for the board meeting in this case will be 1/3rd of 10 directors, i.e. 3.33, rounded off as 4 or 2 directors, whichever is higher. So, quorum required will be 4 directors. At the beginning of meeting, 7 directors were present, but after transacting 4 items of the agenda, 4 directors left, as a result number of director's present remains at 3, which is not a valid quorum.

**Conclusion:** First 4 transactions have been validly transacted. Resolutions passed in respect of remaining 6 agenda items are void as only 3 directors were present at that time, which falls below the minimum quorum required.

**26. Question**

Mr. M was appointed as a director at the AGM of a limited company held on 30th Sep, 2019 and he carried on his duties and functions as a director. In the month of August, 2020, it was found out that there were certain irregularities in his appointment and on 31st August, 2020, his appointment was declared Invalid. But Mr. M continued to act as director even after 31st August, 2020. Whether the acts done by Mr. MTP are valid and binding upon the company?

**Answer****Validity of actions taken by directors whose appointment is considered invalid:**

- As per Sec. 176 of the Companies Act, 2013, act done by a person as a director shall not be deemed to be invalid, notwithstanding that it was subsequently noticed that his appointment was invalid by reason of any defect or disqualification or had terminated by virtue of any provision contained in this Act or in the articles of the company.
- Proviso to Sec. 176 provides that nothing in this section shall be deemed to give validity to any act done by the director after his appointment has been noticed by the company to be invalid or to have terminated.

- In the present case, Mr. M was appointed as a director at the AGM of a limited company held on 30th Sep. 2019 and he carried on his duties and functions as a director. In the month of August, 2020, it was found out that there were certain irregularities in his appointment and on 31st August, 2020, his appointment was declared invalid. But Mr. M continued to act as director even after 31st August, 2020. **Conclusion:** Acts done upto 31st Aug, 2020 are considered valid and acts done after 31st Aug 2020 renders invalid.

### 27. Question

Examine the following aspect related to convening of board meeting with reference to the provisions of the Companies Act, 2013:

- (i) The Chairman of Greenhouse Limited convened a board meeting and two weeks' notice was served on all directors of the company. Two of the independent directors on the board objected on the grounds that no proper agenda for the meeting was circulated.
- (ii) Purple Florence Limited proposes to hold its board meeting at a shorter notice through video conferencing.

### Answer:

- (i) According to section 173 (3) of the Companies Act, 2013, a meeting of the Board shall be called by giving not less than 7 days' notice in writing to every director at his address registered with the company and such notice shall be sent by hand delivery or by post or by electronic means.

According to the question, two of the independent directors on the Board has objected on the grounds that no proper agenda for the meeting was circulated.

The Companies Act, 2013 does not specifically provide for sending agenda along with the notice of the meeting. However, generally as a good secretarial practice, the notice is accompanied with the agenda of the meeting. Thus, the contention of the independent directors objecting on the grounds that no agenda for the meeting was circulated, does not hold good.

Further, the Chairman of Greenhouse Limited has convened the Board meeting by serving a two weeks' notice (i.e. more than 7 days). Hence, the meeting shall be valid.

- (ii) According to section 173 of the Companies Act, 2013,

- (a) The directors can participate in a meeting of the Board either in person or through video conferencing or other audio visual means, as may be prescribed, which are capable of recording and recognising the participation of the directors and of recording and storing the proceedings of such meetings along with date and time. Further, Central Government may provide for matters which cannot be dealt in a meeting through video conferencing or other audio visual means.
- (b) A meeting of the Board shall be called by giving not less than 7 days' notice in writing to every director at his address registered with the company.

Provided that a meeting of the Board may be called at shorter notice to transact urgent business subject to the condition that at least one independent director, if any, shall be present at the meeting. Further, in case the independent directors are not present at such a meeting of the Board, decisions taken at such a meeting shall be circulated to all the directors and shall be final only on ratification thereof by at least one independent director, if any.

Hence, Purple Florence Limited can hold a board meeting at a shorter notice through video conferencing, for transacting urgent business subject to the condition that at least one independent director, if any, shall be present at the meeting. Further, if the independent directors are absent from the meeting of the Board, decision taken at such a meeting shall be circulated to all the directors and shall be final only on ratification thereof by at least one independent director, if any.

### 28. Question

XYZ, Public Ltd. with the turnover of Rs. 500 crore entered into a contract of purchasing of raw material from a private company. XYZ Ltd. appointed Mr. Khurana, a director of the company, to act in this deal of transaction. Mr. Khurana is also a member of that private company. He settled the said transaction into 60 crore and entered into the contract. After few transactions made under the contract, XYZ Ltd. finds degradation in the quality of the product supplied. In the Board Meeting, this contract was challenged considering it as a related party transaction and in contravention to section 188(1). During this period, Mr. Khurana was appointed as a director in newly setup, PQR Ltd.

In the light of the given facts, examine the following situations as per the Companies Act, 2013.

- What is the legal position of the contract entered between XYZ Ltd through Mr. Khurana, and the private company?
- Is there any contravention of section 188 (1)? if yes, then the liability of the wrong deed. Comment upon the appointment of Mr. Khurana as a director in PQR Ltd. **Answer:**

As per the given facts, Mr. Khurana, a director of XYZ Ltd., was also a member of a private company with which he entered into contract for the purchase of the raw material. In terms of section 2(76) of the Companies Act, 2013, XYZ Ltd. is a related party to a such private company. However , as per section 188(1) of the Act, no company shall enter into any contract or arrangement with a related party with respect to the transaction related to the sale, purchase or supply of any goods or materials or made through an appointment of any agent for purchase or sale of goods, materials, services or property, except with the consent of the Board of Directors given by a resolution at a meeting of the Board and subject to such conditions as given in rule 15 of the Companies (Meetings of Board and its Powers) Rules, 2014 However, no contract or arrangement, in the case of a company having a paid-up share capital of not less than such amount, or transactions not exceeding such sums, as prescribed in Rule 15(3) of the

Companies (Meetings of Board and its Powers) Rules, 2014 , shall be entered into except with the prior approval of the company by a resolution. [First proviso to section 188(1)]

A company shall not enter into transaction/s related sale, purchase or supply of any goods or materials, directly or through appointment of agent, where the transaction or transactions to be entered into is amounting to 10% or more of the turnover of the company or rupees 100 crore, whichever is lower, except with the prior approval of the company by a resolution.

Since in the given case, XYZ, Public Ltd. has turnover of Rs. 500 crore, here the transaction is amounting to more than 10% of the turnover i.e.,  $500 \text{ cr} \times 10/100 = 50 \text{ cr}$ , but without seeking prior approval of the company by a resolution.

So, in terms of the above provision, this contract is of voidable nature at the option of the Board, or as the case may of the shareholders according to section 188(3) of the Companies Act, 2013.

**In case of contravention of Section 188(1):** Where any contract or arrangement is entered into by a director or any other employee, without obtaining the consent of the Board or approval by a resolution in the general meeting as required under section 188(1), and if it is not ratified by the Board or, as the case may be, by the shareholders at a meeting within 3 months from the date on which such contract or arrangement was entered into. Further, if the contract or arrangement is with a related party to any director, or is authorised by any other director, the directors concerned shall indemnify the company against any loss incurred by it.

**Company may proceed to recover loss in contravention of the provisions of this section:** Section 188 (4) provides that it shall be open to the company to proceed against a director or any other employee who had entered into such contract or arrangement in contravention of the provisions of this section for recovery of any loss sustained by it as a result of such contract or arrangement.

**Penalty:** Any director or any other employee of a company, who had entered into or authorised the contract or arrangement in violation of the provisions of this section shall be punishable with fine which shall not be less than 25,000 rupees but which may extend to 5 lakh rupees.

**(ii) Appointment of Director under Section 164:** A person shall not be eligible for appointment as a director of a company, where he has been convicted of the offence of dealing with related party transactions under section 188 at any time during the last preceding 5 years;

In the given instance, Mr. Khurana was not convicted, only levied with the penalty, against the offence dealt with related party transactions under section 188, so he is eligible and can be appointed as a director in the PQR Ltd.

## 29. Question

Examine with reference to the provisions of the Companies Act, 2013 whether notice of a Board Meeting is required to be sent to the following persons:

- (a) An interested Director
- (b) A director who has gone abroad less than 3 months.

**Answer:**

### Notice of Board meeting

Section 173(3) of the Companies Act, 2013 makes it mandatory for every director to be given proper notice of every board meeting. It is immaterial whether a director is interested or not.

- (a) An Interested Director: Notice must be given to a director even though he is precluded from voting at the meeting on the business to be transacted.
- (b) A director who has gone abroad: A director who has gone abroad is still a director. Therefore, he is entitled to receive notice of board meetings during his stay abroad.

The Companies Act, 2013, allows delivery of notice of meeting by electronic means also. This is important because the Companies Act, 2013 permits a director to participate in a meeting by video conferencing or any other audio visual means.

### 30. Question

The Board of Directors of IBC Consultants Limited, registered in Maharashtra, proposes to hold the next board meeting in the month of May, 2019. They seek your advice in respect of the following matters:

- (i) Can the board meeting be held in Delhi through video conferencing, when all the directors of the company reside at Maharashtra.
- (ii) Is it necessary that the notice of the board meeting should specify the nature of business to be transacted?

### Answer

- (i) There is no provision in the Companies Act, 2013 under which the board meetings must be held at any particular place. Therefore, there is no difficulty in holding the board meeting at Delhi even if all the directors of the company reside at Maharashtra and the registered office is situated at Maharashtra provided that the requirements regarding the holding of a valid board meeting and the other provisions relating to the signing of register of contracts, taking roll calls, etc. are complied with.
- (ii) Section 173 (3) of the Companies Act, 2013 provides for the giving of notice of every board meeting of not less than seven days to every director of the company. There is no provision in the Act laying down the contents of the notice. Hence, it may be construed that notice may be interpreted as intimation of the meeting and does not necessarily include the sending of the Agenda of the meeting. However, considering the importance of Board Meetings and the responsibilities placed on the directors for decisions taken at the meetings, it is



inevitable for them to be properly prepared and informed about the items to be discussed at the Board Meetings.

In view of the above and as a matter of good secretarial practice, the Agenda, setting out the business to be transacted at the Meeting, and Notes on Agenda should be given to the Directors at least seven days before the date of the board meeting, unless the Articles prescribe a longer period. Usually, the articles of a company make it mandatory to do so in almost all cases.

As the board meeting is being conducted through video conferencing, Rule 3 (3) (b) of the Companies (Meetings of Board and its Powers) Rules, 2014 requires that the notice of the meeting shall inform the directors regarding the option available to them to participate through video conferencing mode or other audio-visual means, and shall provide all the necessary information to enable the directors to participate through video conferencing mode or other audio-visual means.

### 31. Question

The Board of Directors of Infotech Consultants Limited, registered in Kolkata, proposes to hold the next board meeting in the month of May, 2019. They seek, your advice in respect of the following matters:

- (i) Can the board meeting be held in Chennai through video conferencing, when all the directors of the company reside at Kolkata?
- (ii) Is it necessary that the notice of the board meeting should specify the nature of business to be transacted?

### Answer

- (i) No provision in the Companies Act, 2013 requires that the board meetings must be held at a particular place. Accordingly, there is no difficulty in holding the current board meeting at Chennai through video conferencing even if all the directors of the company reside at Kolkata and the registered office is also situated at Kolkata. However, it is to be seen that the legal requirements as prescribed by Section 173 (2) and Rule 3 of the Companies (Meetings of Board and its Powers) Rules, 2014 are meticulously followed.

- (ii) Section 173 (3) of the Companies Act, 2013 provides for the giving of notice of every board meeting of not less than seven days to every director of the company. There is no provision in the Act laying down the contents of the notice. Hence, it may be construed that notice may be interpreted as intimation of the meeting and may not necessarily include Agenda of the meeting. However, considering the importance of board meetings and the responsibilities placed on the directors for decisions taken at the meetings, it is inevitable for them to be properly prepared and informed about the items to be discussed at the board meetings.

In view of the above and as a matter of good secretarial practice, the Agenda, setting out the business to be transacted at the Meeting, and Notes on Agenda should be given to the Directors at least seven days before the date of the board meeting, unless the Articles prescribe a longer period. Usually, the articles of a company make it mandatory to do so in almost all cases.

As the board meeting is being conducted through video conferencing, Rule 3 (3) (b) of the Companies (Meetings of Board and its Powers) Rules, 2014 requires that the notice of the meeting shall inform the directors regarding the option available to them to participate through video conferencing mode or other audio-visual means, and shall provide all the necessary information to enable the directors to participate through video conferencing mode or other audio-visual means.

### 32. Question

XYZ Ltd. is a foreign collaborator in ABC Ltd. incorporated in India under the Companies Act, 2013 . The foreign collaborator holds 49% of the shareholding. The Board meetings of ABC Ltd are usually held in India and sometimes meetings of the Board are called at a very short notice for which there is a provision in the Articles of Association that during such situations, notices of the meetings of the Board can be sent by e-mail. State in this connection whether such a provision in the Articles of Association of ABC Ltd. is valid.

**Answer:**

In terms of the proviso to section 173(3) of the Companies Act, 2013 a meeting of the Board may be called at shorter notice to transact urgent business subject to the condition that at least one independent director, if any, shall be present at the meeting. No exception is made for any class or classes of companies. Further, under section 173(3) a meeting of the Board shall be called by giving not less than seven days' notice in writing to every director at his address registered with the company and such notice shall be sent by hand delivery or by post or by electronic means.

If we examine the above provision, it is amply clear that the notice is allowed to be sent, inter alia, by electronic means also. Hence, the sending of notice by e-mail is a permissible mode of delivery and can be resorted to without any hinderance. In case Articles contain such a provision, there is no illegality involved even if there is a foreign collaborator in the company.

Therefore, in the given case the shorter notice by e-mail is legally permitted. It is to be noted that there should be the presence of quorum and at least one independent director at the meeting. The provision of the Articles in this regard is not so relevant since the position is quite clear in the Act itself.

### 33. Question

Discuss the following situations with respect to the quorum.

- (a) There are 9 directors in a company and out of which 2 offices of the directors have fallen vacant.
- (b) There are total 15 directors in a company and during discussion on a particular item, 13 of the directors happen to be 'interested' within the meaning of section 184(2) of the Companies Act, 2013.

### Answer:

(a) According to section 174(1) of the Companies Act, 2013, quorum is one third of the total strength of Board (any fraction contained in the said one third being rounded off as one) or two directors whichever is higher. The total strength is to be derived after deducting the number of directors whose offices are vacant. Therefore, where total number of directors is 9 and 2 offices of the directors have fallen vacant, the total strength comes to seven. In this case  $\frac{1}{3}$  of 7 =  $2\frac{1}{3}$  directors which will be rounded off as 3 which is higher than 2. Therefore, 3 directors would constitute the quorum for the Board meetings. (b) Under section 174(3) of the Companies Act, 2013, if at any time the number of the interested directors exceeds or is equal to two thirds of the total strength of the Board of Directors, the number of the directors who are non-interested but present at the meeting, not being less than two shall constitute the quorum.

In the given situation, there are total 15 directors and the Board meeting commences with all of them. During the meeting, an item comes up for discussion in respect of which 13 directors happen to be 'interested directors'. In spite of the fact that the interested directors are more than two-thirds, minimum two non-interested directors who are present at the meeting shall constitute the quorum and they can validly transact that particular item of business in view of Section 174 (3).

#### 34. Question

A meeting of the Board of 'No Holiday Ltd' was held on a holiday on account of Ganesh Chaturthi. However due to lack of quorum, the proceedings of the meeting could not be held and therefore the Chairman of the meeting with the consent of the majority decided that the Board meeting be adjourned to next week on the same day. However, the date fixed for the adjourned meeting happened to be a Sunday. Whether the adjourned meeting of the Board can be held on a Sunday.

#### Answer

When a board meeting is adjourned due to lack of quorum, then under section 174(4) the adjourned meeting can be held on the same day at the same time and place in the next week or if that day is a national holiday, till the next succeeding day, which is not a national holiday, at the same time and place, unless the Articles provide otherwise.

Since Section 174(4) specifies exclusion of only a national holiday, any original/adjourned/committee meetings can be held on Sundays and other holidays. In view of this provision, the adjourned meeting of the Board of 'No Holiday Ltd' can be held on Sunday without involvement of any illegality.

#### 35. Question

Mr. Mohan was appointed as director at the Annual General Meeting of a company held on 30th September, 2018 and he functioned in the capacity as director from then onwards. Subsequently, during the mid of August, 2019, it was noticed that there were certain irregularities in his appointment and therefore, on 31st August, 2019, his appointment was declared invalid. However, Mr. Mohan continued to act as director even after 31st August, 2019. Whether the subsequent acts done by him as director are valid and binding on the company?

#### Answer:

According to Section 176 of the Companies Act, 2013, any act done by a person as a director shall be deemed to be valid, notwithstanding that it may afterwards be discovered that his appointment was invalid by reason of any defect or disqualification or had terminated by virtue of any provision contained in this Act or in the articles of the company.

The Proviso to Section 176, however, states that nothing in this section shall be deemed to give validity to acts done by a director after his appointment has been noticed by the company to be invalid or to have terminated. In view of the above provisions of Section 176, the acts done by Mr. Mohan till the date of noticing irregularity in his appointment shall be deemed as valid and binding on the company.

Any act done by him after the date on which irregularity in his appointment was noticed by the company shall be invalid. Accordingly, acts done by Mr. Mohan after 31st August, 2019 shall be invalid and not binding upon the company.

### 36. Question

- (i) What is the procedure to be followed, when a board meeting is adjourned for want of quorum?
- (ii) How is a resolution by circulation passed by the Board or its Committee.

### Answer:

(i) Section 174(4) of the Companies Act, 2013 provides that, if a Board meeting could not be held for want of quorum, then, unless the articles otherwise provide, the meeting shall automatically stand adjourned to the same day in the next week, at the same time and place, or if that day is a national holiday, till the next succeeding day which is not a national holiday, at the same time and place.

(ii)(a) The Companies Act, 2013 permits a decision of the Board of Directors to be taken by means of a resolution by circulation. Board's approvals can be taken in two ways - one, by a resolution passed at a Board Meeting and the other, by means of a resolution passed by circulation.

In terms of Section 175(1) of the Companies Act, 2013 no resolution shall be deemed to have been duly passed by the Board or by a committee thereof by circulation, unless the following provisions have been complied with:

- (1) the resolution has been circulated in draft, together with the necessary papers, if any,
- (2) the draft resolution has been circulated to all the directors, or members of the committee, as the case may be;

- (3) the Draft resolution has been sent at their addresses registered with the company in India;
- (4) such delivery has been made by hand or by post or by courier, or through prescribed electronic means;
- Rule 5 of the Companies (Meetings of Board and its Powers) Rules, 2014 provides that a resolution in draft form may be circulated to the directors together with the necessary papers for seeking their approval, by electronic means which may include E-mail or fax.
- (5) such resolution has been approved by a majority of the directors or members, who are entitled to vote on the resolution
- (6) However, if at least 1/3rd of the total number of directors of the company for the time being require that any resolution under circulation must be decided at a meeting, the Chairperson shall put the resolution to be decided at a meeting of the Board (instead of being decided by circulation).
- (7) A resolution that has been passed by circulation shall have to be necessarily noted in the next meeting of Board or the Committee, as the case may be, and made part of the minutes of such meeting.

### 37. Question

Mr. P and Mr. Q who are the directors of C-Tech Limited informed the company about their inability to attend the Board meeting because the notice thereof was not served on them. Discuss whether there is any default on the part of C-Tech Limited and the consequences thereof.

#### Answer:

Under section 173(3) of the Companies Act, 2013 a meeting of the Board shall be called by giving not less than seven days' notice in writing to every director at his address registered with the company and such notice shall be sent by hand delivery or by post or by electronic means.

Section 173(4) further provides that every officer of the company whose duty is to give notice under this section and who fails to do so shall be liable to a penalty of Rs. 25,000.

In the given case, as no notice was served on Mr. P and Mr. Q who are the directors of C- Tech Limited, every officer responsible for such default in serving notice shall be punishable with fine of Rs. 25,000 as required by Section 173 (4).

Neither the Companies Act, 2013 nor the Companies (Meetings of the Board and its Powers) Rules, 2014 lay down any specific provision regarding the validity of a resolution passed by the Board of Directors in case notice was not served to all the directors. We shall have to go by the provisions of the Companies Act, 2013 which clearly provide for the notice to be sent to every director. The Supreme Court, in case of Parmeshwari Prasad vs. Union of India (1974) has held that the resolutions passed in the board meeting shall not be valid, since notice to all the Directors was not given in writing. Hence, even though the directors concerned knew about the Board meeting, the meeting shall not be valid and resolutions passed thereat also shall not be valid.

### 38. Question

A director goes abroad for a period of more than 3 months and an alternate director has been appointed in his place under Section 161(2). During the period of absence of the original director, a board meeting was called. In this connection, with reference to the provisions of the Companies Act, 2013, advise who should be given the notice of Board meeting i.e. the “original director” or the “alternate director”?

### Answer:

According to Section 161(2) of the Companies Act, 2013, the Board of Directors of a company may, if so authorised by its articles or by a resolution passed by the company in general meeting, appoint a person, not being a person holding any alternate directorship for any other director in the company or holding directorship in the same company, to act as an alternate director for a director during his absence for a period of not less than three months from India.

According to Section 173(3), a meeting of the Board may be called by giving at least 7 days’ notice in writing to every director at his address registered with the company and such notice shall be sent by hand delivery or by post or by electronic means.

There is no legal precedence whether the notice of the meeting is to be sent to the original director or the alternate director. But as a matter of prudence such notice may be served to both the alternate director as well as the original director who is for the time being outside India.

### 39. Question

Examine with reference to the provisions of the Companies Act, 2013 whether notice of a Board Meeting is required to be sent to the following persons:

(i) An interested Director;

(ii) A Director who has expressed his inability to attend a particular Board

Meeting; (iii) A Director who has gone abroad (for less than 3 months).

**Answer:**

Notice of Board meeting

- (i) Interested director: Section 173(3) of the Companies Act, 2013 makes it mandatory that every director needs to be given proper notice of every board meeting. It is immaterial whether a director is interested or not. In case of an interested director, notice must be given to him even though in terms of Section 184 (2) he is precluded from participation i.e. engaging himself in discussion or voting at the meeting on the business in which he is interested.
- (ii) A Director who has expressed his inability to attend a particular Board Meeting: In terms of section 173(3) even if a director states that he will not be able to attend the next Board meeting, notice must be given to that director also.
- (iii) A director who has gone abroad: A director who has gone abroad is still a director. Therefore, he is entitled to receive notice of board meetings during his stay abroad. The Companies Act, 2013, allows delivery of notice of meeting by electronic means also i.e. through e-mail. This factor carries weight because the Companies Act, 2013 permits a director to participate in a meeting by video conferencing or any other audio- visual means also, in addition to physical presence

**40. Question**

Apex Ltd. is an unlisted Public Company and having 10 Directors on its Board. At a duly convened meeting of the Board of Directors of the Company held on 14th August, 2020, it was proposed to approve entering into contracts or arrangements with 'E Limited' and 'Q and Associates', a partnership firm. Mr. Y and his spouse hold 2 and 1 shareholding respectively in E Limited. Mrs. Z, spouse of Mr. Z is a partner in Q and Associates. Mr. Y and Mr. Z are the Directors of Apex Limited. The board meeting was attended by five directors including Mr. Y and Mr. Z. All the directors participated in the discussions and voted in favor of the resolution except Mr. Y. The contracts



were approved. However, Mr. Y and Mr. Z disclosed their respective interests in the contracts. The earlier Board Meeting was held on 25th May, 2020. In the light of the provisions of the Companies Act, 2013 (the Act), examine the following:

- (i) Whether the Board Meeting that was held and the transactions therewith are within the provisions of the Act?
- (ii) Under what circumstances any arrangement entered into by the Company in violation of Section 192 of the Companies Act, 2013 dealing with non-cash transactions involving directors shall not be held voidable?

**Answer**

(i) According to section 173 of the Companies Act, 2013, every company shall hold minimum of 4 meetings every year but the gap between two consecutive board meetings shall not be more than 120 days.

In the given question earlier Board Meeting was held on 25th May, 2020. The next board meeting was held on 14th August, 2020. Thus, this provision has been complied as the gap between two meetings is less than 120 days.

As per section 174 of the Companies Act, 2013, the quorum for a Board Meeting shall be 1/3rd of its total strength or two directors whichever is higher. Where at any time, the number of interested director exceeds or is equal to 2/3 of the total strength, the quorum shall be the number of directors who are present and not interested directors.

According to section 184 of the Companies Act, 2013, every director shall disclose his concern or interest in any company or companies or bodies corporate, firms, or other association of individuals which shall include the shareholding, in the manner prescribed in Rule 9 of the Companies (Meetings of Board and its Powers) Rules, 2014.

The section further provides that, a director of a company shall make a specific disclosure of interest whenever he, in any way, whether directly or indirectly, is concerned or interested in a contract or arrangement or proposed contract or arrangement entered into or to be entered into:

- (a) with a body corporate in which such director or such director in association with any other director holds more than two per cent shareholding of that body corporate; or

(b) with a body corporate in which such director is a Promoter, Manager, Chief Executive Officer; or

(c) with a firm or other entity in which, such director is a partner, owner or member.

According to Section 184 (5) (b), the provisions of Section 184 regarding disclosure by interested director shall not apply to any contract or arrangement entered into or to be entered into between two companies where any of the directors of the either company or two or more of them together holds or hold not more than 2% of the paid-up share capital in the other company.

As in the given case, Mr. Y holds 2% shareholding (his wife shareholding shall not be included) in E Limited. Since, his shareholding is not more than 2%, therefore, provisions of disclosure of interest shall not apply to him.

Similarly, the provisions related to disclosure of interest are not applicable on Mr. Z (as his wife is a partner in Q and Associates and he disclosed his indirect interest).

As per the question five directors including Mr. Y and Mr. Z (all uninterested) attended the board meeting which is more than 1/3rd of the strength. Thus this provision has been complied.

Therefore, the meeting convened on 14-08-2020 is valid.

The provisions of section 184 of the Companies Act, 2013 are also complied with, and so the transactions of the meeting held on 14th August, 2020 are in order. However, in terms of section 188 of the Companies Act, 2013, no contract or arrangement, in case of a company having paid up share capital of not less than such amount or transactions not exceeding such sums, as may be prescribed shall be entered into except with the prior approval of the company by a resolution.

**(ii)** Where any arrangement entered into by the company in violation of the section 192(3) of the Companies Act, 2013 dealing with non cash transactions involving directors, shall not be voidable:

(a) If the restitution of any money or other consideration which is subject matter of the arrangement is no longer possible and the company has indemnified by any other person for any loss or damage caused to it or

(b) If any rights are acquired bonafide for value and without notice of the contravention of the provisions of this section by any other person.

**41. Question**

Atlantic Garments Ltd., is a company engaged in the business of manufacturing of garments for all seasons. The company have in all 14 directors.

The first meeting of the Board was held on 15th February, 2020. Thereafter, the subsequent meetings of the Board were held on 29th February, 2020, 25th March, 2020, 30th August, 2020 and 25th December, 2020.

In these meetings, the full strength of the Board was present except in the meeting of 25th March, 2020. In this meeting only 4 persons were present.

Decide whether the Board meeting held on 25th March 2020 is valid in compliance with the legal requirements under the Companies Act, 2013. What shall be date of the meeting in case where if meeting could not be held because of quorum.

**Answer**

As per given section 174(1) of the Companies Act, 2013 the quorum for a meeting of the Board of Directors of a company shall be **one third of its total strength or two directors, whichever is higher**, and the participation of the directors by video conferencing or by other audio visual means shall also be counted for the purposes of quorum under this sub-section.

Section 174(4) provides that where a meeting of the Board could not be held for want of quorum, then, unless the articles of the company otherwise provide, **the meeting shall automatically stand adjourned to the same day at the same time and place in the next week or if that day is a national holiday, till the next succeeding day, which is not a national holiday, at the same time and place.**

Further explanation to section 174(4) provides that for the purposes of this section, (i) **any fraction of a number shall be rounded off as one;** (ii) "total strength" shall not include directors whose places are vacant.

Total Strength of directors = 14 One-third of 14 = 4.67 Rounded off to = 5 (Five)

As in the meeting scheduled on 25th March 2020, only 4 persons were present, hence due to want of required minimum quorum, the meeting shall have to be adjourned to the same day at the same time and place in the next week or if that day is a national holiday, till the next succeeding day, which is not a national holiday, at the same time and place.

The meeting of the Board was not valid as the required quorum was not present in the meeting. In this case, the adjourned meeting was to be held on 1st April, 2020



## CHAPTER 17 – CORPORATE SOCIAL RESPONSIBILITY

### 1. Question

Any expenditure incurred for the benefit of the society will be considered as expenditure in pursuance of corporate social responsibility policy. Comment with reference to the provisions of the Companies Act, 2013.

Answer

Section 135 of Companies Act, 2013 provides that a company falling under specified criteria shall put in place a Corporate Social Responsibility Policy indicating the activities to be undertaken by the company in areas or subject, specified in Schedule VII of Companies Act, 2013. It is further provided that the Board of Directors of every company shall ensure that the activities as are included in Corporate Social Responsibility Policy of the company are undertaken by the company.

The expenditure incurred for the benefit of society shall be considered as expenditure in pursuance to Section 135 of Companies Act, 2013, only if the same falls under Corporate Social Responsibility Policy of the Company.

### 2. Question

Explain whether the Corporate Social Responsibility (CSR) Committee is entrusted with any specific functions under the Companies Act, 2013?

Answer

Section 135 (3) of the Companies Act, 2013 read with Rules made thereunder provides that the following functions shall be carried out by a Corporate Social Responsibility (CSR) Committee:

- To formulate and recommend to the Board, a CSR Policy which would indicate the activities to be undertaken in areas or subject, specified in Schedule VII of the Act.
- To recommend the amount of the expenditure to be incurred on the activities undertaken in pursuance of the CSR policy.
- To institute a transparent monitoring mechanism for implementation of the CSR projects or programs or activities undertaken by the company.
- To monitor the CSR policy of the company time to time.

### 3. Question

DEF Traders Ltd. is incorporated as a small company. State with reference to the relevant legal provisions whether it is required to set up a Corporate Social Responsibility Committee ?

Answer

According to Section 135 of the Companies Act, 2013, only the following companies are required to constitute a Corporate Social Responsibility Committee which in the immediately preceding financial year have: (a) Net worth of `500 crore or more; or

(b) Turnover of `1000 crore or more; or

(c) Net profit of `5 crore or more

A small company is defined in section 2(85) of the Companies Act, 2013 to mean a company, other than a public company whose:

(a) Paid up share capital does not exceed `50 Lakh or such higher amount as may be prescribed which shall not be more than `10 crore and

(b) Turnover of which as per profit and loss account for the immediately preceding financial year does not exceed `2 crore or such higher amount as may be prescribed which shall not be more than `100 crore As DEF Traders Ltd. is incorporated as small company, it does not meet the criteria specified in section 135 of the Companies Act, 2013 and would, therefore not be required to constitute a Corporate Social Responsibility Committee.

#### 4. Question

Mind-Game Ltd., is a subsidiary company of Mind-Guru Ltd. Mind-Game attracts the provisions of section 135 of the Companies Act, 2013 and it has minimum average obligation to spend Corporate Social Responsibility (CSR) amount of `15 crore during each of the preceding 5 years. In this connection, Board of directors need your expert views on the following matters :

- (i) What is the meaning of “impact assessment” ?
- (ii) Whether impact assessment is required to be undertaken by all the companies ?
- (iii) Who can conduct impact assessment ?

Answer

- (i) The impact assessment is exercise to assess the social impact of a particular project. Impact assessment intends to evaluate "social return on investment". Impact assessment is the exercise of taking a retroactive view on the Corporate Social Responsibility (CSR) activities completed by the entity. Impact assessment is seemingly another step to encourage companies to take considered decisions before deploying CSR

amounts and assess the impacts of their investments to capture the impact being generated by them. This shall not only serve as feedback for companies to plan and better allocate resources, but shall also deepen the impact of CSR.

(ii) Since impact assessment is cost-intensive and time consuming, the idea is to obligate only certain classes of companies which have large amounts of spending and have completed their large CSR projects. Accordingly, Rule 8(3) of the Companies (Corporate Social Responsibilities Policy), 2014 requires following class of companies to conduct impact assessment:

- companies with minimum average CSR obligation of Rs. 10 crore or more in the immediately preceding three (3) financial years; and
- having CSR projects of outlays of minimum Rs. 1 crore and which have been completed not less than 1 year before undertaking impact assessment.

(iii) The impact assessment shall be conducted by an independent agency.

### 5. Question

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 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?

### Answer

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.

### 6. Question

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.

Answer

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. There is no provision for carry forward of excess expenditure to the next year(s). The words used in the section are 'at least'. Therefore, any expenditure over 2% would be considered as voluntary higher spending.

### 7. Question

Explain the concept of 'CSR' (Corporate Social Responsibility) as introduced by the Companies Act, 2013. Examining the provisions of the Act, answer the following:

- (i) Which companies are required to constitute CSR Committee?
- (ii) Which companies are excluded from the requirements of the provisions of the Act in relation to CSR committee?
- (iii) What is the minimum contribution the companies are required to make towards CSR?

Answer

- i) Every company including its holding or subsidiary, and a foreign company defined under section 2(42) of the Companies Act, 2013 having its branch office or project office in India, having a) net worth of rupees 500 crore or more, or
- b) turnover of rupees 1,000 crore or more or
- c) a net profit of rupees 5 crore or more.
- ii) Every company which ceases to be a company as per section 135(1) of the Act for three consecutive financial years (1) shall not be required to constitute a CSR Committee, and
- (2) is not required to comply with the provisions as per section 135.



## CHAPTER 18 – ANNUAL REPORT

### 1. Question

Signing of the Board's Report can be done by any one of the directors and be filed within 60 days of AGM.

### Answer

As per Section 134(6) of the Companies Act, 2013, the Board's report and any annexures thereto, shall be signed by the Chairperson of the company if he is authorised by the Board and where he is not so authorised, 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.

Section 137(1) of the Companies Act, 2013 provides that a copy of financial statements, including consolidated financial statement, if any, along with all documents required to be attached to such financial statements under the Companies Act, 2013 duly adopted at the annual general meeting or adjourned annual general meeting of the company shall be filed with the Registrar of Companies within 30 days of annual general meeting or adjourned annual general meeting along with the prescribed fees. The Board's Report has to be attached to the financial statements.

However, where the financial statements are not adopted at annual general meeting or adjourned annual general meeting, such unadopted financial statements along with the required documents shall be filed with the Registrar within thirty days of the date of annual general meeting.

In case of a One Person Company 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, shall be filed within one hundred eighty days from the closure of the financial year.

### 2. Question

XYZ Limited did not prepare its Balance Sheet as at 31st March, 2015 and the Profit and Loss Account for the year ended on that date in conformity with some of the mandatory Accounting Standards issued by the Institute of Chartered Accountants of India. You are required to state with reference to the provisions of the Companies Act, 2013, the responsibilities of directors and statutory auditor of the company in this regard.

### Answer

The Board of Directors is also required under Section 134 of the Companies Act, 2013 to include a Directors Responsibility Statement indicating therein that in the preparation of the financial statements the applicable

accounting standards had been followed along with proper explanation relating to material departures, if any. If such person (as above referred) fails to take all reasonable steps to secure compliance by the company, as respects any accounts laid before the company in general meeting, with the provisions of this section and with the other requirements of this Act as to the matters to be stated in the accounts, he shall, in respect of each offence, be punishable with imprisonment for a term which may extend to 1 year, or with fine not less than ₹ 50,000 but which may extend to ₹ 5,00,000 or with both.

## 19. KEY MANAGERIAL PERSONNEL AND THEIR REMUNERATION

### 1. Question

On 4th September, 2018 Varun was appointed as Managing Director of Astha Ltd. by the Board of directors subject to the approval of the members at the next general meeting. On 10th September, 2018 Varun in the capacity of managing director executed an agreement with Shabeer to purchase some machines. On 3rd October, 2018 members in the general meeting did not approve the appointment of Varun. Later on company refuses to accept delivery of machines from Shabeer on the ground that agreement was executed by Varun whose appointment is not approved by the members. Is refusal of company valid on the said ground? Examine.

### Answer

According to section 196 (5) of Companies Act, 2013 where an appointment of a managing director, wholetime director or manager is not approved by the company at a general meeting, any act done by him before such approval shall not be deemed to be invalid.

In accordance with above stated provision in the present case the contention of refusing to accept delivery of goods on the grounds that the appointment of managing director was not approved at the general meeting and agreement was signed prior to general meeting and after appointment by the Board does not stand valid.

### 2. Question

SRM Ltd. has paid ₹15 lakh as an insurance premium on behalf of its Company Secretary and Managing Director for indemnifying any of them against any liability in respect of any negligence, default, misfeasance, breach of duty or breach of trust for which they may be guilty in relation to the company. Can the company pay such insurance premium? Discuss referring to the provisions of the Companies Act, 2013.

**Answer**

According to section 197(13) of Companies Act, 2013 where any insurance is taken by a company on behalf of its managing director, whole-time director, manager, Chief Executive Officer, Chief Financial Officer or Company Secretary for indemnifying any of them against any liability in respect of any negligence, default, misfeasance, breach of duty or breach of trust for which they may be guilty in relation to the company, the premium paid on such insurance shall not be treated as part of the remuneration payable to any such personnel. Further it has been provided that if such person is proved to be guilty, the premium paid on such insurance shall be treated as part of the remuneration.

In accordance with above stated provision in the present case the company can pay the insurance premium of Rs. 15.00 lacs for company secretary and managing director for indemnifying any of them against any liability in respect of any negligence, default, misfeasance, breach of duty or breach of trust for which they may be guilty in relation to the company, and such shall not be treated as remuneration.

**3. Question**

'S' is a member of Institute of a Company Secretaries of India. He has defaulted in payment of annual subscription and his name is removed from the Register of Members by ICSI on 31st December, 2018.

- (i) Can he be appointed as "Company Secretary" by 'M' Ltd. with a paid up share capital of `10 crore on 1st January, 2019 ?
- (ii) If M Ltd. has paid up share capital of `2 crore and it has appointed 'S' as a company secretary on part time basis, is it valid ?

**Answer**

Section 2(24) of the Companies Act, 2013 defines "company secretary" or "secretary" means a company secretary as defined in clause (c) of sub-section (1) of section 2 of the Company Secretaries Act, 1980 who is appointed by a company to perform the functions of a company secretary under this Act.

According to clause (c) of Sub-section (1) of section 2 of the Company Secretaries Act, 1980, a company secretary means a person who is a member of the Institute of Company Secretaries of India.

Therefore, 'Company Secretary' means a person who is a member of the Institute of Company Secretaries of India (ICSI) and who is appointed by a company to perform the function of a company secretary. The functions of company secretary have been detailed in section 205 of the Companies Act, 2013.

- (i) No, S cannot be appointed as a company secretary as his name is removed from the register of members by ICSI on 31.12.2018 itself.
- (ii) There is no mandatory requirement to appoint company secretary for a company having paid up share capital of less than five crore rupees. No, S cannot be appointed as a company secretary of M Ltd. even if the paid up capital of the company is Rs. 2 crores as his name is removed from the register of members by ICSI. Therefore, appointment of S as Company Secretary is not valid.

#### 4. Question

ABC Corporation Ltd. has no managerial person acting in professional capacity. During the current financial year the company sustained a loss. How can the company remunerate their non-professional managerial personnel in such a situation ?

#### Answer

The ABC Corporation Ltd. can remunerate their non-professional managerial personnel according to the following provisions of Section 197 of the Companies Act, 2013 read with Schedule V of the Act, which provides as under:

- (a) If in any financial year, a company has no profits or its profits are inadequate, the company shall not pay by way of remuneration any sum exclusive of sitting fees to its directors including any managing or whole- time director or manager except in accordance with the provisions of Schedule V.
- (b) In cases where Schedule V is applicable on grounds of no profits or inadequate profits, any provision relating to the remuneration of any director which purports to increase or has the effect of increasing the amount thereof, whether the provision be contained in Company's memorandum or articles, or in an agreement entered into by it, or in any resolution passed by the company in general meeting or its Board, shall not have any effect unless such increase is in accordance with the conditions specified in that schedule.

In case a company has inadequate profits/no profits in any financial year, no amount shall be payable by way of remuneration except if these provisions are followed:

Where the effective capital is Limit of Yearly remuneration payable shall not exceed

|                                                  |              |                                    |
|--------------------------------------------------|--------------|------------------------------------|
| Negative or less than Rs.5 crore                 | Rs.60 lakhs  | Rs.5 crores or above but less than |
| Rs.100 crores                                    | Rs.84 lakhs  |                                    |
| Rs.100 crore and above but less than Rs.50 crore | Rs.120 lakhs |                                    |

Rs.250 crores and above      Rs. 120 lakhs plus 0.01% of the effective  
capital in excess of Rs. 250 crore

Provided that the remuneration in excess of above limits may be paid if the resolution passed by the shareholders is a special resolution.

### 5. Question

Jackson is a prospective candidate for the post of Managing Director of Tirubuvani Sugars Ltd. Unfortunately, his proposed appointment could not satisfy the conditions of Schedule V of the Companies Act, 2013. Discuss if any other option is available with the company to appoint him as the Managing Director of the company.

### Answer

In terms of Section 196 and 201 of the Companies Act, 2013 in case the provisions of Schedule V of the Companies Act, 2013 are not fulfilled by company, w.e.t. appointment of a Managing Director, the terms and conditions of such appointment and remuneration payable be approved by the Board of Directors at a meeting which shall be subject to approval by a resolution at the next general meeting of the company and by the Central Government. Further an application seeking approval to the appointment of a managing director as aforesaid shall be made to the Central Government, in E-Form No. MR.2, within a period of ninety days from the date of such appointment.

As per Section 201 of Companies Act, 2013, before such application is made to the Central Government, there shall be issued by or on behalf of the company a general notice to the members indicating nature of application proposed to be made. The general notice shall be published in at least once in a newspaper in the principal language of the district in which, registered office of the Company is situated and at least once in English in an English newspaper circulating in that district.

The copies of the notices, together with a certificate by the company as to the due publication therefore, shall be attached to the application.

Therefore, Tirubuvani Sugars Limited will file an application seeking approval to the appointment of Jackson as Managing Director to the Central Government in e-Form No. MR-2.

### 6. Question

Board of directors of Yes No Ltd. proposes to appoint Arjun as managing director. Arjun has recently celebrated his 71st birthday. Arjun has spent his entire career in power sector and will be a strategic fit for Yes No Ltd. Company Secretary of the company suggests that Arjun can only be appointed through special resolution. Do you agree with the Company Secretary ?

**Answer**

As per Section 196(3) of the Companies Act, 2013, no company shall appoint or continue the employment of any person as managing director, whole-time director or manager who is below the age of 21 years or has attained the age of 70 years.

However, appointment of a person who has attained the age of 70 years may be made by passing a special resolution in which case the explanatory statement annexed to the notice for such motion shall indicate the justification for appointing such person.

Further, where no such special resolution is passed but votes cast in favour of the motion exceed the votes, if any, cast against the motion and the Central Government is satisfied, on an application made by the Board, that such appointment is most beneficial to the company, the appointment of the person who has attained the age of seventy years may be made.

**Accordingly, in the given case, appointment of Mr. Arjun in Yes No Ltd. can also be made by an application made by the Board of Directors to the Central Government. Therefore, advice of Company Secretary is not correct.**

**7. Question**

Logic Ltd. wants to remove Radhika, Company Secretary of the Company. Explain the procedure.

**Answer**

A Company Secretary can be removed or dismissed like any other employees of the organization. Since he/she is appointed by Board, the Board of Directors of a company has absolute discretion to remove a Company Secretary or to terminate his/her services at any time for any reason or without any reason. However, principles of natural justice like show cause notice, hearing, reasoned order etc. must be followed.

A Company Secretary can be removed in accordance with the terms of appointment and the Board can record the same. The procedure for removal of Company Secretary is:

- Convene a Board Meeting after giving notice to all the Directors of the company as per section 173 of the Companies Act, 2013, place the matter of removal of the Company Secretary and pass a resolution to the effect. The resolution shall state the effective date of termination of the Company Secretary.



- The Company shall thereafter serve a notice of termination to the Company Secretary. The period of notice shall be governed by the employment letter or in its absence the termination policy of the Company.
- The Company Secretary shall cease to be in office from the date of expiry of notice.
- Company is required to file e-Form DIR-12 within 30 days of cessation with the Registrar of Companies together with requisite filing fees along with evidence of Cessation. - Inform the stock exchange, if the company is listed.
- Make entries in the Register maintained for recording the particulars of Company Secretaries under section 170 of the Companies Act, 2013.
- Issue a general public notice, if it is so warranted, according to size and nature of the company.

**Thus, Logic Ltd. has to follow above procedures to remove Radhika, Company Secretary of the company.**

### 8. Question

X has been appointed as the Managing Director of XYZ Limited. The company does not have any other whole time directors. The terms and conditions of his appointment are as under :

- (i) Remuneration amounting to 5% of the net profits of the company.
- (ii) A fees of `1,00,000 per annum towards actuarial services, even though X does not hold any professional qualification in actuarial science.
- (iii) Sitting fees of `50,000 for every meeting of the Board or the Committee thereof attended by X. The Company had defaulted in the repayment of interest and principal on term loans borrowed from banks, which default is still subsisting.

Suggest, whether the above remuneration is in line with the provisions of the Companies Act, if not also explain the remedial action required from the Company.

### Answer

The overall limit of managerial remuneration as indicated under section 197 of the Companies Act, 2013 read with Schedule V of the Act inter alia includes the following conditions:

- Except with the approval of the Company in general meeting by a special resolution, the remuneration payable to any one managing director shall not exceed five percent of the net profit of the Company.
- The remuneration shall not include any fee for the services rendered by such director in other capacity if the services are of professional nature and in the opinion of the Nomination and Remuneration committee or

the Board of Directors, as the case may be, the director possesses the requisite qualification for the practice of the profession.

- A director may receive remuneration by way of fee for attending meetings of the Board or Committee thereof or for any other purpose whatsoever as may be decided by the Board.

As per Rule 4 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014, a Company may pay a sitting fee to a director which shall not exceed one lakh rupees per meeting of the Board or Committee thereof.

Section 197(2) of the Companies Act, 2013 provides that the percentages aforesaid shall be exclusive of sitting fees payable to Directors. Therefore, the sitting fees of Rs. 50,000 for every meeting of the board or Committee thereof, is not included in the overall remuneration.

Further, considering the above provisions, the fee payable for actuarial services is to be added to Mr. X remuneration as he does not hold any professional qualification to practice actuarial science.

In this case, the overall remuneration exceeds the limit of 5% of net profits as provided in the section. Therefore, the company has to get the approval of the shareholders by way of a special resolution in terms of Section 197 of the Act.

As the company has defaulted in payment of interest and principal on term loans to the banks, the company should also take a prior approval of the banks for paying the above remuneration to Mr. X before passing the special resolution by shareholders.

### 9. Question

X, a finance expert having experience of 30 years. XYZ Ltd wants to appoint him as a Chief Financial Officer at a salary which is more than that of director of the company. State whether the limits on managerial remuneration under section 197 of the Companies Act, 2013 and Schedule-V apply to X.

### Answer

Section 197 of the Companies Act, 2013 contains certain limits with respect to remuneration of Directors including managing director and whole time director and manager. However, these limits do not apply to other key managerial personnel i.e. the Chief Executive Officer, the Chief Financial Officer and the Company Secretary. Similarly, Schedule V contains certain limits with respect to remuneration of managing director, whole time director and manager. However, these limits also do not apply to other key managerial personnel, i.e. the Chief Executive Officer, the Chief Financial Officer and the Company Secretary.

Thus, the limits on managerial remuneration as contained in section 197 of the Companies Act, 2013 and schedule V shall not apply to Mr. X.

#### 10. Question

Naman is Managing Director, Manan is Whole-time Director and Ojas is Director of the Apollo Ltd. Naman has resigned from his position with effect from 31st March, 2022 due to his ill health. Doctor has advised him to take complete bed rest. Manan and Ojas also tendered resignation with effect from 1st April, 2022 pursuant to a slump sale of one of the undertakings of Apollo Ltd. to Nimbo Ltd. (a group company of Apollo Ltd.). Consequently, Manan and Ojas were appointed as Whole-time Director and Director respectively in Nimbo Ltd. w.e.f. 1 June, 2022. Manan and Ojas individually made an application to the Board of Apollo Ltd. for compensation for loss of office. When, Naman came to know about the said applications by Manan and Ojas demanding compensation, he also asked for the compensation. Who will be eligible for such compensation as per the provisions of the Companies Act, 2013 ?

#### Answer

Section 202 of the Companies Act, 2013 provides that company may make payment of compensation for any loss of office. Such compensation is payable to Managing Director (MD) or Whole-time Director (WTD) or Manager of company. However, no compensation shall be payable to any other director for loss of office. As per section 202(2), compensation is not payable in following circumstances:

- Where Managing Director or Whole time Director or Manager resigns his office in view of reconstruction of the company or amalgamation with other company and he is appointed as Managing Director or Whole time Director or Manager of the reconstituted company or body corporate resulting from such amalgamation. In the present case, since Manan has taken up directorship in Nimbo Ltd. Pursuant to a reconstruction within the group companies (in the form of slump sale of one of the undertakings to another group company), he cannot ask for the compensation for loss of office.
- Ojas is not eligible for compensation at all as per the provisions of section 202 of the Companies Act, 2013.
- When a director (MD/WTD) resigns from his office at his / her will (i.e., otherwise than because of the reconstruction or amalgamation) he cannot claim compensation for the loss of office. Accordingly, Naman also cannot claim any compensation for the loss of his office as he has resigned voluntarily.

Advise the Board of directors of Clean Ltd. regarding appointment in the following scenarios :

#### 11. Question

- (i) Can Ram who is already director of Clean Ltd. be appointed as Chief Executive Officer (CEO) or Chief Financial Officer (CFO) of the same company ?
- (ii) Is it possible to appoint Ram as Managing director of Clean Ltd. when Shyam is already a Manager of the same company ?

**Answer**

- (i) "Chief Executive Officer" means an officer of company, who has been designated as such by company - section 2(18) of the Companies Act, 2013. "Chief Financial Officer" means a person appointed as the Chief Financial Officer of company - section 2(19) of the Companies Act, 2013. The Companies Act, 2013 does not prohibit appointment of director as CEO or CFO of same company but company has to comply with other provisions of Act (i.e. disclosure of interest, office of profit or place etc.).

Further as per Regulation 77 of Table F, a director can be appointed as Chief Executive Officer, Manager, Company Secretary or Chief Financial Officer of same company. Accordingly, Ram who is the director of Clean Ltd. can be appointed as CEO or CFO in the same company.

- (ii) As per section 196(1) of the Companies Act, 2013 a company can appoint either Managing Director or Manager, but not both at the same time. Accordingly, Ram cannot be appointed as Managing Director of Clean Ltd. in case where Shyam is already appointed as a Manager of Clean Ltd. in view of section 196(1) of the Companies Act, 2013.

**12. Question**

Mr. 'X' was appointed as Managing Director for life by the Articles of Association of a private company incorporated on 1st June, 2020. Examine in this connection, can 'X' be appointed for life as Managing Director?

**Answer****Appointment of Managing Director for life:**

- As per Sec. 196(2) of the Companies Act, 2013, no company shall appoint or re-appoint any person as its managing director, whole-time director or manager for a term exceeding 5 years at a time.
- No concession or exception is allowed by the Act to private companies.
- In the present case, Mr. 'X' was appointed as Managing Director for life by the Articles of Association of a private company incorporated on 1st June, 2020.

**Conclusion:** Mr. 'X' cannot be appointed as Managing Director for life in a private company.

**13. Question**

M/s. Star Health Specialties Ltd. owns a multi-specialty Hospital in Chennai. Dr Hamilton a practising heart surgeon has been appointed by the company as its non-executive ordinary director and it wants to pay him fee on case to case basis for surgery performed on the patient at the hospital, A question has arisen whether payment of such fees to him would amount to payment of managerial remuneration to a director subject to any restriction under the Companies Act, 2013. Advise the company which seeks to ensure that the same does not contravene any provisions of the Companies Act, 2013.

**Answer****Remuneration for services rendered by any director in other capacity:**

- Proviso to Sec. 197(4) of Companies Act, 2013 states that remuneration for services rendered by any director in other capacity shall not be so included in managerial remuneration if (a) the services rendered are of a professional nature; and (b) in the opinion of the Nomination and Remuneration Committee, if the company is covered u/s 178(1), or the BOD in other cases, the director possesses the requisite qualification for the practice of the profession.
- In the present case, Dr. Hamilton has been appointed as a director and company wants to pay him fee on case to case basis for surgery performed on the patient at the hospital.

**Conclusion:** Company can pay Dr. Hamilton, fee for surgeries performed, as a professional fee which shall not be construed as a Managerial Remuneration under the Act.

**14. Question**

A public company wants to include the following clause in its articles of association: "Each director shall be entitled to be paid out of the funds of the company for attending meetings of the board or a committee thereof including adjourned meeting such sum as sitting fees as shall be determined from time to time by the directors but not exceeding a sum of 1,50,000 for each such meeting to be attended by the director". You are required to advise the company as to the validity of such a clause and the correct legal position.

**Answer****Limit of Sitting Fees payable:**

- Sec.197(5) of the Companies Act, 2013 provides that a director may receive remuneration by way of fee for attending the Board/Committee meetings or for any other purpose as may be decided by the Board, provided that the amount of such fees shall not exceed the amount as may be prescribed.
- As per Rule 4 of the Companies (Appointment and Remuneration of Managerial personnel) Rules, 2014, the amount of sitting fees payable to a director for attending meetings of the Board or committees thereof may be such as may be decided by the Board of directors or the Remuneration Committee thereof which shall not exceed the sum of Rs. 1 lakh per meeting of the Board or committee thereof. **Conclusion:** Proposed Clause as to sitting fees payable is not in order as sitting fees in excess of Rs.1 lac is not permitted under the law. Further, sitting fees cannot be paid for adjourned meeting as it is considered as continuation of original meeting.

### 15. Question

Mr. Doubtful was appointed as Managing Director of Carefree Industries Ltd. for a period of five years with effect from 1.4.2018 on a salary of 12 lakhs per annum with other perquisites. The Board of directors of the company on coming to know of certain questionable transactions, terminated the services of the Managing Director from 1.3.2021. Mr. Doubtful termed his removal as illegal and claimed compensation from the company. Meanwhile the company paid a sum of 5 lakhs on ad hoc basis to Mr. Doubtful pending settlement of his dues. Discuss whether:

- (i) The company is bound to pay compensation to Mr. Doubtful and, if so, how much.
- (ii) The company can recover the amount of 5 lakhs paid on the ground that Mr. Doubtful is not entitled to any compensation, because he is guilty of corrupt practice.

### Answer

#### Compensation for loss of office of managing director:

- As per Sec. 202 of the Companies Act, 2013, a company may make payment to a managing director or whole-time director or manager, but not to any other director, by way of compensation for loss of office, or as consideration for retirement from office or in connection with such loss or retirement.
- However, compensation is not payable where the director has been guilty of fraud or breach of trust in relation to, or of gross negligence in or gross mismanagement of, the conduct of the affairs of the company or any subsidiary company or holding company thereof.

- Amount of compensation shall not exceed the remuneration which he would have earned if he had been in office for the remainder of his term or for 3 years, whichever is shorter.
- In the present case, Mr. Doubtful, Managing Director was appointed for a period of 5 years on w.e.f. 1.4.2018 on a salary of 12 lakhs p.a. Due to some allegation against him, his services were terminated from 1.3.2021 and company paid a sum of 5 lakhs on ad hoc basis to him pending settlement of his dues. Mr. Doubtful termed his removal as illegal and claimed compensation from the company.

**Conclusion:** Based on the provisions of Sec. 202, following conclusions may be drawn:

- (i) Company is not liable to pay any compensation, if it was found that director is guilty of fraud or breach of trust or gross negligence in the conduct of affairs of the company. Otherwise, compensation payable by the company would be 25 Lacs calculated at the rate of 12 Lacs p.a. for unexpired term of 25 months.
- (ii) As far as ad hoc payment of Rs. 5 Lacs is concerned, it will not be possible for the company to recover the amount from Mr. Doubtful in view of the decision in case of Bell vs. Lever Bros. where it was observed that a director was not legally bound to disclose any breach of his fiduciary obligations so as to give the company an opportunity to dismiss him.

## 16. Question

Examine the following situations in the light of the relevant provision of the Companies Act, 2013:

- (1) The Board of Director of ABC Ltd. declared interim dividend for the current financial year 2020-2021. The proposal of dividend declaration was accepted at the meeting and dividend was declared. However, due to some reasons, the company failed to pay the dividend to the shareholders within prescribed period. Mr. futuristic, a director on the board of this company, had offer of appointment in other company PQR Ltd. He wishes to take up the post in the appointed company. Discuss on the appointment of Mr. Futuristic in PQR Ltd.
- (2) Mr. Talented was a director in a holding company and also in its subsidiary company. He was drawing his managerial remuneration from both the companies in his capacity as a director. It was brought to the attention of the company that he cannot draw remuneration from both the companies because of virtue of relationship as a holding and subsidiary company. Discuss on the legality of drawing managerial remuneration by Mr. Talented from both the companies.

**Answer**

(1) Section 164 talks about the disqualifications of directors under the Companies Act, 2013. In specific, sub-section (2)(b) of the said section, no person who is or has been a director of a company which has failed to pay any dividend declared and such failure continues for one year or more, shall not be eligible to be re-appointed as a director of that company or appointed in other company for a period of 5 years from the date on which the defaulted company fails to do so. Mr. futuristic, a director on the board of ABC Ltd., had offer of appointment in other company PQR Ltd. He wishes to take up the post in the other company. In view of above stated provision, since Mr. futuristic was a director in a company which failed to pay dividend even after 1 year of declaration and so was a defaulted company. Therefore, he cannot be appointed in PQR Ltd.

(2) Any director who is in receipt of any commission from the company and who is managing or Whole time director of the company shall not be disqualified from receiving any remuneration of commission from any holding or subsidiary company of such company subject to its disclosure by the company in the Board's report as per section 197(14) of the Companies Act. However subject to the provisions of sections I to IV of schedule V of the Companies Act, 2013, a managerial person shall draw remuneration from one/both companies, provided that the total remuneration drawn from the companies does not exceed the higher maximum limit admissible from any one of the companies of which he is managerial person. Accordingly, Mr. Talented is advised to check that it does not exceed the higher maximum limit admissible in any of the companies i.e. either holding or subsidiary.

### 17. Question

Innovative Intelligence Limited, a listed Company proposes to pay the following managerial remuneration:

(i) Commission at the rate of five percent of the net profits to its Managing Director, Mr. Sharma. (ii) The directors other than the Managing Director are proposed to be paid a monthly remuneration of ₹ 2,50,000 and also commission at the rate of one percent of the net profits of the Company subject to the condition that overall remuneration payable to ordinary directors including monthly remuneration payable to each of them shall not exceed two percent of the net profits of the Company. The commission is to be distributed equally among all the directors.

You are required to examine with reference to the provisions of the Companies Act, 2013 the validity of the above proposals

### Answer



Innovative Intelligence Limited, a listed company, being managed by a Managing Director proposes to pay the following managerial remuneration:

**(i) Commission at the rate of 5% of the net profits to its Managing Director, Mr. Sharma:** Clause (i) of the Second Proviso to Section 197(1), provides that except with the approval of the company in general meeting by a special resolution, the remuneration payable to any one managing director or whole time director or manager shall not exceed 5% of the net profits of the company and if there is more than one such director then remuneration shall not exceed 10% of the net profits to all such directors and manager taken together.

In the present case, since the Innovative Intelligence Limited is being managed by a Managing Director, the commission proposed to be paid at the rate of 5% of the net profit to Mr. Sharma, the Managing Director, is permissible and no approval of company in general meeting is required. Therefore, said proposal is valid.

**(ii)** The Clause (ii) of the Second Proviso to Section 197(1) provides that except with the approval of the company in general meeting by a special resolution, the remuneration payable to directors who are neither managing directors nor whole time directors shall not exceed- **(A)** 1% of the net profits of the company, if there is a managing or whole-time director or manager; **(B)** 3% of the net profits in any other case.

In the present case, the maximum remuneration allowed to directors other than managing or whole-time director is 1% of the net profits of the company because the company is managed by a managing director. Hence, if the company wants to fix directors' remuneration at not more than 2% of the net profits of the company, the approval of the company in general meeting is required by passing a special resolution. Therefore the said proposal is not valid and can be said to be valid, only if made in compliance with the said requirement.

### 18. Question

There are Four Directors in Shine Paper Ltd. Mr. Madhav being the director in station, has been authorized to draw and endorse Cheque or other negotiable instruments on account of the company and also to direct registration of transfer of shares and signing the share certificates etc. Evaluate whether he will be treated as managing director of the company? Also recommend the procedure of appointment

### Answer

**Managing Director [Section 2(54)]:** Section 2(54) of the Companies Act, 2013 defines a "Managing Director" as a director who is entrusted with substantial powers of management of the affairs of the company by:

- a) virtue of articles of a company, or
- b) an agreement with the company, or
- c) a resolution passed in its general meeting, or by its Board of Directors, and includes a director occupying the position of the managing director, by whatever name called.

**Explanation** to Section 2 (54) clarifies that substantial powers of the management shall not be deemed to include the power to do such administrative acts of a routine nature when so authorised by the Board such as:

- (i) the power to affix the common seal of the company to any document or
- (ii) to draw and endorse any cheque on the account of the company in any bank or (iii) to draw and endorse any negotiable instrument or
- (iv) to sign any certificate of share or
- (v) to direct registration of transfer of any share.

In the instant case, Mr. Madhav, a director in Shine Paper Limited has been authorized to draw and endorse cheque or other negotiable instruments on account of the company and also to direct registration of transfer of shares and signing the share certificates etc.

Hence, according to explanation to section 2(54), Mr. Madhav will not be treated as managing director of the company as he is authorized to do administrative acts of a routine nature.

#### **Procedure of appointment of a managing director [Section 196(4)]**

**Approval by Board and Shareholders:** Subject to the provisions of section 197 and Schedule V, a managing director shall be appointed, and the terms and conditions of such appointment and remuneration payable be approved by the Board of Directors at a meeting. The terms and conditions and remuneration

- (i) approved by Board of Directors at a meeting and
- (ii) approval of shareholders by a resolution at the next general meeting of the company.

**Approval By central Government:** In case Such appointment is at variance to the conditions specified in Part 1 of Schedule V, the appointment shall be approved by the central government

**Inclusion of Certain Disclosures in Notice:** The notice convening Board or general meeting for considering such appointment shall include the terms and conditions of such appointment, remuneration payable and such other matters including interest, of a director or directors in such appointments, if any.

**Filing Return :** A return in the prescribed form (Form No. MR.1) along with the prescribed fee shall be filed with the Registrar within sixty days of such appointment.

#### **19. Question**

Mr. Xavier, a Director of Mac Ltd., was appointed on 1st April, 2017. One of the terms of appointment was that if the company had no profits in a particular year, he will be paid remuneration in accordance with Schedule V. For the financial year ended 31 st March, 2018, the company suffered heavy losses. The company was not in a position to pay any remuneration but he was paid Rs. 60 lacs for the year, as paid to other directors. The effective capital of the company is Rs.100 crores.

Besides, Mr. Young was appointed as Managing Director in the Company. He was appointed for the term of 5 years with effect from 1.4.2014 on a salary of Rs. 12 lakh per annum. The Board of Directors of the company on coming to know of certain questionable transactions, terminated the services of the Mr. Young from 1.3.2018. Mr. Young termed his removal as illegal and claimed compensation from the company. Integrating the given facts in terms of the relevant provisions of the Companies Act, 2013, Examine the following situations:

(i) Validity of the payment of remuneration to Mr. Xavier. Compensation paid, if any, to Mr. Young.

**Answer:**

(i) Under Section II of Part II of Schedule V to the Companies Act, 2013, the remuneration payable to a managerial personnel is linked to the effective capital of the company. Where in any financial year during the currency of tenure of a managerial person, a company has no profits or its profits are inadequate, it may, without Central Government approval, pay remuneration to the managerial person not exceeding Rs. 120 Lakh in the year in case the effective capital of the company is Rs. 100 crore to 250 crore. The limit will be doubled if approved by the members by special resolution and further if the appointment is for a part of the financial year the remuneration will be pro-rated.

From the foregoing provisions contained in schedule V to the Companies Act, 2013 the payment of Rs. 60 Lac in the year as remuneration to Mr. Xavier is valid in case he accepts it, as under the said schedule he is entitled to a remuneration of Rs. 120 Lakh in the year.

(ii) According to Section 202 of the Companies Act, 2013, compensation can be paid only to a Managing, Whole-time Director or Manager. Amount of compensation cannot exceed the remuneration which he would have earned if he would have been in the office for the unexpired term of his office or for 3 years whichever is shorter. No compensation shall be paid, if the director has been found guilty of fraud or breach of trust or gross negligence in the conduct of the affairs of the company.

In light of the above provisions of law, the company is not liable to pay any compensation to Mr. Young, if he has been found guilty of fraud or breach of trust or gross negligence in the conduct of affairs of the company. But, it is not proper on the part of the company to withhold the payment of compensation on the basis of mere allegations. The compensation payable by the company to Mr. Young would be Rs.

13 Lacs calculated at the rate of Rs. 12 Lacs per annum for unexpired term of 13 months.

## 20. Question

Mr. Gopi is the Managing Director of LGB Limited. The Company wants to vacate the post of Managing Director on March 31, 2018 and appoint Mr. Lakshmikanth in place of Mr. Gopi due to hands on experience and better track records. The tenure of appointment of Mr.

Gopi is upto 30th June, 2022 with the condition that he will get compensation in case of early vacation of his office due to the Company's requirements. Mr. Gopi was drawing following remuneration during the last five financial years:

| Financial Year | Remuneration(Rs. in Lakhs) |
|----------------|----------------------------|
| 2013-14        | 30                         |
| 2014-15        | 35                         |
| 2015-16        | 40                         |
| 2016-17        | 45                         |
| 2017-18        | 50                         |

Mr. Gopi approaches you to know the amount of compensation he will be eligible to get from LGB Limited, as per the provisions' of the Companies Act, 2013. Advise.

What will be your answer if a person is only an ordinary director but neither the Managing Director nor a whole time director nor a manager of the Company?

**Answer:**

Section 202 of the Companies Act, 2013 provides the provisions for compensation for loss of office of managing or whole-time director or manager as under:

- (i) A company may make payment to a managing or whole-time director or manager, but not to any other director, by way of compensation for loss of office, or as consideration for retirement from office or in connection with such loss or retirement.
- (ii) The compensation payable to such managing director or whole-time director or manager shall not exceed the remuneration he would have earned if he would have been in office for the remainder of his term or three years, whichever is shorter, calculated on the basis of the average remuneration earned by him during a period of three years immediately preceding the date on which he ceased to hold such office, or where he held the office of less than three years, then for such shorter period.

In the light of the provisions as stated above, the following will be taken into consideration while calculating the amount of compensation to be paid to Mr. Gopi:

Average remuneration earned by Mr. Gopi during a period of 3 years (i.e. 2015-16, 2016-17 and 2017-18) immediately preceding the date on which he ceased to hold office:  $[(40+45+50)/3] = \text{Rs. } 45 \text{ Lakhs}$ . Remainder time period left to be served in office has Mr. Gopi not been removed, 1st April, 2018 to 30th June, 2022, 4 years.

Thus, Mr. Gopi will be paid compensation for Maximum 3 years.

**Amount of Compensation:** The maximum amount of compensation that Mr. Gopi will be eligible to get from LGB Limited is Rs.45 lakhs for 3 years = Rs. 135 lakhs.

**In case of an ordinary director:** Further, if a person is only an ordinary director but neither the Managing Director nor a whole time director nor a manager of the company, he shall not be eligible to get compensation for loss of office, or as consideration for retirement from office or in connection with such loss or retirement.

## 21. Question

Best Limited, with a paid up capital of Rs. 400 crore proposes to pay the following remuneration :

- (i) Commission @ 5% of net profit to Mr. X, Managing Director;
- (ii) Directors under than Mr. X are proposed to be paid monthly remuneration of Rs. 60,000/- and also commission @ 1% of net profit of the Company, subject to the condition that overall remuneration payable to each of them shall not exceed 2% of net profit of the Company. The commission is to be distributed equally amongst all the Directors.
- (iii) The Company also proposes to pay suitable additional remuneration to Mr. Careful, a Director for professional services rendered as Lawyer whenever such services are utilized. **Answer:**

Section 197 of the companies provides a way to pay managerial remuneration in case of company's having adequate profits. As per the section, the total managerial remuneration payable by a public company, to its directors, including managing director and whole-time director, and its manager in respect of any financial year shall not exceed eleven per cent. of the net profits of that company for that financial year computed in the manner laid down in section 198 of the Companies Act, 2013.

In case where there is any one managing director; or whole-time director or manager shall not exceed five per cent. of the net profits of the company and there is more than one such director remuneration shall not exceed ten per cent. of the net profits to all such directors and manager taken together.

Moreover, any remuneration for services rendered by any such director which are of a professional nature shall not be included in the managerial remuneration. Further, a director may receive remuneration by way of a fee for each meeting of the board, or a committee thereof attended by him.

As per the facts given in the questions, following are the answers :

- (i) Commission at the rate of 5% P.A to Mr. X its Managing Director can be paid as per the provisions of the Companies Act, 2013.
- (ii) To other directors a monthly fixed remuneration of Rs. 60,000 along with a commission of 1% on net profits of the company with a limit that maximum remuneration per director shall not exceed 2% of net

profits. This remuneration can be paid if this remuneration along with the remuneration paid above does not exceed the maximum limit of managerial remuneration of 11% under the Act.

- (iii) Additional remuneration paid to Mr. Careful for professional services rendered by him. This remuneration can be paid by the company as it is outside the purview of managerial remuneration. Here as per the fact, it is assumed that the company is earning profits and hence is paying remuneration to its managerial personnel under section 197 of the Act.

## 22. Question

The Article of Association of a listed company have fixed payment of sitting fee for each meeting of Directors subject to maximum of Rs. 30,000. In view of the increased responsibilities of independent directors of listed companies, the company proposes to increase the sitting fee to Rs. 45,000 per meeting. Advise the company about the requirement under the Companies Act, 2013 to give effect to the proposal.

### Answer:

Section 197(5) of the Companies Act, 2013 provides that a director may receive remuneration by way of fee for attending the Board / Committee meetings or for any other purpose as may be decided by the Board, provided that the amount of such fees shall not exceed the amount as may be prescribed. The Central Government through rules prescribed that the amount of sitting fees payable to a director attending meetings of the Board or committees thereof may be decided by the Board of Directors or the Remuneration Committee thereof which shall not exceed the sum of Rs. 1 lac per meeting of the Board or committee thereof. Further, the Board may decide different sitting fee payable to independent and non-dependent directors other than whole-time directors.

From the above, it is clear that fee to independent directors can be increased from Rs. 30,000 to Rs. 45,000 per meeting by passing a resolution in board meeting and altering the Articles of Association by passing special resolution.

## 23. Question

The International Technologies Limited, a listed company, being managed by a Managing Director proposes to pay the following managerial remuneration:

- (i) Commission at the rate of five percent of the net profits to its Managing Director, Mr. Kunal.
- (ii) The directors other than the Managing Director are proposed to be paid monthly remuneration of Rs. 50,000 and also commission at the rate of one percent of net profits of the company subject to the condition that overall remuneration payable to ordinary directors including monthly remuneration payable to each of them shall not exceed two percent of the net profits of the company. The commission is to be distributed equally among all the directors.

- (iii) The company also proposes to pay suitable additional remuneration to Mr. Bhim, a director, for professional services rendered as legal counsel, whenever such services are utilized.

You are required to examine with reference to the provisions of the Companies Act, 2013 the validity of the above proposals.

### Answer

International Technologies Limited, a listed company, being managed by a Managing Director proposes to pay the following managerial remuneration:

- (i) **Commission at the rate of 5% of the net profits to its Managing Director,**

Mr. Kunal: Part(i) of the second proviso to section 197(1), provides that except with the approval of the company in general meeting by a special resolution, the remuneration payable to any one managing director; or whole time director or manager shall not exceed 5 % of the net profits of the company and if there is more than one such director then remuneration shall not exceed 10 % of the net profits to all such directors and manager taken together.

In the present case, since the International Technologies Limited is being managed by a Managing Director, the commission at the rate of 5% of the net profit to Mr. Kunal, the Managing Director is allowed and no approval of company in general meeting is required.

- (i) The directors other than the Managing Director are proposed to be paid monthly remuneration of Rs. 50,000 and also commission at the rate of 1 % of net profits of the company subject to the condition that overall remuneration payable to ordinary directors including monthly remuneration payable to each of them shall not exceed 2 % of the net profits of the company:

Part (ii) of the second proviso to section 197(1) provides that except with the approval of the company in general meeting by a special resolution, the remuneration payable to directors who are neither managing directors nor whole time directors shall not exceed-

- (A) 1% of the net profits of the company, if there is a managing or whole time director or manager; (B) 3% of the net profits in any other case.

In the present case, the maximum remuneration allowed for directors other than managing or whole time director is 1% of the net profits of the company because the company is having a managing director also.

Hence, if the company wants to fix their remuneration at not more than 2% of the net profits of the company, the approval of the company in general meeting is required by a special resolution.

- (ii) The company also proposes to pay suitable additional remuneration to Mr. Bhim, a director, for professional services rendered as legal counsel, whenever such services are utilized:
- (1) According to section 197(4), the remuneration payable to the directors of a company, including any managing or whole-time director or manager, shall be determined, in accordance with and subject to the provisions of this section, either
  - (i) by the articles of the company, or
  - (ii) by a resolution or,
  - (iii) if the articles so require, by a special resolution, passed by the company in general meeting, and
- (2) the remuneration payable to a director determined aforesaid shall be inclusive of the remuneration payable to him for the services rendered by him in any other capacity.
- (3) Any remuneration for services rendered by any such director in other capacity shall not be so included if—
  - (i) the services rendered are of a professional nature; and
  - (ii) in the opinion of the Nomination and Remuneration Committee, if the company is covered under section 178(1), or the Board of Directors in other cases, the director possesses the requisite qualification for the practice of the profession.

Hence, in the present case, the additional remuneration to Mr. Bhim, a director for professional services rendered as legal counsel will not be included in the maximum managerial remuneration and is allowed but opinion of Nomination and Remuneration Committee is to be obtained.

Also, the International Technologies Limited (a listed company) shall disclose in the Board's report, the ratio of the remuneration of each director to the median employee's remuneration and such other details as may be prescribed under the Companies (Appointment and Remuneration of Managerial personnel) Rules, 2014.

#### 24. Question

Aster limited (a listed company) deals in business of trading of raw materials to the manufacturer of the garments. The company was running in losses for past two years. The Board of the company appointed Mr. C with good experience in cost management to overcome the said situation, as whole time director. He was of 70 years on the date of his appointment i.e. 18.12.2019.



Following were the relevant extracts from latest audited financial statements (as on 31st March, 2019);

- (a) Authorised Share capital is Rs. 390 crore, out of which paid up share capital was Rs. 215 crore; company was in process of FPO, hence had balance of Rs. 15 crore in share application money account.
- (b) Balance of reserve and surplus was Rs. 170 crore, out of which Rs. 150 crore was general reserve and Rs. 20 crore was on accounts of revaluation reserve.
- (c) Outstanding amount for long term loans was Rs. 200 crore
- (d) Company had investment of Rs. 40 crore at book value; due to economic slowdown same is not liquid investment
- (e) Accumulated losses were of Rs. 10 crore.

In the light of the given facts and figures, evaluate the given situations in terms of the relevant provisions of the Companies Act, 2013-

- (i) Validity of appointment of Mr. C, as managerial person in office of whole time director in Aster Limited.
- (ii) Compute the Effective Capital of Aster Limited for payment of Managerial Remuneration.
- (iii) Since Aster Ltd. was running in losses, state the maximum amount of remuneration to be paid on yearly basis to each Managerial Person.

#### Answer

- (i) As per section 196(3) of the Companies Act, 2013, no company shall appoint or continue the employment of any person as managing director, whole-time director or manager who is below the age of twenty-one years or has attained the age of seventy years, unless that appointment of a person who has attained the age of seventy years may be made by passing a special resolution(SR) with explanatory statement annexed to the notice for such an appointment of person.

Where no such special resolution is passed but votes cast in favour of the motion exceed the votes, if any, cast against the motion and the Central Government is satisfied, on an application made by the Board, that such appointment is most beneficial to the company, the appointment of the person who has attained the age of seventy years may be made.

Therefore, appointment of Mr. C as whole time director in the Aster Ltd. being of 70 years, is valid in compliance to above legal provisions.

- (ii) As per section II of Part II of Schedule V to the Companies Act 2013, "effective capital" means the aggregate of the paid-up share

- (iii) capital (excluding share application money or advances against shares); amount, if any, for the time being standing to the credit of share premium account; reserves and surplus (excluding revaluation reserve); long-term loans and deposits repayable after one year (excluding working capital loans, overdrafts, interest due on loans unless funded, bank guarantee, etc., and other short-term arrangements) as reduced by the aggregate of any investments (except in case of investment by an investment company
- (iv) whose principal business is acquisition of shares, stock, debentures or other securities), accumulated losses and preliminary expenses not written off. According to the particulars given:

| Particulars                                                        | Amounts (in Crore) |
|--------------------------------------------------------------------|--------------------|
| Paid up share capital (Excluding share application money) (215-15) | Rs.200             |
| General Reserve (Excluding Revaluation Reserve) (170-20)           | Rs.150             |
| Long term loans                                                    | Rs.200             |
| Less; Investments (40) and Accumulated losses (10)                 | Rs.50              |
| Effective Capital                                                  | Rs.500             |

- (v) As per Section II of Part II of Schedule V to the Companies Act 2013, in case of no or inadequate profits, if effective capital of company is Rs. 250 crore or more then, yearly remuneration per person payable shall not exceed by Rs. 120 lakh plus 0.01% of the effective capital in excess of Rs. 250 crore.

The maximum remuneration that may be paid to each managerial person will be  $[120 \text{ lakh} + (0.01\% \times 250 \text{ cr})] = 122.5 \text{ lakh}$ .

Provided that the remuneration in excess of above limits may be paid if the resolution passed by the shareholders is a special resolution.

## 25. Question

Mr. X, a Director of Sunrise Limited, was appointed on 1st April, 2016, one of the terms of appointment was that in the absence of adequacy of profits or if the company had no profits in a particular year, he will be paid remuneration in accordance with Schedule V. The company suffered heavy losses during the financial year ended 31st March, 2018. The company was not in a position to pay any remuneration, but he was paid Rs. 50 Lakhs for the year, as paid to other directors.

The effective capital of the company is Rs. 150 crores. Referring to provisions of the Companies Act, 2013, examine the validity of the above payment of remuneration to Mr. X.

**Answer**

Under Section II of Part II of Schedule V to the Companies Act, 2013, the remuneration payable to managerial personnel is linked to the effective capital of the company. According to section 197(3) of the Companies Act, 2013, where in any financial year during the currency of tenure of a managerial person, a company has no profits or its profits are inadequate, it may, pay remuneration to the managerial person not exceeding Rs. 120 Lakh in the year in case the effective capital of the company is between Rs.100 crore to Rs. 250 crore. However, the remuneration in excess of Rs. 120 Lakhs may be paid if the resolution passed by the shareholders is a special resolution.

From the foregoing provisions contained in schedule V to the Companies Act, 2013 the payment of Rs. 50 Lakh in the year as remuneration to Mr. X is valid in case he accepts it, as under the said schedule he is entitled to a remuneration of Rs. 120 Lakh in the year and his terms of appointment

**26. Question**

Mr. Doubtful was appointed as Managing Director of Carefree Industries Ltd. for a period of five years with effect from 1.4.2016 on a salary of Rs. 12 lakhs per annum with other perquisites. The Board of Directors of the company came to know about certain questionable transactions entered into by Mr. Doubtful and therefore, terminated his services as Managing Director from 1.3.2019. Mr. Doubtful termed his removal as illegal and claimed compensation from the company. Meanwhile the company paid a sum of Rs. 5 lakhs on ad hoc basis to Mr. Doubtful pending settlement of his dues. Discuss whether:

(i) The company is bound to pay compensation to Mr. Doubtful and, if so, how much.

(ii) The company can recover the amount of Rs. 5 lakhs paid on the ground that Mr. Doubtful is not entitled to any compensation, because he is guided by corrupt practices.

**Answer:**

According to Section 202 of the Companies Act, 2013, compensation can be paid only to a Managing Director, Whole-time Director or Manager. Amount of compensation cannot exceed the remuneration which he would have earned if he would have been in the office for the unexpired term of his office or for 3 years whichever is shorter. No compensation shall be paid, if the director has been found guilty of fraud or breach of trust or gross negligence in the conduct of the affairs of the company.

In light of the above provisions of law, the company is not liable to pay any compensation to Mr. Doubtful, if he has been found guilty of fraud or breach of trust or gross negligence in the conduct of affairs of the company.

But, it is not proper on the part of the company to withhold the payment of compensation on the basis of mere allegations. The compensation payable by the company to Mr. Doubtful would be Rs. 25 Lacs calculated at the rate of Rs. 12 Lacs per annum for unexpired term of 25 months.

Regarding ad-hoc payment of Rs. 5 Lacs, it will not be possible for the company to recover the amount from Mr. Doubtful in view of the decision in case of Bell vs. Lever Bros. (1932) AC 161 where it was observed that a director was not legally bound to disclose any breach of his fiduciary obligations so as to give the company an opportunity to dismiss him. In that case the Managing Director was initially removed by paying him compensation and later on it was discovered that he had been guilty of breaches of duty and corrupt practices and that he could have been removed without compensation

### 27. Question

International Technologies Limited, a listed company, being managed by a Managing Director proposes to pay the following managerial remuneration:

- (i) Commission at the rate of five percent of the net profits to its Managing Director, Mr. Kamal.
- (ii) The directors other than the Managing Director are proposed to be paid monthly remuneration of Rs. 50,000 and also commission at the rate of one percent of net profits of the company subject to the condition that overall remuneration payable to ordinary directors including monthly remuneration payable to each of them shall not exceed two percent of the net profits of the company. The commission is to be distributed equally among all the directors.
- (iii) The company also proposes to pay suitable additional remuneration to Mr. Bhatt, a director, for professional services rendered as software engineer, whenever such services are utilized. You are required to examine with reference to the provisions of the Companies Act, 2013 the validity of the above proposals.

### Answer:

International Technologies Limited, a listed company, being managed by a Managing Director proposes to pay the following managerial remuneration:

- (i) Commission at the rate of 5% of the net profits to its Managing Director, Mr. Kamal: Part (i) of the Second Proviso to Section 197(1), provides that except with the approval of the company in general meeting by a special resolution, the remuneration payable to any one managing director or whole time director or manager shall not exceed 5% of the net profits of the company and if there is more than one such

director then remuneration shall not exceed 10% of the net profits to all such directors and manager taken together.

In the present case, since the International Technologies Limited is being managed by a Managing Director, the commission at the rate of 5% of the net profit to Mr. Kamal, the Managing Director is allowed and no approval of company in general meeting is required.

- (ii) The directors other than the Managing Director are proposed to be paid monthly remuneration of Rs. 50,000 and also commission at the rate of 1 % of net profits of the company subject to the condition that overall remuneration payable to ordinary directors including monthly remuneration payable to each of them shall not exceed 2% of the net profits of the company:

Part (ii) of the Second Proviso to Section 197(1) provides that except with the approval of the company in general meeting by a special resolution, the remuneration payable to directors who are neither managing directors nor whole time directors shall not exceed-

- (A) 1% of the net profits of the company, if there is a managing or whole-time director or manager;  
(B) 3% of the net profits in any other case.

In the present case, the maximum remuneration allowed to directors other than managing or wholetime director is 1% of the net profits of the company because the company is managed by a managing director. Hence, if the company wants to fix directors' remuneration at not more than 2% of the net profits of the company, the approval of the company in general meeting is required by passing a special resolution.

- (iii) The company also proposes to pay suitable additional remuneration to Mr. Bhatt, a director, for professional services to be rendered by him as software engineer, whenever such services are utilized by the company:

- (1) According to section 197(4), the remuneration payable to the directors of a company, including any managing or whole-time director or manager, shall be determined, in accordance with and subject to the provisions of this section, either

- (i) by the articles of the company, or
- (ii) by a resolution or,
- (iii) if the articles so require, by a special resolution, passed by the company in general meeting, and

- (2) the remuneration payable to a director determined aforesaid shall be inclusive of the remuneration payable to him for the services rendered by him in any other capacity.
- (3) Any remuneration for services rendered by any such director in other capacity shall not be so included if—
  - (i) the services rendered are of a professional nature; and
  - (ii) in the opinion of the Nomination and Remuneration Committee, if the company is covered under sub-section (1) of section 178, or the Board of Directors in other cases, the director possesses the requisite qualification for the practice of the profession.

Hence, in the present case, the additional remuneration payable to Mr. Bhatt, a director, for professional services rendered by him as software engineer will not be included in the maximum managerial remuneration. Accordingly, such additional remuneration shall be allowed but opinion of Nomination and Remuneration Committee needs to be obtained.

(4) Also, the International Technologies Limited (a listed company) shall disclose in the Board's report, the ratio of the remuneration of each director to the median employee's remuneration and such other details as are prescribed under Rule 5 of the Companies (Appointment and Remuneration of Managerial personnel) Rules, 2014.

## 28. Question

Mr. AMIT is the Managing Director of ANJ Limited, which is a non-government public company. The directors of CHH Limited decided to appoint Mr. AMIT as the Managing Director of the company, even though Mr. AMIT decided not to vacate his place of office of Managing Director of ANJ Limited. A notice for a Board meeting specifying a resolution containing the proposal of appointment of Mr. AMIT was served to all the eligible directors of CHH Limited. Out of eight directors of the company, six directors attended the meeting and out of them four directors gave consent to the resolution, one director voted against the said appointment and another director abstained from voting. The Board of Directors seek your opinion whether Mr. AMIT can be appointed as the Managing Director, of the company in this situation. Referring to the applicable provisions of the Companies Act, 2013, advise them

## Answer

Appointment of Key Managerial Personnel

As per Section 203(3) of the Companies Act, 2013, a whole-time key managerial personnel shall not hold office in more than one company except in its subsidiary company at the same time.

However, the above sub-Section (3), shall not disentitle a key managerial personnel from being a director of any company with the permission of the Board.

Provided also that a company may appoint or employ a person as its managing director, if he is the managing director or manager of one, and of not more than one, other company and such appointment or employment is made or approved by a resolution passed at a meeting of the Board with the consent of all the directors present at the meeting and of which meeting, and of the resolution to be moved thereat, specific notice has been given to all the directors then in India.

In the given case, unanimous consensus of all the directors present at the meeting was lacking. Hence, Mr. Amit cannot be appointed as a Managing Director of CHH Limited.



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