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MOST IMPORTANT QUESTIONS FOR CA INTER CORPORATE & OTHER LAWS

CHAPTER 2 – INCORPORATION OF COMPANY

Five Star	Four Star	3 Star	2 Star
✓ Section 19 - Subsidiary company not to hold shares in its holding company	✓ Section 8 - Formulation of companies with charitable objects, etc. ✓ Section 3 read with rule 3 – One Person Company	✓ Section 20 – Service of Documents ✓ Section 22 – Execution of deeds	✓ Section 13 – Alteration of MOA ✓ Section 16 – Rectification of name of company ✓ Section 3A – Minimum number of members

Important sections

- ✓ Section 19 - Subsidiary company not to hold shares in its holding company
- ✓ Section 8 - Formulation of companies with charitable objects, etc.
- ✓ Section 3 read with rule 3 – One Person Company
- ✓ Section 20 – Service of Documents
- ✓ Section 22 – Execution of deeds
- ✓ Section 16 – Rectification of name of company
- ✓ Section 13 – Alteration of MOA
- ✓ Section 3A – Minimum number of members
- ✓ Section 7 – Order of Tribunal (Miscellaneous)
- ✓ Section 5 – Entrenchment Clause (Miscellaneous)
- ✓ Section 2 (69) – Promoter (Miscellaneous)

Subsidiary company not to hold shares in its holding company

Question 1A

AB Limited issued equity shares of Rs. 1,00,000 (10000 shares of Rs. 10 each) on 01.04.2020 which have been fully subscribed whereby XY Limited holds 4000 shares and PQ Limited holds 2000 shares in AB Limited. AB Limited is also holding 20% equity shares of RS Limited before the date of issue of equity shares stated above. RS Limited controls the composition of Board of Directors of XY Limited and PQ Limited from 01.08.2020. Examine with relevant provisions of the Companies Act, 2013:

- (i) Whether AB Limited is a subsidiary of RS Limited?
- (ii) Whether AB Limited can hold shares of RS Limited?
- (iii) Whether AB Limited can vote at Annual General Meeting of RS Limited held on 30.09.2020?

Answer

This given problem is based on sub-clause (87) of Clause 2 read with section 19 of the Companies Act, 2013.

As per sub-clause (87) of Clause 2 of the Companies Act, 2013 "subsidiary company" or "subsidiary", in relation to any other company (i.e., the holding company), means a company in which the holding company—

- (i) controls the composition of the Board of Directors; or
- (ii) exercises or controls more than one-half of the total voting power either at its own or together with one or more of its subsidiary companies.

For the purposes of this clause, Explanation is given providing that a company shall be deemed to be a subsidiary company of the holding company even if the control referred to in point (i) or point (ii) above, is of another subsidiary company of the holding company.

Whereas Section 19 provides that, no company shall, hold any shares in its holding company and no holding company shall allot or transfer its shares to any of its subsidiary companies and any such allotment or transfer of shares of company to its subsidiary company shall be void.

Provided that nothing in this sub-section shall apply to a case where the subsidiary company is a shareholder even before it became a subsidiary company of the holding company.

Here in the instant case, AB Ltd. issued 10,000 equity shares on 1.4.2020 whereby XY Ltd. & PQ Ltd. Holds 4000 & 2000 shares respectively in AB Ltd., Considering 1 share = 1 vote, XY Ltd. and PQ Ltd. together holds more than one-half (50%) of the total voting power. Therefore, AB Ltd. will be subsidiary to XY Ltd. & PQ Ltd. from 1.4.2020.

Whereas AB Ltd. is already holding 20% equity shares of RS Ltd. before the date of issue of equity shares i.e., 1.4.2020.

Further, RS Ltd. controls the composition of Board of Directors of XY Ltd. and PQ Ltd. from 01.08.2020. In the light of sub-clause (87) of Clause 2, RS Ltd. is a holding company of XY Ltd. and PQ Ltd. (Subsidiary companies).

Following are the answers to the questions:

- (i) **Yes.** In this case AB Ltd. shall be deemed to be a subsidiary company of the holding company (RS Ltd.) as RS Ltd. controls the composition of subsidiary companies XY Ltd. & PQ Ltd. as per explanation to sub-clause (87) of Clause 2.
- (ii) **Yes.** In this case AB Limited is a subsidiary of RS Limited as AB Ltd. was holding 20% of equity shares of RS Ltd. even before it became a subsidiary company of the RS Ltd. (i.e. on 01 08.2020), according to the exception to section 19.
- (iii) **No.** The subsidiary company shall have a right to vote at a meeting of the holding company only in respect of the shares held by it as a legal representative or as a trustee but not where the subsidiary company is a shareholder even before it became a subsidiary company of the holding company. Therefore, AB Ltd. cannot vote at AGM of RS Ltd. held on 30.9.2020.

Question 1B

S Ltd acquired 10% paid up share capital of H Ltd on 15th March 2017. H Ltd acquired 55% paid up share capital of S Ltd on 10th March 2018. H Ltd. on 25th September, 2020 decided to issue bonus shares in the ratio of 1:1 to the existing shareholders. Accordingly, bonus shares were allotted to S Ltd. Examine under the provisions of the Companies Act, 2013 and decide

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

Answer

Provision same as above

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

Therefore -

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

Question 1C

S Ltd. is a company in which H Ltd. is holding 60% of its voting power. One of the shareholders of H Ltd. made a charitable trust and donated his 10% shares in H Ltd. And Rs.50 crores to the trust. He appoints S Ltd. as the trustee. All the assets of the trust are held in the name of S Ltd. Can a subsidiary hold share in its holding company in this way?

Answer

Section 19 – Same as above

Following are the exceptions to the above rule—

- (a) where the subsidiary company holds such shares as the legal representative of a deceased member of the holding company; or
- (b) where the subsidiary company holds such shares as a trustee; or
- (c) where the subsidiary company is a shareholder even before it became a subsidiary company of the holding company but in this case, it will not have a right to vote in the meeting of holding company.

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

Formulation of companies with charitable objects, etc.

Question 2A

A group of individuals intend to form a club namely 'Budding Pilots Flying Club' as limited liability company to impart class room teaching and aircraft flight training to trainee pilots. It was decided to form a limited liability company for charitable purpose under Section 8 of the Companies Act, 2013 for a period of ten years and thereafter the club will be dissolved and the surplus of assets over the liabilities, if any, will be distributed amongst the members as a usual procedure allowed under the Companies Act.

Examine the feasibility of the proposal and advise the promoters considering the provisions of the Companies Act, 2013.

Answer

(a) According to section 8(1) of the Companies Act, 2013, where it is proved to the satisfaction of the Central Government that a person or an association of persons proposed to be registered under this Act as a limited company—

- (a) has in its objects the promotion of commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment or any such other object;
- (b) **intends to apply its profits**, if any, or other income in promoting its objects; and
- (c) **intends to prohibit** the payment of any dividend to its members;

the Central Government may, by issue of licence, allow that person or association of persons to be registered as a limited liability company.

In the instant case, the decision of the group of individuals to form a limited liability company for charitable purpose under section 8 for a period of ten years and thereafter to dissolve the club and to distribute the surplus of assets over the liabilities, if any, amongst the members will not hold good, since there is a restriction as pointed out in point (b) above regarding application of its profits or other income only in promoting its objects.

Further, there is restriction in the application of the surplus assets of such a company in the event of winding up or dissolution of the company as provided in sub-section (9) of Section 8 of the Companies Act, 2013. Therefore, the proposal is not feasible.

Question 2B

State Cricket Club was formed as a Limited Liability Company under Section 8 of the Companies Act, 2013 with the object of promoting cricket by arranging introductory cricket courses at district level and friendly matches. The club has been earning surplus. Of late, the affairs of the company are

conducted fraudulently and dividend was paid to its members. Mr. Cool, a member decided make a complaint with Regulatory Authority to curb the fraudulent activities by cancelling the licence given to the company.

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

Answer

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

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

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

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

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

Question 2C

One of the matters contained in the articles of Dhimaan Foundation, incorporated as a limited company under section 8 of the Companies Act, 2013, was altered by passing a special resolution in its general meeting and thereafter, intimation for the same was given to Registrar of Companies.

However, such alteration in the articles was opposed by Dhvaj & Co., a partnership firm which is its member that there such alteration was not valid.

Advise, as per the provisions of the Companies Act, 2013, whether the contention of Dhvaj & Co. was valid and whether it can be a member in such company?

Answer

According to section 8 of the Companies Act, 2013, a company registered under this section shall not alter the provisions of its memorandum or articles except with the previous approval of the Central Government (the power has been delegated to Registrar of Companies).

Also, a firm may be a member of the company registered under section.

Here, one of the matters of articles of Dhimaan Foundation was altered by passing a special resolution in its general meeting and thereafter, intimation for the same was given to Registrar of Companies.

As per the provisions of the Act, it is necessary to take previous approval of the Registrar of Companies for the same which was not done in the present case and thus the contention of Dhvaj & Co. was valid.

Also, section 8 allows a firm to be a member of such company and hence, Dhvaj & Co. can be its member.

One Person Company

Question 3A

Naveen incorporated a "One Person Company" making his sister Navita as the nominee. Navita is leaving India permanently due to her marriage abroad. Due to this fact, she is withdrawing her consent of nomination in the said One Person Company. Taking into considerations the provisions of the Companies Act, 2013 answer the questions given below.

(A) If Navita is leaving India permanently, is it mandatory for her to withdraw her nomination in the said One Person Company?

(B) If Navita maintained the status of Resident of India after her marriage, then can she continue her nomination in the said One Person Company?

Answer

Only a natural person who is an Indian citizen **WHETHER RESIDENT IN INDIA OR OTHERWISE**

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

In the light of the above provision and facts of the case:

- (a) Navita is not required to withdraw her nomination because now it is not mandatory for nominee or sole member to be resident in India in order to become nominee or sole member of OPC.
- (b) Navita is not required to maintain status of resident in India as per the amended provision of Companies Act, 2013. Therefore she can continue to be nominee of OPC even after her marriage without maintaining the status of resident in India.

Question 3B

Mr. Raja along with his family members is running successfully a trading business. He is capable of developing his ideas and participating in the market place. To achieve this, Mr. Raja formed a single person economic entity in the form of One Person Company with his brother Mr. King as its nominee. On 4th May 2020, Mr. King withdrew his consent as Nominee of the One Person Company. Can he do so under the provisions of the Companies Act, 2013?

Examine whether the following individuals are eligible for being nominated as Nominee of the One Person Company as on 5th May 2020 under the above said Act.

- (i) Mr. Shyam, son of Mr. Raja who is 15 years old as on 5th May 2020.
- (ii) Ms. Devaki an Indian Citizen, sister of Mr. Raja stays in Dubai and India. She stayed in India during the period from 2nd January 2019 to 16th August 2019. Thereafter she left for Dubai and stayed there.
- (iii) Mr. Ashok, an Indian Citizen residing in India who is presently a member of a 'One Person Company'.

Answer

As per section 3 of the Companies Act, 2013, the memorandum of One Person Company (OPC) shall indicate the name of the other person (nominee), who shall, in the event of the subscriber's death or his incapacity to contract, become the member of the company.

The other person (nominee) whose name is given in the memorandum shall give his prior written consent in prescribed

form and the same shall be filed with Registrar of companies at the time of incorporation along with its Memorandum of Association and Articles of Association.

Such other person (nominee) may withdraw his consent in such manner as may be prescribed.

Therefore, in terms of the above law, Mr. King, the nominee, whose name was given in the memorandum, can withdraw his consent as a nominee of the OPC by giving a notice in writing to the sole member and to the One Person Company.

Following are the answers to the second part of the question as regards the eligibility for being nominated as nominee:

- (i) As per the Rule 3 of the Companies (Incorporation) Rules, 2014, no minor shall become member or nominee of the OPC. Therefore, Mr. Shyam, being a minor is not eligible for being nominated as Nominee of the OPC.
- (ii) As per the Rule 3 of the Companies (Incorporation) Rules, 2014, Only a natural person who is an Indian citizen WHETHER RESIDENT IN INDIA (person who stayed in India for a period of not less than 120 days during immediately preceding financial year) OR OTHERWISE
 - shall be eligible to incorporate a OPC;
 - shall be a nominee for the sole member of a OPC.

Here Ms. Devaki being a natural person and Indian citizen is eligible for being nominated as Nominee of the One Person Company even though she is not resident in India during immediately preceding financial year because now it is not mandatory for nominee or sole member to be resident in India in order to become nominee or sole member of OPC.

- (iii) As per the Rule 3 of the Companies (Incorporation) Rules, 2014, a person shall not be a member of more than one OPC at any point of time and the said person shall not be a nominee of more than one OPC. Mr. Ashok, an Indian Citizen residing in India who is a member of an OPC (Not a nominee in any OPC), can be nominated as nominee.

Question 3C

Mr. Aditya had incorporated a one person company on 07.07.2021. Mr. Yash was named as a nominee in the memorandum of the said one person company. Now, Mr. Aditya, considering the perpetual nature of company form of business, desires to appoint ABC Private Limited as a nominee instead of Mr. Yash. Examine with reference to the Companies Act, 2013, whether the proposal of Mr. Aditya to appoint ABC Private Limited as a nominee is valid?

Answer

By taking into account the above provisions, ABC Private Ltd. cannot be appointed as nominee in one person company as only natural persons can be appointed as a nominee. Hence, the proposal of Mr. Aditya to appoint ABC Private Ltd. as a nominee is not valid.

Service of Documents

Question 4A

The Article of Association (AOA) of AB Ltd. provides that documents may be served upon the company only through Speed Post. Suresh dispatches some documents to the company by courier, under certificate of posting. The company did not accept it on the ground that it is in violation of the AOA. As a result, Suresh suffered from loss. Explain with reference to the provisions of the Companies Act, 2013:

- (i) Whether refusal of document by the company is valid?
- (ii) Whether Suresh can claim damages for it?

Answer

Serving of document to Company

In terms of Section 20(1) of the Companies Act, 2013, a document may be served on a company or an officer thereof by sending it to the company or the officer at the registered office of the company by-

- registered post, or
- speed post, or
- courier service, or
- leaving it at its registered office, or
- means of such electronic or other mode as may be prescribed.

In the instant case, Suresh dispatches some document to AB Ltd. by courier whereas the AOA of said company provides that documents may be served upon the company only through Speed Post. AB Ltd. did not accept the documents on the ground that it is in violation of the AOA.

Taking into account the above provision,

(i) Refusal of documents by AB Ltd. is not valid as sending of documents by courier to AB Ltd. is complying with the provisions given under section 20(1) of the Act.

(ii) Since, the AB Ltd. is at fault by not accepting the documents sent by Suresh, YES, he can claim the damages for any loss occurred to him.

Question 4B

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

Decide:

- (i) Whether the contention of Vijay is valid.
- (ii) Will your answer be the same if Vijay remains in London for two months during the notice of the meeting and the meeting held?

Answer

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

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

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

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

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

Execution of deeds

Question 5

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

Answer

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

A deed signed by such an attorney on behalf of the company and under his seal shall bind the company as if it were made under its common seal.

In the present case company has not neither given any written authority nor affixed common seal of the authority letter. It means that Mr. Parag is not legally entitled to execute deeds on behalf of the company. Therefore, deeds executed by him are not binding on the company. Therefore, company can deny its liability as a partner.

Rectification of name of company

Question 6

Aman an engineer has started a new company with the name of Nuts and Bolts Private Limited. He got registered a company with the same name. However, Nuts and Bolts is a registered trademark. After 5 years when the owner of trademark came to know about the same, it filed an application with relevant authority. Can the company be compelled to change its name by the owner of trademark? Can the owner of registered trademark request the company and then company change its name at its discretion?

Answer

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

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

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

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

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

Alteration of MOA

Question 7

Examine the validity of the following different decisions/proposals regarding change of office by A Ltd. under the provisions of the Companies Act, 2013:

- (i) The Registered office is shifted from Thane (Local Limit of Thane District) to Dadar (Local limit of Mumbai District), both places falling within the jurisdiction of the Registrar of Mumbai, by passing a special resolution but without obtaining the approval of the Regional Director.
- (ii) The Registered office is situated in Mumbai, Maharashtra (within the jurisdiction of the Registrar, Mumbai, Maharashtra State) whereas the Corporate Office is situated in Pune, Maharashtra State (within the jurisdiction of the Registrar, Pune). A Ltd. proposes to shift its corporate office from Pune to Mumbai under the authority of a Board resolution.
- (iii) The registered office situated in certain place of a city is proposed to be shifted to another place within the local limits of the same city under the authority of Board Resolution.

Change of Registered Office

Within the same city	Outside the city but within the same state [Section 12 (5)]	One state to another state [Section 13(4)] [Rule 30]	Within same state but different ROC i.e from the jurisdiction of one Registrar to the jurisdiction of another Registrar [Section 12 (5) Proviso] [Rule 28] [Possible only in Tamil Nadu & Maharashtra]
BR at BM	SR [By postal Ballot as per SS2]	SR [By postal Ballot as per SS2]	SR in GM [By postal Ballot as per SS2]
	MGT – 14 to ROC Within 30 days of Passing SR [Section 117 (3)]	MGT – 14 to ROC Within 30 days of Passing SR [Section 117 (3)]	MGT – 14 to ROC Within 30 days of Passing SR [Section 117 (3)]
INC – 22 to ROC Within 30 days of change [Section 12 (4) read with Rule 27]	Application to RD in Form INC 23	Application to RD in Form INC 23	Application to RD in Form INC 23
	Form INC – 26 – Advertisement	Form INC – 28	Form INC – 28
	Form INC – 28	Form INC -22 to both old and new ROC	Form INC -22 to both old and new ROC

Answer

Regarding the validity of Proposals w.r.t change of registered office by A Ltd. in the light of the section 12 of the Companies Act, 2013:

- (i) In the first case, where the Registered office is shifted from Thane to Dadar (one District to another District) falling under jurisdiction of same ROC i.e., Registrar of Mumbai.

As per Section 12 (5) of the Act which deals with the change in registered office outside the local limit from one town or city to another in the same state, may take place by virtue of a special resolution passed by the company. No approval of regional director is required. Accordingly, said proposal is valid.

- (ii) Section 12 talks about shifting of Registered office only, In the second case the corporate office is being shifted from Pune to Mumbai under the authority of Board resolution. Shifting of corporate office under the board resolution is valid.

Note: It may be assumed that corporate office and registered office are same. Then in this case, registered office situated in Mumbai is changed from Mumbai to Pune falling the jurisdiction of different of ROC's in the same State.

In line section 12 (5) of the Act, where a company changes the place of its registered office from the jurisdiction of one Registrar to the jurisdiction of another Registrar within the same State, there such change is to be confirmed by the Regional Director on an application made by the company. Accordingly, the said proposal may be treated as invalid, due to lack of confirmation by regional director of such change.

- (iii) In the third case, change of registered office within the local limits of the same city. Said proposal is valid in terms it has been passed under the authority of Board resolution.

Order of Tribunal

Question 8

Mahima Ltd. was incorporated by furnishing false informations. As per the Companies Act, 2013, state the powers of the Tribunal (NCLT) in this regard.

Answer

Order of the Tribunal: According to section 7(7) of the Companies Act, 2013, where a company has been got incorporated by furnishing 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—

- (a) pass such orders, as it may think fit, for regulation of the management of the company including changes, if any, in its memorandum and articles, in public interest or in the interest of the company and its members and creditors; or
- (b) direct that liability of the members shall be unlimited; or
- (c) direct removal of the name of the company from the register of companies; or
- (d) pass an order for the winding up of the company; or
- (e) pass such other orders as it may deem fit. However before making any order-
 - (i) the company shall be given a reasonable opportunity of being heard in the matter; and
 - (ii) the Tribunal shall take into consideration the transactions entered into by the company, including the obligations, if any, contracted or payment of any liability.

Promoter

Question 9

Mr. Abhi is a Chartered Accountant and MBA by profession, has been appointed as an Executive Director on the Board of XYZ Limited. His job profile includes advising the Board of Directors of the company on various compliance matters, strategies, business plans, and risk matters relating to the company. Keeping in view of above position whether Mr. Abhi can be classified as the Promoter of XYZ Limited? Please examine the same under the provisions of the Companies Act, 2013.

Answer

According to section 2(69) of the Companies Act, 2013, Promoter means a person: -

- (a) Who has been named as such in a prospectus or is identified by the company in the annual return; or
- (b) Who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise; or
- (c) In accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act.

Provided that nothing in sub-clause (c) shall apply to a person who is acting merely in a professional capacity.

As the job profile of Mr. Abhi is only limited to advise the Board of Directors on various compliance matters, strategies, business plans and risk matters relating to business of the company and that too only in a professional capacity, he will not be classified as a Promoter of XYZ Limited.

Entrenchment Clause

Question 10

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

Answer

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

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

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

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

Alteration of MOA

Question 11

Vintage security equipments limited is a manufacturer of CCTV cameras. It has raised Rs. 100 crores through public issue of its equity shares for starting one more unit of CCTV camera manufacturing. It has utilized 10 crores rupees and then it realized that its existing business has no potential for expansion because government has reduced customs duty on import of CCTV camera hence imported cameras from china are cheaper than its own manufacturing. Now it wants to utilize remaining amount in mobile app development business by adding a new object in its memorandum of association.

Does the Companies Act, 2013 allow such change of object? If not then what advise will you give to company. If yes, then give steps to be followed.

Answer

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

(i) the details in respect of such resolution shall also be published in the newspapers (one in English and one in vernacular language) which is in circulation at the place where the registered office of the company is situated and shall also be placed on the website of the company, if any, indicating therein the justification for such change;

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

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

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

Minimum number of members

Question 12

UMC Limited has only 7 shareholders having fully paid-up shares. On 30th April, 2017, all the shares of X (a shareholder of the company) are sold to Y (another shareholder of the company) in an auction by the order of the court. Z, (a shareholder of the company) was in USA for a business trip from January and thus he was not aware of the developments. The company continues to carry on its business thereafter. In December, 2017, the company borrowed a sum of Rs. 5 Lac from the Unique Bank. Later, the company was wound up and the Assets of the company were not sufficient for the payment of its Liabilities. The Bank filed a suit against Y and Z for recovery of the said loan from them. Decide the Liabilities of Y and Z under the provisions of Companies Act, 2013. Would your answer be the same, if the said loan was taken in the month of March, 2017?

Answer

Y is personally liable for loan taken from Unique Bank	<ul style="list-style-type: none"> - because the number of members has reduced below statutory minimum, viz. 7; - since the company continues to carry on business for more than 6 months, viz. after 31.10.2017. - since Y is cognisant of the fact of reduction in number of members; - since loan from Unique Bank was taken by the company after 6 months of the date the number of members was reduced below 7. viz. after 31.10.2017.
Z is not personally liable for loan taken from Unique Bank	<ul style="list-style-type: none"> - since Z was not cognisant of the fact of reduction in number of members, as he was not in India.
Limitation on liability of Y	Y shall be liable only for such of the debts as have been incurred by UMC Limited after a period of 6 months, viz. after 31.10.2017.
Y shall not be personally liable	<ul style="list-style-type: none"> - if the loan was obtained by the company in March, 2017, - since the personal liability u/s 3A arises only for such of the debts as are incurred by the company after a period of 6 months from the date of reduction in number of members below statutory minimum, viz. for such of the debts as have been incurred by UMC Limited after 31.10.2017.