

**Kingfisher Tycoon Vijay Mallya flees India Amid Multi Million Dollar Fraud Charges**

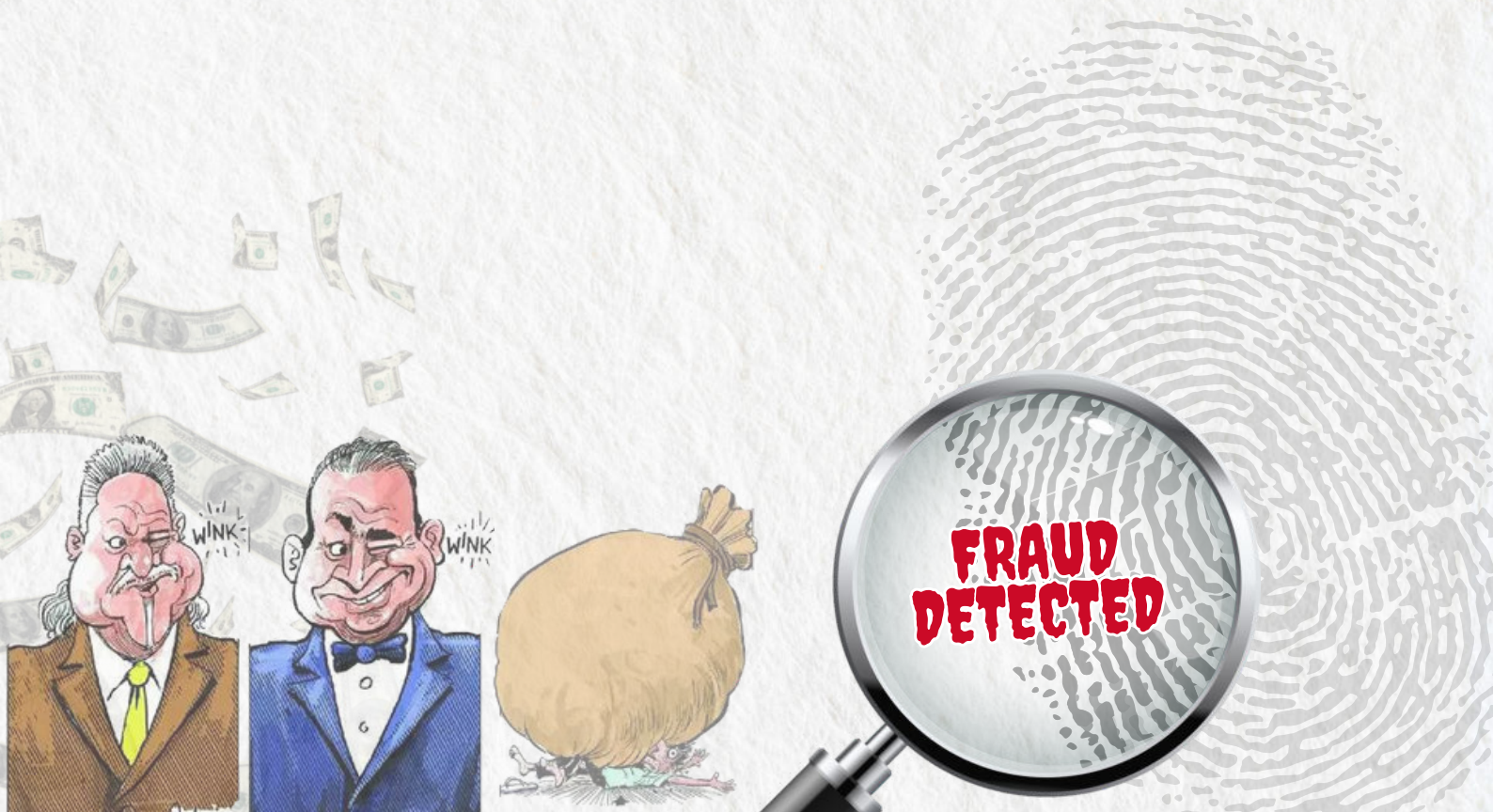
**Nirav Modi escapes India following \$2 Billion Bank Fraud Scandal**

**Satyam Scandal Unveiled: India's Biggest Corporate Fraud exposes \$1.5 Billion Accounting Scam**

**PART A**

# COMPLIANCE MANAGEMENT, AUDIT & DUE DILIGENCE

*CS Muskan Gupta*





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SUMMARISED VERSION (MIND MAP)



### 1. Corporate Compliance Framework

- Company has to comply with a lot of rules and regulations and to ensure compliance with laws rules and regulations is an integral part of any corporate strategy.
- It is the duty of Board of Directors of the company to identify the scope and implication of applicable laws and consider the same while framing and setting the corporate strategies for achieving their target goals and objectives.
- The board of directors of the company need to establish the compliance framework. Effective Corporate Compliance Framework enables the organization to achieve its objectives and goals with compliance of applicable laws and regulations, mitigating the risks associated with and making continuous improvements as required.
- The Compliance Framework is an essential part of our company's system to ensure compliance with applicable laws and regulations. Periodically, an independent professional conducts a secretarial audit to check how well our controls are working and whether we are following all the required laws and regulations because when companies abide by the rules, they gain a good reputation and the trust of customers.
- Company Secretary being the compliance officer plays the most important role in corporate compliance framework.
- However, to ensure an effective approach to compliance, the following steps are to be undertaken by the Board of Directors:
  - a. **Development and maintenance of a compliance program:** Senior management, which includes company secretary, should be involved in developing and further maintaining the compliance programme.
  - b. **Reviewing the effectiveness of compliance system:** Compliance Management System should be reviewed on periodical level to assess effectiveness.
  - c. **Ensuring its updation and relevance:** It should be updated with updating acts, rules and regulations.

## CASE STUDY



### Compliance Management of Maruti Suzuki Limited

Over the years, Maruti Suzuki has been committed to conducting business with compliance and integrity. They have established systems and controls to ensure adherence to increasing regulatory requirements. Quarterly compliance certificates are submitted to the Board, monitoring over 3,500 applicable compliances through an electronic system. The company also conducts 78 compliance health checks covering all facilities. The tracking mechanism was improved for better compliance management.

In FY 20-21, Maruti Suzuki organized a virtual Compliance Month with the theme 'Being Compliant in the New Normal'. The event aimed to educate employees about the importance of following laws, regulations, and company policies for maintaining ethical standards and legal adherence. Panel discussions, training programs, and talks on privacy, cyber security, risk management, and pandemic lessons were held, with valuable insights shared by the Board members and senior leadership, benefiting over 4,000 attendees.

Throughout the year, Maruti Suzuki observed a strong commitment to compliance, resulting in no significant non-compliance with applicable laws and regulations.

## 2. The Governance, Risk management, and Compliance (GRC): Emerging concept of 21st century

The purpose of GRC is to reduce risks and costs as well as duplication of effort.

It integrates these three crucial functions into the processes of every department within an organization.

1. **Governance or Corporate Governance:** Governance means the rules and values of the business through which a business operates. These are the practices incorporated by the Board of Directors that is reflected in the structure of organisation and leads towards achievement of goals. Governance describes the overall management approach through which senior executives direct and control the entire organization.
2. **Risk or Enterprise Risk management:** ERM involves identification of potential threats to the business and elimination of same to reduce the financial impact. Risk management is the set

of processes through which management identifies, analyzes, and, where necessary, responds appropriately to risks that might adversely affect realization of the organization's business objectives.

3. **Compliance or corporate compliance:** Compliance is the set of process that ensures that management and employees are adhering to legal standards while conducting the business. It refers to the adhering with the mandated boundaries, laws and regulations and voluntary boundaries, company's policies, procedures, etc.

### 3. Components of Corporate Compliance Framework

Compliance framework consists of three key components: compliance chart, compliance advisory and compliance board.

1. **Compliance Chart:** The Chart provides an overview of the applicable local, state, central and international laws, regulations and standards relating to a business' operations. The compliance chart also outlines how compliance risk mitigation activities are embedded in business processes. The compliance chart helps businesses meet their obligations to customers, regulators, shareholders, and employees. It reflects compliance calendar and shows the tasks and deadlines each business unit needs to follow to manage compliance risks effectively.
2. **Compliance Advisory:** Advices on compliance of applicable laws and effect of non-compliances.
3. **Compliance Scorecard:** A tool to analyse the position of an organisation in compliance.



**Thoda Extra gyaaannnn..... Swaad Anusaar**  
**(Short Note)**

*Compliance Scorecard:*

- *A compliance scorecard is a tool or system used by organizations to measure and assess their compliance with various laws, regulations, policies, and industry standards. It is a visual representation or dashboard that provides a snapshot of the organization's compliance performance.*
- *The scorecard is not just for reporting; it's a compliance management tool. If there's a compliance violation, it immediately informs a designated person responsible for fixing the issue. This person can start remediation activities right away.*



#### **4. Compliance Chart**

*The Chart provides an overview of the applicable local, state, central and international laws, regulations and standards relating to a business' operations and outlines how compliance risk mitigation activities are embedded in business processes.*

*Compliance chart is a vital part of this framework and a Company Secretary plays a crucial role in preparation of the same.*

*The compliance chart of the company is prepared after considering the operations and the structure of the company, activity of the company, Industry, Sector in which the company operates and laws which are specifically applicable to the company.*

*Broadly, the compliance chart is prepared by considering the following activities:*

- Identification of compliances under applicable Laws, Rules and Regulations*
- Risk Assessment*
- Risk Mitigation*



- d) Compliance Monitoring
- e) Compliance Reporting

## 5. Content of Compliance Chart

A compliance chart should contain all information relating to compliances including-

1. Reference to compliance related laws, rules, regulations and policies and procedures of the company.
2. Statements which provide about compliance obligations and risk arising from such obligations.
3. Risk level of such obligations (critical, medium or low)
4. The business processes or people to which the compliance obligations are linked or on which they have an impact.
5. Compliance risk mitigation policies and compliance risk tracking and monitoring for managing compliance obligations.
6. Ownership of activities and obligations outlined in the chart.
7. To whom and how frequently compliance related findings and results are reported.

## 6. Well-designed Compliance Management System

If a compliance management system is well-designed following are the advantages:

### 1. Compliance Dashboard

The compliance program must have a single enterprise-wide dashboard for all users to track and trend compliance events. This interactive dashboard allows statutory auditors, internal auditors, and compliance officers to make decisions on the organization's compliance status.

### 2. Compliance Policy And Procedure

A well designed compliance management system ensures that policies and procedures are in conformity with ever changing rules and regulations.

### 3. Access To Rules And Regulations

A well-designed compliance management solution must offer capabilities for organization to continuously stay in sync with changing rules and regulations. As soon as there are regulatory changes, various departments should be notified proactively through "email based" collaboration.

#### 4. Compliance Audit

Audits are now a fundamental part of enterprise operations. Audits are no longer limited to annual activities, and companies must have suitable audit capabilities. Having evidence of internal audits is crucial in demonstrating compliance with regulations.

#### 5. Quality Management

Most organizations have internal operational, plant-level or departmental quality initiatives to industry mandates like Six-sigma or ISO 9000. A well-designed compliance management program incorporates and supports ongoing quality initiatives. Most quality practitioners agree that compliance and quality are two sides of the same coin. Therefore, it is critical to ensure that compliance management solution offers support for enterprise-wide quality initiatives.

#### 6. Compliance Training

Compliance programs require evidence of employee training. Inadequate knowledge and incomplete procedures can result in fines and penalties for company directors and officers. To avoid such issues, the compliance office collaborates closely with the organization's legal team to facilitate effective employee training.

#### 7. Compliance Task Management

The company must create plan to manage and report status of all compliance related activities from a centralized data base. Automated updates from the various compliance modules should provide for up-to-the-date status reporting that could be viewed

#### 7. Process of Corporate Compliance Framework



1. Compliance Identification includes identification of laws applicable on the companies on the company in consultation with functional heads. The legal team identifies the rules and regulations and compliances associated with such regulations.
2. Compliance owner is the person responsible for all compliances. Compliance ownership involves identifying the compliances, function wise and individual wise.
3. Ownership is divided into primary owners and secondary owners where primary owners are responsible for the compliance and secondary owners are responsible for supervising the compliance.
4. Sometimes the compliances are handled by persons who are not fully aware of the requirements of the legislations and hence creating appropriate awareness amongst the owners is very important. Thus, compliance awareness involves conduct of meetings, trainings and awareness programs, to create awareness of various compliances amongst the owner of compliances.
5. In Compliance reporting status of compliances and non-compliances is communicate to the concerned annually by the compliance officer. Reporting of non-compliances ensures that appropriate corrective action is being taken by the responsible person in case of non-compliance

**The entire corporate compliance framework revolves around 4 process:**



### **8. Identification of Applicable Laws and Regulations**

- Identification of applicable laws and regulations involves the identification of compliances under various laws rules and regulations applicable on the company.

- There must be as systematic process of identifying compliance obligations of the organisation and their implications for its activities and services.
- For framing a compliance framework company secretary, to identify the compliances & other requirements, has to get familiar with the business model of the company along with the environmental, health and safety aspects, and data security requirements. He has to review the system periodically in light of regulatory updates.
  
- The sources for identification of compliance obligation includes:
  - a. Engagement with management and other key staff in Divisions.
  - b. Laws and regulations.
  - c. Permits, licences or other forms of authorisation.
  - d. Orders, rules or guidance issues by regulatory agencies.
  - e. Judgements of courts or administrative tribunals.
  - f. Treaties, conventions and protocols.
  - g. Internal policies and procedures.
  - h. Voluntary principals or codes of practice.
  - i. Commentary sourced from the public domain.
  - j. Membership of professional groups.
  - k. Subscriptions to relevant information services.
  - l. Attending industry forums and seminars.
  - m. Monitoring regulators (websites, mailing lists, meetings, media).

Company has to comply with following Laws:

1. Labour Laws
2. Fiscal/ Tax Laws
3. Pollution/Environment related Laws
4. Securities Laws
5. Commercial Laws including Intellectual Property Rights Laws
6. Industry Specified Laws
7. Corporate and Economic Laws
8. Cyber Laws which is also known as 'The Information Technology Laws';
9. All other laws affecting the company concerned depending upon the type of industry/activity.



## CASE STUDY

### **In Re Siddarth Gupta (Appellant) v. The Delhi Golf Club Limited & Anr**

*In this matter the Appellant had acquired membership in the Delhi Golf Club Ltd after paying the requisite fees and was enjoying the rights and privileges guaranteed to the members of the Club. Meanwhile, the Appellant got to know that a resolution had been passed in the AGM of the Club wherein the Appellant's membership was cancelled. Consequently, the Appellant filed a Petition against the said resolution in the Delhi High Court.*

*The court ruled that a person's membership can only be cancelled according to the provisions stated in the Club's Memorandum of Association, Articles of Association, and the principles of natural justice. In this case, the appellant was not given any notice or an opportunity to be heard, and the club did not follow the specified procedures for expelling members. As a result, the court declared the resolution invalid and directed the club to reverse it, preserving the appellant's membership.*

## CASE STUDY

### **CCPA fines Cloudbail with Rs 1 Lakh for not complying with mandatory standards prescribed as per the Domestic Pressure Cooker (Quality Control) Order, 2020**

*Cloudbail, a retail company selling pressure cookers on an e-commerce platform, was issued an order for unfair trade practice by selling domestic pressure cookers in violation of mandatory standards prescribed as per the Domestic Pressure Cooker (Quality Control) Order, 2020.*

*In the light of same*

*The Central Consumer Protection Authority (CCPA) has imposed a fine of Rs 1 Lakh for violating the Quality Control Orders and consumer rights.*

*The company has also been asked for the price reimbursement of 1,033 pressure cookers to the consumers and is directed to submit the compliance report within 45 days.*

## 9. Compliance Risk Assessment: Basis for Compliance Management

- Risk assessment should be done with changes in new laws and regulations. It is the process where company identifies the inherent risk of each obligation and categorises them as critical-medium-high-low. On the basis of this a risk mitigation strategy is decided.
- There are two types of risk assessments that can be performed by the company, High Level Risk Assessment and Detailed Risk Assessment.
- To ensure that risk is properly assessed and mitigated, a detailed risk assessment should be undertaken whereas, results from detailed risk assessments are used for high risk assessments. The current and anticipated critical and high compliance risks must be included in the high level risk assessment process.
- Risk Assessment includes:
  1. Identification areas of potential non compliance
  2. Rating the risks
  3. Assessing the outcomes to find the need for training, monitoring, internal controls, detailed reviews and corrective steps
- While considering risk following risk drivers should also be considered:
  1. Legal Effect: Non compliances by the organisation can leads to various penalties, fines, imprisonment, debarment, and seizing the products etc. against the organisation and its officers.
  2. Financial Effect: Low share prices of the securities of the organisation, financial losses and low revenues and lowering the trust of the investors are some of its negative effects.
  3. Business Effect: Shutdown of the factories can affect the business operations of the organisation.
  4. Reputational Effect: Loss in customers' confidence in the brand of the organisation, bad media or social discussion can tarnish the reputation of the organisation.

## 10. Compliance Monitoring and Responsibility Centre Mapping /Allocation

### Compliance Monitoring

- Monitoring enables companies to recognize whether their compliance framework has been implemented in practice and whether it is practicable, responsive, and suitable for the characteristics of the company.

- It means the “oversight” of the company’s operations and activities, both in light of local and binding cross-border regulations and the company’s local and global policies, procedures, and ethical rules.
- A single regulatory compliance check is not sufficient since companies operate in a dynamic environment. Business activities and services can change quickly due to mergers, acquisitions, new partnerships, etc. To stay relevant, risk assessment and monitoring must be reviewed periodically to ensure the compliance framework adapts to changing business conditions.

### **Compliance Ownership**

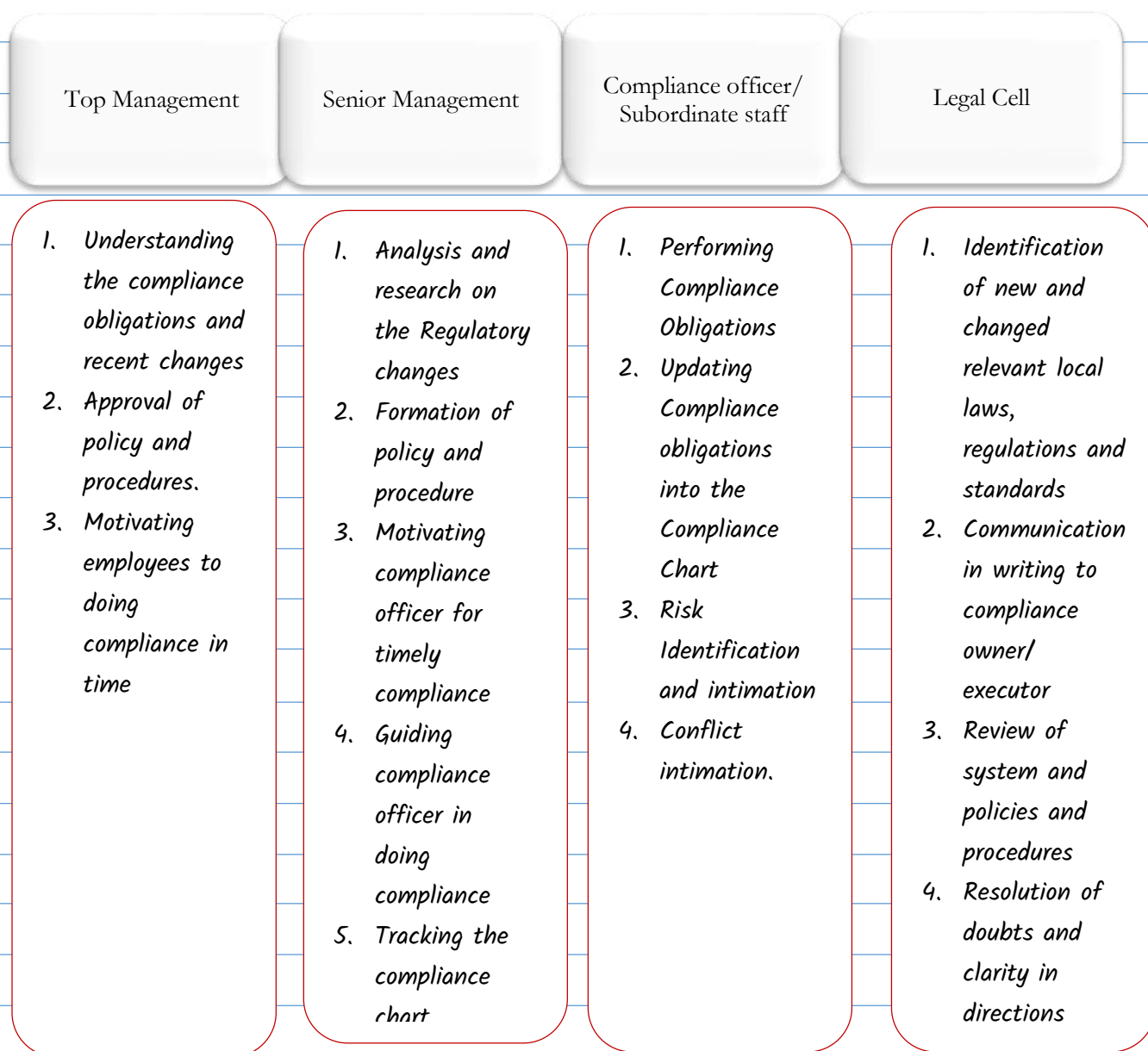
Compliance ownership involves identifying the compliances, function wise and individual wise. Ownership is divided into primary owners and secondary owners where primary owners are responsible for the compliance and secondary owners are responsible for supervising the compliance.

#### **LET’S UNDERSTAND THIS:**

Secretarial Officer /Asst. Company Secretary may be primarily responsible and Group Company Secretary’s responsibility is secondary.



The role of the various level of management for compliance ownership is as following:



## II. Escalation and Compliance Reporting

- Compliance reporting enables Management and the Compliance function to evaluate whether Compliance Risks surpass the Company's risk appetite. It also facilitates communication and discussion of potential Compliance Risks.
- Broadly, there can be two primary types of reporting: **Cyclical Reporting and Incident Reporting**.



- *In Cyclical Reporting, at least quarterly basis, the Compliance officer works with management and other risk functions to provide non-financial risk reporting. However, the Management may require more frequent or other types of Compliance-Risk related reporting.*
- *Under the Incident Reporting the material compliance incidents are reported, which need to be handled through the risk management process. Material compliance incidents are defined as events that have effect on the company's integrity, damaging company reputation, legal or regulatory sanctions, or financial loss, as a result of a failure (or perceived failure) to comply with applicable compliance related laws, regulations and standards.*

**Thoda Extra gyaaannnn..... Swaad Anusaaar**  
**(Short Note)**

ABC Limited, A BSE limited company has made following cyclical reporting arrangements for compliance activities which includes

**Audit & Risk Management Committee:** Quarterly reports on the performance of the compliance programme will be submitted to the Audit and Risk Management Committee. These reports will include a high-level summary of activities by all functions undertaking significant compliance related activities. Separate reports will also be submitted to the Audit and Risk Committee for major noncompliance incidents or emerging compliance issues.

**Annual Certifications:** At the end of each financial year Responsible Officers will be required to provide an assurance that to the best of their knowledge, the ABC Limited has complied with the obligations relevant to their area of responsibility.

**Assurance Maps:** To facilitate quarterly and annual reporting requirements an assurance mapping approach that is consistent with the model.

**Regulatory Reporting:** The regulatory reporting arrangements for compliance activities shall be accounted. The reporting of significant compliance issues which are required by law must be undertaken in accordance with the procedures.



## 12. Creation of Compliance Reporting System

1. all compliances and non-compliances should be properly reported to the concerned authority so that an appropriate action can be taken by the authorities to reduce the compliance risk.

Procedure for Compliance Reporting is as following:

1. Firstly, functional heads should be identified for reporting of various laws. For example - the company secretary would be the functional head for reporting of company law, listing regulations and commercial laws.
2. Each of the functional heads then collect and classify the relevant information from the various units of their department and consolidate it in the form of a report.
3. The report should carry an affirmation from the functional heads that the report is prepared based on the inputs received from the various unit and should provide, specific compliances/ non-compliances.
4. These reports are then forwarded to Company Secretary or managing director.
5. The company secretary would give a brief to the managing director and managing director after consolidating the inputs from company secretary, submit the report to the Board with his signature.
6. The whole process of CCR is contingent on the creation and implementation of comprehensive legal Management Information System (MIS).

## 13. Compliance Risk - Review and Updation

Monitoring of compliance risk is essential to identify if any new risk has arisen and to ensure that risk mitigation activities are working properly. Hence, the plan for monitoring the compliance risk should be documented, reviewed and updated timely.

The entire purpose of review is to identify:

- a. if the plan is still necessary and accurate
- b. if the plan should be combined with another plan or if it should be rescinded
- c. if the plan is up to date with current laws and regulations
- d. if changes are required to improve the effectiveness or clarity of the plan

**Compliance Risk Monitoring plan must include:**

- a) Critical and high Compliance Risks.

- b) *Key Compliance Risk mitigation activities.*
- c) *Routine business transactions to which compliance obligations or risks are associated.*
- d) *Compliance with the laws, regulations and standards included in the chart, including the company values.*
- e) *The implementation /embedding of the Framework and all policies issued by the corporate compliance department.*

**The plan for monitoring must include:**

1. *Concise statements that capture the relevant internal and external compliance obligations and the risks arising from those obligations;*
2. *The business processes to which the compliance obligations are linked or on which they have an impact;*
3. *Specific Compliance Risk mitigation activities for managing the compliance obligations;*
4. *The first line tracking (ongoing tracking as part of the normal course of business activities), second line monitoring (health check performed by the Compliance Function) and third line assurance (independent review performed by internal audit) for efficiency and / or effectiveness of first and second line activities);*
5. *Brief description of how tracking and monitoring activities are performed;*
6. *Frequency of tracking and monitoring activities;*
7. *Recipient(s) of the tracking and monitoring reports*

*The following methodology may be adopted for accessing the compliance mechanism of the company:*

- a) **Risk Assessment:** *Through employee surveys, interviews, and document reviews, a company's culture of ethics and compliance at all levels of the organization is validated. This assessment is done to identify gaps between company's current practices and the regulatory requirements.*
- b) **Program Design/Update:** *This approach can be used to assess the compliance programme and the reporting structure or communication methods in an organisation.*
- c) **Policies and Procedures:** *The company should review and keep updating and enhancing the policies and procedures, including issues of financial reporting, fraud, conflicts of interest, sexual harassment etc.*



- d) **Communication, Training, and Implementation:** This approach involves the communication of the various policies and procedure of the company along with the philosophy behind such policies and training programme on such policies which may help in the adoption of such policies in day-to-day realities and incorporate it into the attitudes and behaviours of the employees of the company.
- e) **Ongoing self-Assessment, Monitoring, and Reporting:** In order to understand that both the intent and letter of the law are still being observed throughout organization and the program and the organization adapt to changing legislation and business conditions, the assessment, mechanisms, and processes must be incorporated including employee surveys, internal controls, and monitoring and auditing programs, to achieve success.

#### 14. Training and Implementation

Creating appropriate awareness amongst the owners of compliances is very important as many times compliances are handled by such persons who are not fully aware of the requirements of the law. This can be done through trainings/ meetings or through a manual containing detail of compliances. A strong Compliance training and education programme reinforces Company compliance culture and builds awareness and understanding of -:

1. Company Framework
2. Roles and responsibilities outlined in the policies and Framework
3. Critical and high compliance obligations identified in the Compliance Chart
4. The process for addressing compliance issues
5. Consequences of failing to meet compliance obligations.

Five essential things to create Compliance Training Programme:

1. Make it personal
2. Make it interesting
3. Make it understandable
4. Make it accessible
5. Make it ongoing

An annual plan for Compliance Risk related training and education must be developed and updated and must include-:

1. Statements that provide relevant internal and external compliance obligations and the risks arising from those obligations;
2. The business processes to which the compliance obligations are linked or on which they have an impact
3. Brief description of the training or education activity;
4. Target audience (new employees or existing employees)
5. Frequency of training

### 15. Compliance Audit

- As per CAG Auditing Standards, the Compliance audit is the independent assessment of whether a given subject matter is in compliance with applicable laws and regulations
- Compliance audits are carried out by assessing whether activities, financial transactions and information comply in all material respects, with the authorities who govern the audited entity.
- The compliance audit is completely different from the audit of financial statements and from performance audits. The compliance audits may be conducted separately on a regular basis, as distinct and clearly-defined audits each related to a specific subject matter.
- Compliance auditing may be
- Regulatory – compliance with relevant laws, regulations and agreements applicable to the entity.
- Propriety - observance of the general principles governing sound financial management and the ethical conduct of public officials.

### 16. Benefits of Corporate Compliance Management

A compliance management programme has following significance:

1. Better compliance of the law
2. Real time status of legal/statutory compliances
3. Improved operations and higher productivity
4. Lays the foundation for the control environment
5. Real time status on the progress of pending litigation before the judicial/quasi-judicial authority;
6. Companies with effective compliance management programme are more likely to avoid penalties.

7. It creates safety valve against non-compliances which were unintended.
8. Ensures cost savings by avoiding penalties/fines and minimizing litigation.
9. Creates better brand image of the company in the market.
10. Enhances credibility/creditworthiness that only a law-abiding company can have.
11. Creates goodwill among the shareholders, investors, and stakeholders.
12. Gives recognition as Good corporate citizen.

### **17. Secretarial Audit and Compliance Management System**

The compliance system and processes in a company are dependent mainly on the following factors:

- A. Nature of business (es).
  - B. Geographical domain of its area of operation(s).
  - C. Size of the company both in terms of operations as well as investments, technology, multiplicity of business activities and manpower employed.
  - D. Jurisdictions in which it operates.
  - E. Whether the company is a listed company or not.
  - F. Regulatory authority (ies) in respect of its business operations.
  - G. Nature of the company viz., private, public, government company, etc.
- Based on the above the Secretarial Auditor can constitute a broad idea about the desired system and process to be adopted by a company.
  - Auditing in such systems requires the Auditor to enter and to have access within the system. While taking up the audit assignment, the Auditor needs to ensure that access would be given so that assessment of proper system and process of compliance is made.
  - Auditing of compliance system and process is not a fault-finding exercise, rather a device to improve compliance mechanism of a company. It is expected that the Secretarial Auditor as an expert in corporate compliance would advise the companies to build up strong corporate compliance system in case the system appears to be insufficient during the audit process.

### **18. Role of Company Secretaries in Compliance Management**

1. A Company Secretary is the 'Compliance Manager' of the company. He ensures that the company is in total compliance with all regulatory provisions.

2. Corporate disclosures, which play a vital role in enhancing corporate valuation, is the forte of a Company Secretary. These disclosures can be classified into statutory disclosures, non-statutory disclosures, specifies disclosures and continuous disclosures. SEBI (Listing Obligations and Disclosure Requirements) Regulation, 2015 spells out elaborately on various aspects of disclosures which are to be made by the company such as contingent liabilities, related party transactions, proceeds from initial public offerings, remuneration of directors and analysis in the corporate governance report which is duly certified by company secretaries. A company secretary has to ensure that these disclosures are made to shareholders and other stakeholders in true letter and spirit.
3. The company secretary provide advice on compliance risk, responsibilities, obligations, concerns and other compliance issues. The advisory services of the company secretaries impact the compliance framework, as the business receives advice to help manage its compliance risks more effectively. The company secretary is the professional who guides the board and the company in all matters, renders advice in terms of compliance and ensures that the board procedures are duly followed.
4. In nutshell, the company secretary is the professional who guides the board and the company in all matters, renders advice in terms of compliance and ensures that the board procedures are duly followed, best global practices are brought in and the organisation is taken forward towards good corporate citizenship.

#### 19. Directors Responsibility Statement

Section 134 of the Companies Act, 2013 is related to the financial statement, Board's report, and annual return of companies. It outlines the requirements and contents of the Board's report, which the Board of Directors of a company must prepare and present to the shareholders. Section 134(5) Casts duty upon the directors that directors' reports must contain statements regarding the responsibility of directors.

Director's responsibility statement is required as per section 134(5) should report following:

- a. In preparing the annual accounts, the applicable accounting standards and proper explanations relating to material departures were followed.
- b. The directors had selected such accounting policies and applied them consistently and made judgments and estimates that were reasonable and prudent to give a true and fair view of the

state of affairs of the Company at the end of the financial year and of the profit and loss of the Company for that period.

- c. The directors had taken proper and sufficient care for the maintenance of adequate accounting records in accordance with the Act's provisions for safeguarding the Company's assets and for preventing and detecting fraud and other irregularities.
- d. The directors had prepared the annual accounts on a going concern basis.
- e. In the case of a listed company, the directors had laid down internal financial controls to be followed by the Company and that such internal financial controls are adequate and operating effectively.
- f. The directors had devised a proper system to ensure compliance with all applicable laws and that such systems are adequate and operating effectively.

## CASE STUDY

### Rajeev Saumitra Vs Neetu Singh

In the instant case director carried a competing business that conflicted with the interest of the company, to gain advantage by directors and employees  
Court held that director has breached fiduciary duty u/s 166 of Companies Act, 2013.  
Section 166 imposes a fiduciary duty on the director to **act in good faith in order to promote the objects of the company** for the benefit of its members. Court concluded that a director could be liable to reimburse the company for any unwarranted gains resulting from the breach of obligations stipulated by Section 166 of the Companies Act, 2013.

## 20. **Certain Important Compliance Requirements under Companies Act, 2013**

1. **Disclosures by director of his interest- MBP-1:** every director shall disclose his concern or interest in other entities, including shareholding, in the first meeting and every first meeting of financial year or when there is a change in disclosure already made.
2. **Disqualifications of Directors-DIR-8:**



- Every director should inform about his disqualification before he is appointed or re-appointed, according to section 164.
- where a person is appointed as a director of a company which is in default of clause (a) or clause (b) of section 264(2), he shall not incur the disqualification for a period of six months from the date of his appointment.
- Every person who has not filed the financial statement or annual returns for a continuous period of 3 Financial years or has failed to pay the deposits or redeem the debentures on due date or pay the dividend declared for a continuous period of one year or more, should not 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.

3. **Annual Return-MGT-7:** Every Company shall file its Annual Return within 60 days of holding the AGM or where no AGM is held in any year within 60 days from the date on which the AGM should have been held together with the statement specifying the reasons for not holding the AGM.

Annual Return of Every Private Company shall be signed by a director and the company secretary, or where there is no company secretary, by a company secretary in practice.

4. **Filing Financial Statements: Form AOC-4 & AOC-4 CFS:**

- Company is required to file its financial statements, including consolidated financial statements, along with all the documents required to be or attached to such financial statements, duly adopted at the AGM of the company, with the Registrar within 30 days of the date of AGM.
- In case financial statements are not adopted in the AGM or adjourned AGM, it shall be filed with the ROC within 30 days of the date of AGM 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.
- If annual general meeting is not held for any year, the financial statements duly signed along with the statement of facts and reasons for not holding the annual general meeting shall be with the Registrar within 30 days of the last date before which the annual general meeting should have been held in such manner, with such fees or additional fees as may be prescribed.

### LET'S UNDERSTAND THIS

The Company ABC Pvt. Ltd. has not filed annual returns for the year 2019-2020, 2020-2021 & 2021-2022 yet.

The consequences can be that if Company does not file annual returns for any continuous period of three financial years, then directors of said company shall become disqualified for continuous period of 5 years, and they would not be eligible to be appointed, re-appointed as directors in other company



5. **Certification of Annual return-MGT-8:** The annual return filed by a listed company or a company having paid up share capital of Rs. 10 Crores or more or turnover of Rs. 50 crores or more shall be certified by a Company Secretary in Practice.
6. **Circulation of Financial Statement & other relevant Documents** Company should send to all the members of the Company, all trustees for the debenture holders and to all persons so entitled, a copy of the (approved) Financial Statements, along with consolidated financial statement at least 21 clear days before the Annual General Meeting.
7. **Notice of AGM:** Notice of Annual General Meeting shall be sent to all the Directors, Members, Auditors, legal representative of any deceased member as per section 101 of Companies Act, 2013 and SS-2.
8. **Board Meetings:** Every Company shall hold a minimum number of 4 Board meetings every year and maximum gap between two meetings should not be more than 120 days. Company should hold at least 1 Board Meeting in every quarter of each calendar year.  
In case of Specified IFSC Private Company-The Company shall hold the first meeting of the Board of Directors within sixty days of its incorporation and thereafter atleast one meeting of the Board of Directors in each half of a calendar year.



### LET'S UNDERSTAND THIS:

If a company is incorporated on 15th June, the first Meeting should be held within thirty days i.e. latest by 14th July. If the meeting is held say on 10th July, then the next Meeting should be held within 120 days from 10th July.

9. **Notice of Board Meeting:** a notice of board meeting should be sent to all the directors at least 7 days before the meeting, at the registered address of directors by hand delivery, post or electronic means.  
However, meeting may be called at shorter notice to transact urgent business subject to the presence of one independent director, if any and in his absence decision shall be circulated to all directors and shall be final on ratification by atleast one independent director, if any.
10. **Appointment of Auditor-ADT-1:** Auditor shall be appointed for 5 years in the AGM. The company shall inform the auditor of his appointment and file a notice of such appointment with the Registrar within fifteen (15) days of the meeting in which the auditor is appointed in E-form ADT-1.  
In case of Specified IFSC Private Company- notice of auditor's appointment shall be filed with the Registrar within 30 days of the meeting in which the auditor is appointed.
11. **Appointment of Company Secretary:** Private Company having paid up share capital of Rs. 10 crores or more is required to appoint a whole time Company Secretary.
12. **Register of members:** company has to mandatorily maintain register of Members residing in or outside India, register of debenture-holders and register of any other security holders.



### CAN YOU SOLVE THIS?

What if the company secretary is not appointed in ABC Pvt. Ltd., where required under Companies Act, 2013?

**Solution:**

Such company shall be liable to a penalty of five lakh rupees and every director and key managerial personnel of the company who is in default shall be liable to a penalty of fifty thousand rupees and where the default is a continuing one, with a further penalty of one thousand rupees for each day after the first during which such default continues but not exceeding five lakh rupees.



**CAN YOU SOLVE THIS?**

ABC Pvt. Ltd. Has not maintained register of members. What can be penalty under Companies Act, 2013?

**Solution:**

If a company does not maintain a register of members or debenture-holders or other security holders or fails to maintain them in accordance with the provisions of sub-section (1) or sub-section (2), the company shall be liable to a penalty of three lakh rupees and every officer of the company who is in default shall be liable to a penalty of fifty thousand rupees. ABC Pvt. Ltd. Shall be liable to a penalty of three lakh rupees and directors liable to a penalty of ₹50000/-.

**21. Compliance Management Tool**

Compliance Management Tool handles and controls business processes and enables organisations in scaling their operations without increasing their risk of non-compliance.

Compliance Management tools are software products that automate or facilitate processes and procedures that businesses must have in place to be compliant with industry, legal, security and regulatory requirements.

It is a software which facilitates your compliance management by bundling all important workflows on a digital platform.

Compliance Management tool is generally required in large organisations where many risks are involved. However, now a day's not only big companies but also smaller companies are required to comply with applicable laws and regulations.

*Objects of Compliance Management Tool:*

Digitization	Automation	Compliances
<ol style="list-style-type: none"> <li>1. Robust compliance tool replaces spreadsheets and manual processes</li> <li>2. Enhances visibility &amp; accountability.</li> <li>3. Reduces the information &amp; knowledge gap</li> </ol>	<ol style="list-style-type: none"> <li>1. Provides automated legal updates</li> <li>2. Helps in automated compliance tracker.</li> <li>3. Showcase automated workflows, dashboards &amp; reports</li> </ol>	<ol style="list-style-type: none"> <li>1. Robust compliance tool replaces spreadsheets and manual processes</li> <li>2. Enhances visibility &amp; accountability.</li> <li>3. Reduces the information &amp; knowledge gap</li> </ol>

**Thoda Extra gyaaannnn..... Swaad Anusaaar (Short Note)**

**CLOUD COMPUTING**

- Cloud computing is becoming increasingly popular for delivering IT services, thanks to its scalability, ease of deployment, and lower maintenance costs. However, it also introduces new cyber security risks and challenges that businesses need to be aware of.
- SEBI has introduced a cloud framework to help regulated entities manage risks better. It sets standards for security and regulatory compliance in cloud computing.
- This framework complements SEBI's existing guidelines and assists regulated entities in adopting secure and compliant cloud practices. By following the framework, regulated entities can establish a strong risk management approach for cloud adoption, including risk assessment, implementing controls, and ensuring regulatory compliance.

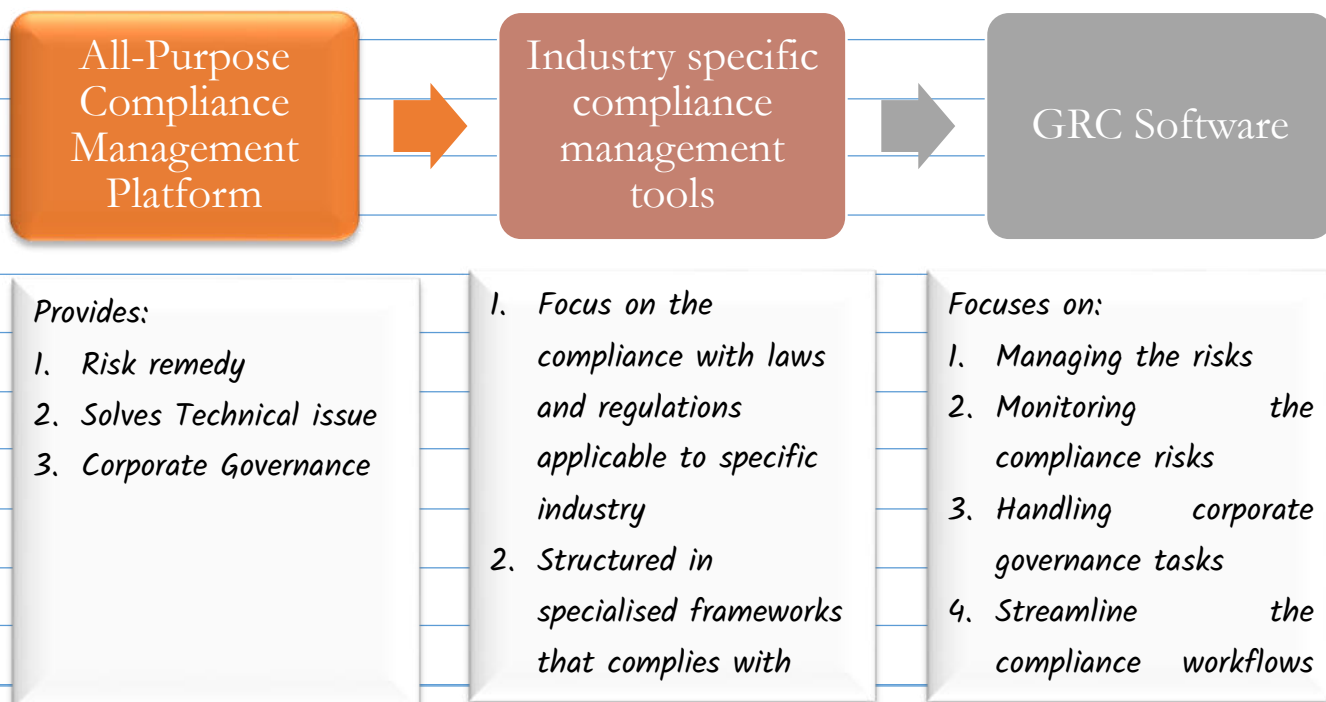


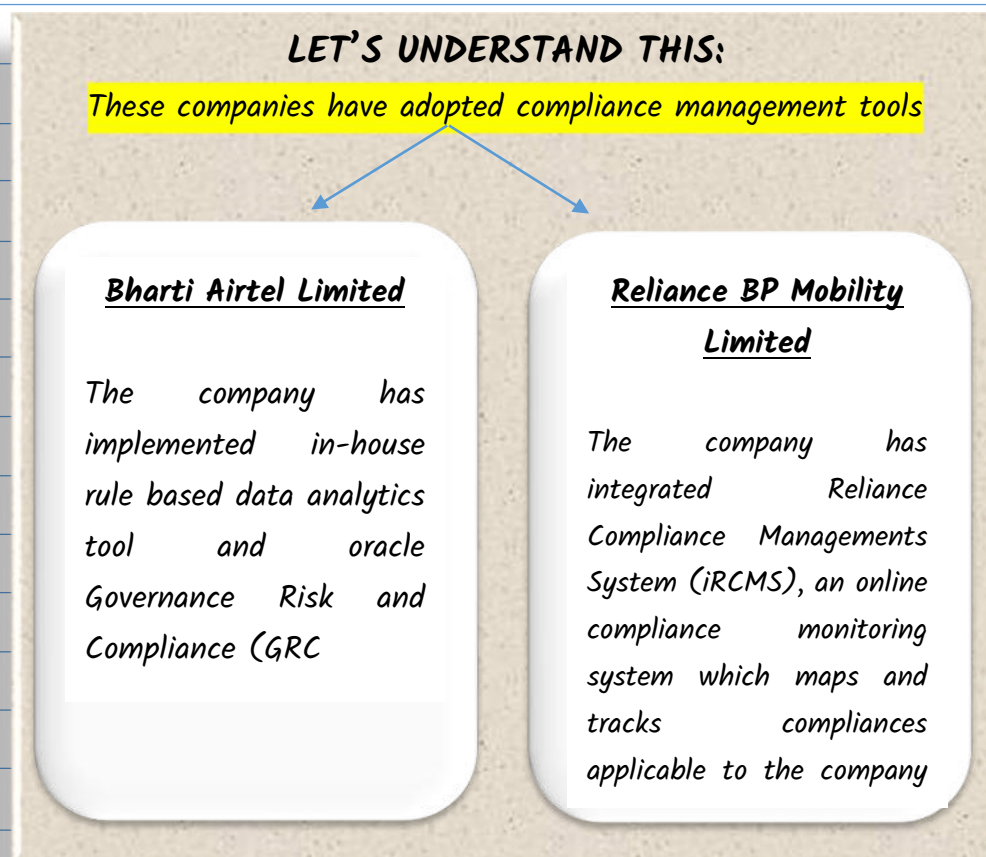
## CASE STUDY

### Compliance Management at Bharti Airtel Limited

The Company has a strong automated Compliance Framework that covers all relevant laws and compliance obligations globally. It regularly updates these requirements based on changes in the law. Automated alerts are sent to compliance owners to ensure timely compliance. The owners certify the compliance status, which is reviewed by compliance approvers. A consolidated dashboard is presented to Business Leaders and the Managing Director & CEO. Quarterly, a certificate of compliance, exceptions report, and mitigation plan (if any) are presented to the Audit Committee and Board of Directors. The Company also uses a centralized automated tool, the Notice Management System, to monitor and update legal notices and court cases regularly.

## 22. Kinds of Compliance Management Tool





### 23. Benefits of Compliance Management Tools

1. **Reduction in Manual Work:** The management of compliances spreadsheet is time consuming and tedious work, thus, compliance management tools helps in the growth of the business and highlights where the improvements are required.
2. **Streamlining implementation:** With streamlining the implementation of various relevant frameworks, it reduces the compliance efforts and compliance audits and corrective steps can be facilitated easily.
3. **Simplification in Monitoring and reporting:** The tool automatically fills in compliance dates and sends alerts for compliance issues. It helps responsible persons remind their subordinates to update metrics in compliance with regulations and laws.
4. **Risk in human errors reduced:** It helps in improving the compliance programs performance and it reduces the risk in human errors. It generates the reports quickly with detection of compliance failures.

5. **Builds Organisation Reputation:** A compliant entity always has a good reputation with its customer base and its employees. Customers work with a company that's trustworthy hence, a good compliance record boost reputation.
6. **Creates a Roadmap for Business:** Major advantage of using a compliance management tool is that it guides you in the right direction. This tool maps out the organization's regulatory requirements and identifies areas that require improvement. The "compliance calendar" helps prioritize what needs to be fixed and when. It maps out compliance activities to drive compliance in the organization effectively.

### **Thoda Extra gyaaannnn..... Swaad Anusaaar (Short Note)**

#### **Project Eagle**

- Infosys compliance program, known as Project Eagle, is intended to track, detect, prevent and remediate any violations of applicable laws and regulations and to encourage a culture of compliance to protect our organizations value
- Project Eagle is supported by the implementation of software tool-based systems ("Compliance Manager Tool") to effectively track and monitor such applicable compliances under various regulations and enable compliance with the same
- Infosys use the Compliance Manager Tool to implement an enterprise-wide regulatory compliance management to oversee and track regulatory compliance for applicable regulations globally.
- Any changes in applicable regulations are also being updated on the tool on a regular basis.
- An inter-functional team of designated users and checkers oversee implementation and its functioning and respective Functional Heads supervise and certify continued adherence of applicable regulations as well as any risk of non-compliance with mitigation plan to the Board on a quarterly basis.

SUMMARISED VERSION (MIND MAP)





### I. INTRODUCTION

#### Document

A document is a part and parcel of written, printed, or electronic matter that provides certain information, which may be structured or unstructured. The emails we send and receive, reports, shopping lists, etc. are all examples of documents.

#### Record

A record is a matter of evidence about the past. It can be used as proof in legal obligations or in the transaction of business. For instance, a taped conversation between two persons may be used as a record to conclude that they were framing a conspiracy. Some examples of records may include final reports, emails confirming actions or decisions, photographs, spreadsheets, business contracts, etc.

#### Responsibility of CS in documentation

- i. It is the primary responsibility of Company Secretary to maintain the records which requires a good understanding of what documents need to be created, what is the purpose of such documentation, how much details are required to be disclosed in any documents etc.
- ii. it is the duty of the Company Secretary to ensure the confidentiality of the documents
- iii. Company Secretary checks whether document is consistent with prior records (or if it conflicts with corporate policies, may create concerns under existing agreements, may results in a violation of law, or may have tax implications etc.
- iv. The Company Secretary is also responsible for storing, maintaining, retrieving, certifying, and explaining corporate documents.
- v. A Company Secretary is often responsible for documents relating to subsidiaries, joint ventures, consortiums, and other entities also, many of which may be at locations other than corporate headquarters, including locations around the world. In such cases, the Company Secretary must consider whether and to what extent, he should rely on local partners in maintaining and creating corporate records, as well as to what extent he or she must exercise oversight.

## CASE STUDY

### CONSEQUENCES OF NON-MAINTENANCE OF RECORDS- M/S. SDU HOLDINGS PRIVATE LIMITED

In the case of M/s. SDU Holdings Private Limited, the Registrar of Companies in Bangalore issued an adjudication order, imposing a penalty for violating the provisions of section 88 of the Companies Act, 2013. According to the Companies Act, 2013, every company limited by shares is required to maintain a register of its members in Form No. MGT-1 from the date of its registration.

During an investigation carried out under section 206 of the Companies Act, 2013, an inspection officer reviewed the statutory registers maintained by the company. It was discovered that the company's register in Form No. MGT-1 was incomplete. In light of this default, the adjudication officer provided the company and the responsible officers with a fair opportunity to present their arguments, which included a personal hearing notice.

After considering the facts, circumstances of the case, and the submissions made by the company and its directors during the personal hearing, the Adjudicating Officer decided to impose a penalty on the company and its directors. The penalty was imposed due to their failure to comply with section 88 of the Companies Act, 2013, which pertains to maintaining the required register of members in proper form.

## 2. PURPOSE OF DOCUMENTATION

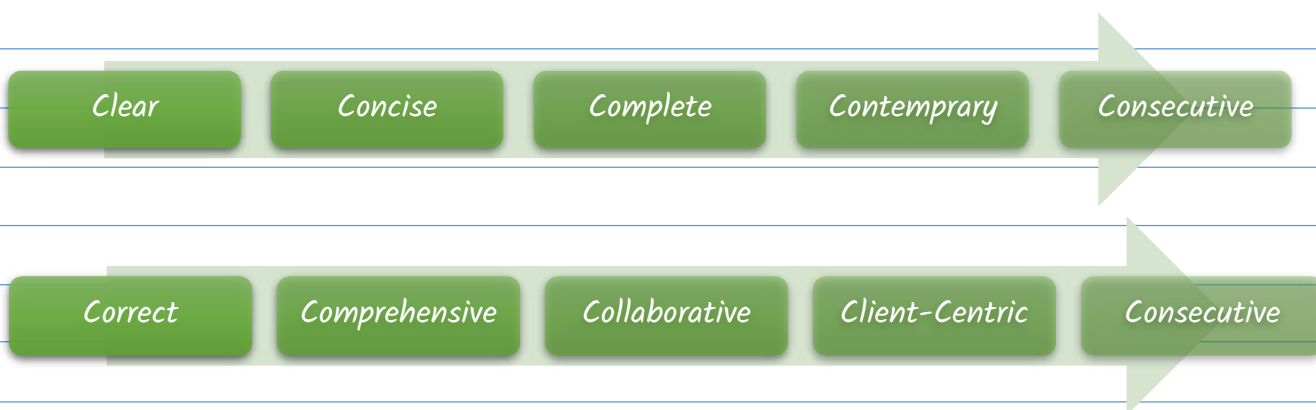
Proper documentation serves the following purpose:

1. **Client Service:** Documentation helps to serve their clients better. It helps in increasing the service standards and improving product quality.
2. **Communication:** Documentation helps to better communicate between the professionals.
3. **Accountability:** Documentation records the work of professional and ensures accountability. It can be used for internal inquiries, regulatory proceedings etc.
4. **Professional Responsibility:** Documentation is an integral part of professional practice and forms the basis for evidence of professional conduct.

5. **Legal Requirement:** Professionals are required to make and keep records of their professional work according to standards and policy of the organisation, however, some information is required to be recorded and maintained according to laws.
6. **Quality:** Documentation is used to evaluate practice of professional in Peer reviews, audits and accreditation processes or regulatory inspections.
7. **Research:** Documentation is a valuable source of data for researchers. It provides information to professional and is a concise record, essential for accurate research data and evidence-based practice.
8. **Resource Management:** Accurate and comprehensive documentation is a valuable source of evidence and provide basis for resource management.

### 3. GUIDING PRINCIPLES OF GOOD DOCUMENTATION

The term document includes all kinds of documents which are prepared by a professional while performing his duty including, written and electronic records, audio and video tapes, emails, images (photographs and diagrams), charts, check lists, communication books, management reports, incident reports and working notes. The good documentation promotes good corporate governance practices in the company, increases compliance level of the company and helps to communicate the information between various stakeholders. The guiding principles for good documentation are as following-:



**Thoda Extra gyaaannnn..... Swaad Anusaaar**

What is Good Documentation Practice?

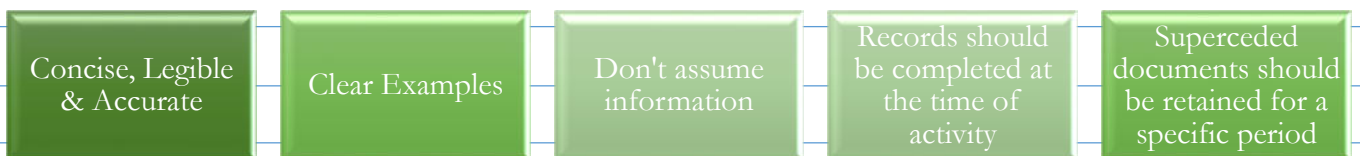
These are the best practices for record keeping which preserves the integrity of document and guides on proper storage of documents.



**4. EXAMPLES OF POOR DOCUMENTATION PRACTICES**



**5. EXAMPLES OF GOOD DOCUMENTATION PRACTICES**



<u>Do's</u>	<u>Don'ts</u>
record the data/document as soon as it is generated	delay in data/document recording
add the reference notes to provide the context	delay in data/document recording
validate your computerised system or document software	encourage handwritten documentation
limit document access to authorised personnel	intentionally falsify the record/document
specify when the data/document was recorded, reviewed and approved	pre-date or back-date the data/document

keep data back-up, either automatically or by storing the true copy in separate location

archive data/documents unless explicitly authorised to do so

## CASE STUDY



### **M/s Indiabulls Real Estate Limited, the Registrar of Companies, NCT of Delhi & Haryana,**

- i. In the case of M/s Indiabulls Real Estate Limited, the Registrar of Companies, NCT of Delhi & Haryana, issued an Adjudication order due to the company's non-compliance with the provisions of sub-section (10) of section 118 of the Companies Act, 2013, which pertains to the mandatory adherence to Secretarial Standards in relation to general and board meetings. This non-compliance involved Secretarial Standards - 1 & 2.
- ii. The inspection of the company's books of accounts was conducted by the Central Government under section 206(5) of the Companies Act, 2013. During the inspection, it was noted that the company failed to comply with the requirements of section 118(10) along with Secretarial Standards. Specifically, the company had not serially numbered its "Attendance Register" for board meetings and other meetings, and the "Attendance Register" was maintained in a loose-leaf form rather than being periodically bound.
- iii. Following the inspector's report, the Registrar of Companies issued a show cause notice to the company. The company responded by acknowledging the inadvertent mistakes and rectifying them after receiving the notice. The company claimed that there was no intentional wrongdoing or mens rea regarding the offenses.
- iv. After reviewing the company's application and considering both oral and written submissions made during the personal hearing, the Registrar of Companies, acting as the Adjudicating Officer, concluded that penalties should be imposed on the company and its officers. The penalty was imposed based on the violation of the provisions related to Secretarial Standards and the company's failure to adhere to the stipulated requirements.

## 6. ELECTRONIC REPOSITORY OF DOCUMENT

Electronic repository is used to store electronic documents, records, images of paper-based documents captured through scanner. In electronic repository, software called as document management system is used to control and manage documents of the organisation. Document management refer to the process of managing and tracking of the documents and records through an electronic or physical source of documents.

Following are the advantages of depository management system:

1. Tracking of check-in or check-out by various officers
2. Locking and unlocking of Document
3. Simultaneous editing
4. Document Version Control
5. Ease in Audit trail
6. Annotation

### CASE STUDY

North American Regional Health Care Provider (RHCP) had moved to electronic records because they wanted one organisation that could handle every aspect of implementing their electronic health record strategy , while simultaneously standardizing records management practices across the four major hospitals and numerous clinics they managed.

The Electronic Record Keeping Service Provider recommended an automated, streamlined end tab labelling system that would standardize all files.

## 7. ADVANTAGES OF THE ELECTRONIC RECORDS

1. **Cost Effective:** Storing data in a digital form is cheaper than storing data in any other format as because of increase in technology the digital media cost is dropping day by day.
2. **Ease of use:** In electronic repository, through document management system it is easy to locate and share electronic documents by searching through documents.



3. **Labour savings:** With electronic documents, all the steps like filing, stapling etc are removed and labour required to locate, manage and dispose of electronic documents is almost nil and minimum.
4. **Search Ability:** Through OCR, electronic documents can be searched easily, however, same is not possible in physical documents.
5. **Portability:** Electronic documents can be stored in a removable hard drive and same can be taken to courthouse or office easily. Thus, they are more portable than physical documents.
6. **Version tracking:** In electronic documents it is easy to track if any changes are made to the documents, who has made the changes, when these changes have been made and what document looked like before making changes.

## CASE STUDY

### A Case Regarding Admissibility of Electronic Evidence: Arjun Panditrao Khotkar vs. Kailash Kushanrao Gorantyal

In this case the Supreme Court of India addressed the interpretation of Section 65B of the Indian Evidence Act, 1872. The case involved a reference to a Bench of Judges by a Division Bench due to conflicting judgments on the matter.

The court found that the Division Bench judgment in the case of Shafhi Mohammad v. State of Himachal Pradesh needed reconsideration by a larger Bench of the Supreme Court. In the Shafhi Mohammad case, it was stated that electronic evidence is admissible, and Sections 65-A and 65-B of the Evidence Act are procedural provisions clarifying its admissibility. It was further noted that the admissibility of electronic evidence depends on its authenticity and whether the person producing the evidence can provide a certificate under Section 65-B(4).

The Supreme Court disagreed with the premise in Shafhi Mohammad that a certificate under Section 65-B(4) cannot be obtained by individuals not in possession of an electronic device. The court clarified that an application can be made to a Judge for the production of such a certificate under Section 65-B(4), even if the person in possession of the electronic device refuses to provide it. This decision sought to address the inconsistency and provide clarity on the admissibility of electronic evidence under the relevant sections of the Evidence Act.

## 2) DISADVANTAGE OF ELECTRONIC RECORDS

1. **Software risk:** If documents are protected by software, there's a potential danger that the company behind the software might not help with the data if it's stored on an unsupported computer. Also, if the company goes out of business, there might be expenses to change things and get back the locked documents.
2. **Format risk:** Sometimes, a person might not be comfortable to read a PDF or JPEG document. Also, it might happen that the software might disappear or stop supporting PDFs, making it hard to read these documents later on.
3. **Reliability:** Paper is often seen as dependable and more reliable. You only need light and eyes to read it. While scanning important papers is a good idea, having a hard copy ensures access anytime.
4. **Portability:** data stored in electronic format can be easily transferred. It's very easy to misplace or accidentally delete large amounts of data. Data may be duplicated without the permission of authority or can be misplaced or become corrupt. If proper precautions are not taken, then advantages of electronic system will turn into a disadvantage.

## 3) MAINTENANCE AND INSPECTION OF DOCUMENTS IN ELECTRONIC FORM UNDER COMPANIES ACT, 2013

- **Section 120 of the Companies Act, 2013 read with Rule 27 & 28 of Companies (Management and Administration) Rule, 2014** provides for maintenance of documents in electronic form and inspection of documents maintained in electronic form. It states that any document, record, register, minutes, etc. that are required to be kept by a company or allowed to be inspected or copies to be given to any person by a company under the Act, may be kept or inspected or copies given, as the case may be, in electronic form.
- **Rule 27** provides that every listed company or a company having not less than one thousand shareholders, debenture holders and other security holders, may maintain its records in electronic form.
- The records in electronic form shall be maintained in such manner as the Board of directors of the company may think fit, provided that:
  1. the records are maintained in the same formats and in accordance with all other requirements as provided in the Act or the rules made there under;

2. the information as required under the provisions of the Act or the rules made there under should be adequately recorded for future reference;
3. the records must be capable of being readable, retrievable and reproducible in printed form;
4. the records are capable of being dated and signed digitally wherever it is required under the provisions of the Act or the rules made there under;
5. the records, once dated and signed digitally, shall not be capable of being edited or altered;
6. the records shall be capable of being updated, according to the provisions of the Act or the rules made there under, and the date of updating shall be capable of being recorded on every updating.

• **Security of records maintained in electronic form- Rule 28:**

1. The Managing Director, Company Secretary or any other director or officer of the company as the Board may decide shall be responsible for the maintenance and security of electronic records.
2. The person who is responsible for the maintenance and security of electronic records shall
  - a. provide adequate protection against unauthorized access, alteration or tampering of records;
  - b. ensure against loss of the records as a result of damage to, or failure of the media on which the records are maintained;
  - c. ensure that the signatory of electronic records does not repudiate the signed record as not genuine;
  - d. ensure that computer systems, software and hardware are adequately secured and validated to ensure their accuracy, reliability and consistent intended performance;
  - e. ensure that the computer systems can discern invalid and altered records;
  - f. ensure that records are accurate, accessible, and capable of being reproduced for reference later
  - g. ensure that the records are at all times capable of being retrieved to a readable and printable form;
  - h. ensure that records are kept in a non-rewriteable and non-erasable format like pdf. version or some other version which cannot be altered or tampered;

- i. ensure that at least one backup, taken at a periodicity of not exceeding one day, are kept of the updated records kept in electronic form, every backup is authenticated and dated and such backups shall be securely kept at such places as may be decided by the Board;
- j. limit the access to the records to the managing director, company secretary or any other director or officer or persons performing work of the company as may be authorized by the Board in this behalf;
- k. ensure that any reproduction of non-electronic original records in electronic form is complete, authentic, true and legible when retrieved;
- l. arrange and index the records in a way that permits easy location, access and retrieval of any particular record; and
- m. take necessary steps to ensure security, integrity and confidentiality of records.

**Thoda Extra gyaaannnn..... Swaad Anusaaar (Short Note)**

- According to section 2(36) of Companies Act “document” includes summons, notice, requisition, order, declaration, form and register, whether issued, sent or kept in pursuance of Companies Act or under any other law for the time being in force or otherwise, maintained on paper or in electronic form.
- The term “records” means any register, index, agreement, memorandum, minutes or any other document required by the Act or the Rules made thereunder to be kept by a company. Therefore, such documents and records can also be maintained in electronic form.



### M/s. Michelin India Pvt Ltd

*In the case of M/s. Michelin India Pvt Ltd, the Registrar of Companies, Tamil Nadu, issued an adjudication order on October 18, 2022, imposing a penalty for the violation of provisions under section 134(3)(f) of the Companies Act, 2013. Section 134(3)(f) mandates that statements presented before a company in a general meeting should include a report by its Board of Directors. This report is expected to address and provide explanations or comments on qualifications, reservations, adverse remarks, or disclaimers made by the auditor in their audit report or by the company secretary in their secretarial audit report.*

*Upon examination, the Regional Director of the Southern Region in Chennai found that the statutory auditors, in their audit report, highlighted deficiencies in the company's internal financial controls and their inability to obtain sufficient and appropriate audit evidence. This indicated that the company lacked proper internal financial control and adequate record-keeping practices. The auditors also noted the absence of backup for electronically maintained books of accounts on servers physically located in India. However, the company's Board of Directors did not offer any explanation for these observations in their own report.*

*In response, the Regional Director, Ministry of Corporate Affairs, issued directions to take action against the company, its directors, and key managerial personnel who were in default. The penalty was imposed as part of the adjudication order to address the violation of the specified provisions of the Companies Act, 2013.*

### Anil Kumar Poddar V. Bonanza Industries Ltd

In the case of "Anil Kumar Poddar V. Bonanza Industries Ltd.," the applicant filed an application seeking an order to direct the respondent company to allow him to inspect the statutory registers and records of the company. The applicant argued that he had a statutory right to request such inspection as a shareholder of the company and to obtain copies of these documents by paying the required charges.

The respondent company, on the other hand, countered that the applicant only held 10 shares and was engaging in harassment by repeatedly demanding copies of statutory registers, general meeting minutes, annual accounts, and other documents, which the company was required to maintain under the Companies Act.

The Court concluded that the applicant appeared to have a history of filing such applications and seemed to make frivolous demands. It noted that nowadays, all statutory records of companies are available on the Ministry of Corporate Affairs (MCA) portal, accessible for inspection by all parties concerned. Certified copies of these records can be obtained from the relevant Registrar of Companies (ROC) department. Given this readily accessible information, the Court found that the applicant's repeated filing of such applications was not genuine and that he was not acting in good faith. Therefore, the Court dismissed the application.

#### 4) PHYSICAL REPOSITORY

Repository is a place where documents can be stored. A repository can be a spot with many databases/files for network sharing, or a place user can access without going through the network.

#### Virtual and Physical Data Room - A Comparison

<u>SNO.</u>	<u>Particulars</u>	<u>Physical Data Room</u>	<u>Virtual Data Room</u>
1.	Form of documents	Papers, files	Electronic or soft copies of documents- video or audio documents



2.	Security of documents	Security is in the hands of the person handling data room	More secured through specific log-in id and password
3.	Time required for creation of data room	Longer time required	Can be created within 48 hours of demand of prospective buyer.
4.	Cost	Cost is high because one person is always required to maintain data room, buyers are required to travel from place to place to access the data room	Cost is low as the documents can be viewed from any location with the help of internet.
5.	Convenience	Searching of documents consumes a lot of time	Multiple buyers can review the documents at the same time
6.	Accessibility to data room	Timings to access data may be restricted	Can be accessed anytime
7.	Facility to restrict access of specific document	Difficult to implement any restriction	Access can be restricted.
8.	Facility to check who has reviewed what documents and how many times	Not available	Available
9.	Ability to copy documents	Possible	Not Possible
10.	One to one communication with the seller or his representatives	Available	Not Available

## 5) CODING AND NOMENCLATURE

Good file naming conventions should be adopted to name any documents. The file names can be either self-descriptive or non-descriptive.

**Descriptive file:** The Descriptive file names are useful for small, well-defined projects with existing identification schemes.

**Non-Descriptive file:** Non-descriptive file names are usually system-generated sequential numerical such as a digital ID number, combination of Date and time, name of original file. These file names are created for large scale digitization projects and may employ a digital ID number and numerical sequences to indicate batch or parent-child relationships. However, the major advantage of non-descriptive names is that there is a very less chance that the file names will be repeated within a data structure.

Some applications do not understand and recognise spaces and for some applications it is suggested that punctuation, symbols or special characters should not be used. Hence, following are the best practices for file naming and the file names should:

1. Be unique and consistently structured
2. Limit the character length to no more than 25-35 characters
3. Use lowercase letters. However, when a name has more than one word, start each word with an uppercase letter for example "File Name"
4. Contain a file format extension
5. Use a period followed by a file extension like .jpg, .gif, .pdf.
6. Use numbers and/or letters but not characters such as symbols or spaces that could cause complications across operating platforms;
7. Use hyphens or underscores instead of spaces
8. Avoid blank spaces
9. Not use an extremely complex or lengthy naming scheme where error can be made during manual input.
10. Use standard date notation (YYYY-MM-DD or YYYYMMDD)

### 10 basic rules for general guidelines:

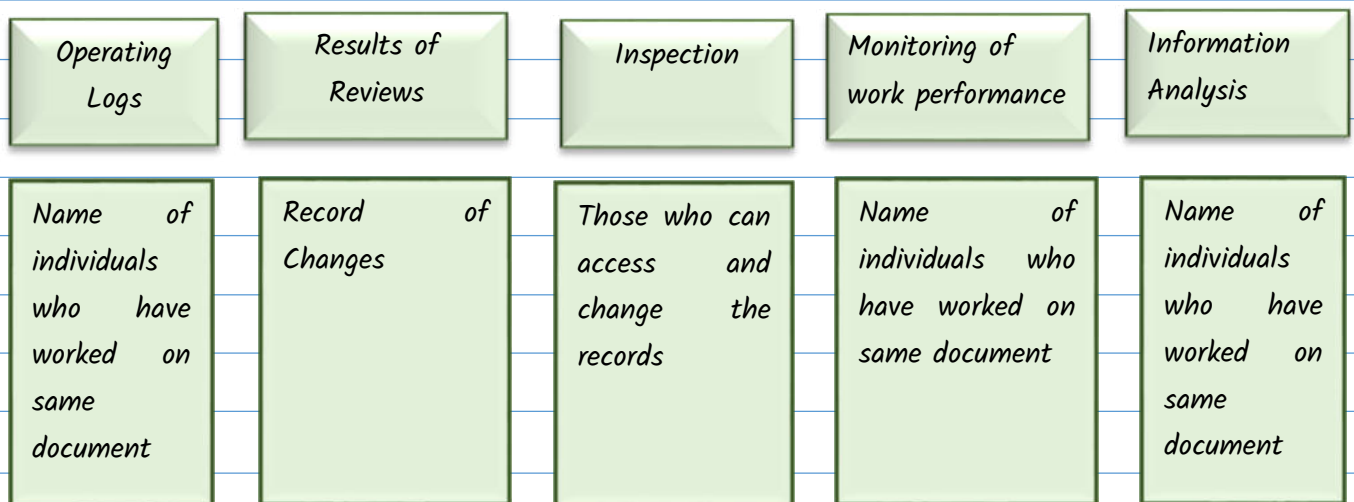
Sno.	Particulars	Do's	Don'ts
1	Avoid Extra Long folders names and Complex hierarchical structures but use information rich filenames instead.	D:\ABC\FY\16-17\ AR\ MGT-7.doc	D:\ Alfa Botanicals Private\Financial Year\2016-2017\ Annual Return\ Form MGT-7.do
2	Put sufficient elements in the structure for easy retrieval and identification but do not overdo it.	ABC_SearchReport_Invoice_20.07.2018. pdf	ABC_Report_Invoice.pdf
3	Use the underscore (_). Do not use spaces or other characters such as: ! # \$ % & ' @ ^ ` ~ + , . ; = ) (	SMITH-J_AXA_7654-6_POLICY_20120915. pdf    FUJITSU_S1500_SPEC_Scanner.pdf	SMITH-J AXA 7654-6 POLICY 20120915.pdf    FUJITSU \$S1500\$ SPEC\$Scanner.pdf
4	Use the hyphen (-) to delimit words within an element or capitalize the first letter of each word within an element.	Smith-John_AIG_7654-6_POLICY_2009-09-15. pdf    WhitePaper_Structured File Naming Strategy. doc	Smith John AIG 7654 6 POLICY 2009 09 15.pdf    White Paper Structured file naming strategy.doc
5	Elements should be ordered from general to specific detail of importance as much as possible.	FY2009_Acme-Corp_Q3_TrialBal_20091015_V02.xls    Production_Paint-Shop_	TrialBal_Q3_20091015_Acme-Corp_V02_FY2009.xls    Paint-Shop_775-2_WorkOrder_Production.xls

		WorkOrder_775-2.xls	
6	Dates should be ordered: YEAR, MONTH, DAY. (e.g. YYYYMMDD, YYYYMMDD, YYYYMM). Time should be ordered: HOUR, MINUTES, SECONDS (HHMMSS).	RFQ375_CablesUnlimited_BID_20091015-1655.pdf    2009-11-20_AMATProj_Phase1_Report.doc	RFQ375_CablesUnlimited_BID_10152009-1655.pdf    Nov-20-2009_AMATProj_Phase1_Report.doc
7	Personal names within an element should have family name first followed by first names or initials.	Tate-Peter_SunLife_1-7566-2_POLICY_10YrTerm.pdf    SmithJ_ID3567_ADMIN_WageReview.xls	Peter-Tate_SunLife_1-7566-2_POLICY_10 Year Term.pdf    JSmith_ID3567_ADMIN_WageReview.xls
8	Abbreviate the content of elements whenever possible.	RevQC_QST_2009-Q2.xls    MCIM_27643_POD.doc	Minister of Revenue Quebec_QuebecSales-Tax_2009-2ndQuarter.xls    MultiCIMTechnologiesInc_27643_ProofOf-Delivery.pdf
9	An element for version control should start with V followed by at least 2 digits and should be placed as the last most element.	MCIM_Proposal_V09.doc    eXadox_UserManual_V1-02.doc	MCIM_Proposal_9.doc    eXadox_UserManual_V2FinalDraft.doc
10	Prefix the names of the pertinent subfolders to the file name of files that are being shared	Prod_PS_AssL7_WO_Suzuki_J3688-20090725.xls    FY2009_Acme-Corp_Q3-	WO_Suzuki_J3688-20090725.xls    Q3_TrialBal_20091015_V02.xls

		TrialBal_20091015 _ V02.xl	
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## 6) SAFETY AND RETRIEVAL OF RECORDS

To assure the quality of documents, following records should be maintained as an evidence to ensure quality:



The care of records is governed by three main concepts:

### 1. Keeping together:

The records must be kept together with the department which created the document, in the original order as it existed at the time of creation. This becomes very important when documents are to be presented as an evidence as it helps to understand who created or used a record, and where, when and why.

2. Ensure life cycle: Every record follow a 'life-cycle', and pass through three main phases; current phase, semi-current phase and non-current phase. In the current phase, they are used regularly in the conduct of current business, in the semi-current phase, they are used less frequently in the conduct of current business and in the non-current phase they are destroyed unless they are required to be preserved. Effective management of records in this life cycle is very important.

3. **Record Preservation:** *The care of records should be taken and they should be preserved through consistent range of actions from the development of record-keeping systems to the creation and preservation of records and their use as archives. Four actions continue or reappear throughout the life of a record i.e., identification of records; intellectual control; provision of access; and physical control. The management of these actions provides the basis for a strategic approach to records management.*



### CASE STUDY

#### U.S. Food & Drug Administration (FDA)

The U.S. Food & Drug Administration (FDA) has issued a series of warning letters to pharmaceutical companies due to violations of Good Manufacturing Practices (GMP), particularly related to data integrity. Some of the companies that have failed to ensure data integrity include:

1. **Ranbaxy Laboratories:** *A multinational pharmaceutical company that received a warning letter from the US FDA for its facilities in Dewas and Poanta Sahib. In Dewas, the company failed to maintain proper batch production and control records. In the Poanta Sahib facility, incomplete batch and production records were used for the review and approval of production and control records for drug products.*
2. **Canton Laboratories:** *A manufacturer of chemical and bulk drugs that received a warning letter for its Vadodara plant. The company was found to be reporting test results for tests that were never actually performed. Significant violations related to Good Manufacturing Practices (GMP) and record maintenance were observed, with accusations of serious documentation practices and missing data.*
3. **Wockhardt Limited:** *A Mumbai-based pharmaceutical company that received a warning letter for its Aurangabad plants. The US FDA cited data integrity issues, indicating that the company had not exercised appropriate controls over computer systems to ensure that only authorized personnel could make changes in master production and control records or other records.*

*These warning letters highlight the FDA's strict enforcement of data integrity standards in the pharmaceutical industry and its commitment to ensuring the safety, efficacy, and quality of drug products through proper manufacturing practices and accurate record-keeping.*



## 7) PRESERVATION OF RECORDS

- Preservation of records means implementation of strategies to manage records and archives for a longer period.
- Regulation 9 and 30(8) of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 deals with preservation of policy and records:
  1. **Regulation 9:** This provides that the listed entity shall have a policy for preservation of documents, approved by its board of directors, classifying them in at least two categories as follows-
    - a. documents whose preservation shall be permanent in nature
    - b. documents with preservation period of not less than eight years after completion of the relevant transactions:
  2. **Regulation 30(8):** provides that the listed entity shall disclose on its website all such events or information which has been disclosed to stock exchange(s) under-regulation 30(Disclosure of events or information by listed entities), and such disclosures shall be hosted on the website of the listed entity for a minimum period of five years and thereafter as per the archival policy of the listed entity, as disclosed on its website.

*Factors to be considered for the archival policy of the company:*

*Analysis & Restructuring Existing System*

- reviewing and revising legislation and policies
- reviewing and revising organizational policies and structures
- determining resource requirements, such as facilities and staffing

*Organising & Controlling Records*

- developing strategic and business plans
- managing the creation, maintenance, and use of files
- building proper record keeping system

*Providing Physical protection for Records*

- identifying and protecting vital records
- implementing and maintaining preservation measures
- developing emergency plans to protect records

*Managing records in record centre*

- developing and maintaining records centre facilities
- transferring, storing, and retrieving records according to disposal schedules
- disposing of records as indicated by the schedules

*Managing Archives*

- acquiring and receiving archives
- arranging and describing archives according to archival principles
- providing public access to the archives

*Supporting & Sustaining the Program*

- promoting records services to the Government and Public
- Promoting education for records & Archives Personnel
- Developing & Expanding the records and archives

### 8) PRESERVATION OF LITIGATION DOCUMENTS

Documents arising out of various litigation shall be preserved as per the directions/orders of the court / tribunal/ judicial/ other authorities as may be applicable. However, if no such order has been given by the authorities the documents shall be preserved for a period of not less than eight consecutive calendar years after conclusion of the litigation

### 9) DEVIATION FROM THE POLICY

Any court, tribunal, judicial or other authorities shall have the power to direct a company to produce, preserve and/or destroy any documents. However, if any document has been destroyed pursuant to the Policy followed as per the SEBI Regulations, herein, it may not be possible for the company to produce such document, therefore, necessary permission to that effect has to be taken by the company and/or a statement to that effect shall be given by the company from/to the relevant authorities. Any other action/s shall need to be taken as may be advised by these authorities.

### 10) SETTING UP OF A RECORD ROOM

1. **Humidity:** An excess of humidity creates fungus and lack of humidity, on the other hand, makes paper easily breakable. Thus, a controlled humidity between 30% and 40% is the best standard for preservation.
2. **Temperature:** Temperature in record room should be same as required for human beings in public places.
3. **Light:** Light has a considerable impact on document's preservation hence, visible light with infrared or ultraviolet radiation should be avoided.

### 11) PRIVACY OF RECORD AND ITS CONTROL

- Though most of the communication is now made electronically and documents are kept in digital form but there is still a lot of data that is stored physically and circulated around various branches in same format.
- Such physical data needs to be protected and handled responsibly, especially if the data contains personal or confidential information. In order to protect digital data company has passwords and encryption. Similarly, to protect physical data right processes and procedures should be applied to ensure data security.

- To ensure confidentiality first step is to identify which information is confidential and for any business house the following documents are primarily considered as confidential and need complete privacy:

1. **Customer's & Employees' Information:** Information collected from employees and customers can be information like Aadhar number, Mobile numbers, Residential addresses, Name, credit card numbers, etc. and is considered as personal information. Majority of the business in India have still not adopted the strong mechanism for safeguarding the personal information. The data needs to be protected and disposed of carefully, thus, the business should work with a trusted information destruction agency to physically destroy both electronic and physical data.
2. **Office Plans, Office IDs and Internal Procedure Manuals:** Internal planning & procedures is important for every organisation and business should ensure its confidentiality. It is important to place the documents with respect to layout of the office, to identify exits in case of emergency but other documents and forms related to internal processes and procedures should be kept electronically on secured networks.
3. **Contracts and Commercial Documents and Trade Secretes:** organisations enter into many agreements and most of the part of this agreement contains information like the nature of the arrangement, the value of the services offered/received in the agreement, the names of the main contracting parties, which is confidential. Thus, sharing of contracts should be restricted both physically and electronically as if confidential information is leaked it can be misused for illegal activities.

## 12) **SUGGESTIVE STEPS FOR PROTECTING CONFIDENTIAL INFORMATION**

The company may adopt the following procedures for protecting confidential information:

1. All confidential documents should be stored in locked file cabinets or rooms accessible only to those who are authorized.
2. All electronic confidential information should be protected through encryption and passwords.
3. Employees should refrain from leaving confidential information visible on their computer monitors when they leave their office.
4. Employees should not discuss confidential information in public places.
5. Employees should avoid using e-mail to transfer certain sensitive or controversial information.
6. All confidential information should be marked as confidential.

7. *Before removing an old computer, software programs should be used to remove the data contained on the computer or the hard drive should be destroyed.*

SUMMARISED VERSION (MIND MAP)





### 1. INTRODUCTION

- i. Companies have to file various e forms and all the e-forms are required to be authenticated by authorized signatories of the company filing the same, using digital signatures. MCA has entrusted practicing professionals like members of the Institute of Company Secretaries of India (ICSI) with the responsibility of certifying the compliances and ensuring reliability of documents filed by companies with MCA in electronic mode.
- ii. The authorized signatory and the professionals, who certify e-form, are responsible for the correctness of the contents of e-forms and enclosures attached with the e-form.
- iii. Once an e-form has been pre-certified by a professional towards its authenticity based on the contained in the books of accounts and records of the company, the Registrar takes on record such e-form. If a professional gives a false certificate or omits any material information knowingly, he is liable for punishment under the provisions of Companies Act, 2013 as well as liable for professional or other misconduct

### 2. PRE-CERTIFICATION

- Pre-certification means certification of correctness of any document by a professional including Company Secretary in Practice, before the same is filed with the Registrar in terms of the requirements of the Companies Act, 2013.
- Company Secretaries are recognized to pre-certify the e-forms which are required to be filed with the Registrar.
- Initially, pre-certification was introduced to avoid registration delays and eventually evolved to check correctness of documents filed by professionals. The introduction of pre-certification by an independent professional in the e-form is aimed at self-regulations of companies and reduce the involvement of government machinery, i.e. the Registrar of Companies.
- Once an e-form has been pre-certified by a professional towards its authenticity based on the particulars contained in the books of accounts and records of the company, same can be taken on record without further examination.
- **Authentication of Documents:**  
**Rule 8(1), (2) & (5):** all electronic forms are required to be authenticated by authorised signatories using digital signatures. The e-forms are required to be authenticated on behalf of the company by the Managing Director or Director or Company Secretary or other key

managerial personnel and in there is any change in directors or Company Secretary, the form relating to appointment of such directors or Company Secretary is required to be filed by continuing director or Secretary of the company or other Key Managerial Personnel.

**Rule 8(6):** scanned image of documents must be of the original signed documents relevant to the e-forms and the scanned document image shall not be left blank without bearing actual signature of authorised person.

**Rule 8(7):** the person signing the form and the professional certifying the form are responsible to ensure that all the required attachments relevant to the form have been attached completely and legibly to the forms or applications or returns filed as per the Act and the rules.

### **3. IMPORTANCE OF PRE-CERTIFICATION**

From a Company's perspective and also from regulators standpoint, pre-certification is important to:

1. **Ensure correctness:** The professional checks the correctness of the particulars stated in the prescribed forms after due consideration of the provisions of the Act and the Rules made thereunder. He also ensures that the particulars stated in the Forms are in agreement with the books and records of the company. If he notices any defect or that the information provided in the form is incomplete or defective, he appropriately advises/provides guidance for completion of document/rectification of defect and makes pre-certification only after completion of documents/ rectification of such defects.
2. **Pre-emptive step:** Pre-certification acts as a pre-emptive check to ensure that the particulars stated in the form or return are as per the books and records of the company and are true and correct. This would mean that the Registrar can rely on the certification of the Company Secretary in practice and may take the document on record without further examination. Thus, Pre-certification by a Company Secretary in practice ensures that no form or return filed with the Registrar of Companies is defective or incomplete.
3. **Aids good governance:** Disclosure of information to shareholders is a critical requirement of good governance mechanism with a view to protect the interests of the shareholders and other stakeholders and to ensure better governance. Accordingly, the Act has stipulated stringent

measures and requirements for disclosure, included in financial statements, Board's report and annual return. The Act has also prescribed onerous duties and responsibilities on the Director of a company as well as the Company Secretaries. The punishment for violation of provisions of the Act has also been enhanced under the Act, to ensure the correctness of information filed by the corporates.

4. **Self-regulation:** The introduction of pre-certification by an independent professional in the e-form was aimed at self-regulations of companies and to reduce the involvement of government machinery, i.e. the Registrar of Companies. Once an e form has been pre-certified by a professional based on the particulars contained in the books of accounts and records of the company, same can be taken on record without further examination.

#### 4. HISTORICAL BACKGROUND

- i. Pre-certification was initially introduced to avoid delay in registration of charges and other documents; however, its scope was later expanded to authentication and verification of documents being filed with the MCA.
- ii. With a view to avoid delay in the Registration of documents, MCA issued two circulars advising the Registrars of Companies to take on record documents that are filed by companies or the creditors concerned, duly certified as correct by a Company secretary/ Chartered accountant/ Cost Accountant in practice.
- iii. The Department Related Parliamentary Standing Committee, which examined the Companies (Second Amendment) Bill, 1999, realised that verification of compliances with the provisions of the Companies Act, 1956 by a Company Secretary in practice was necessary and introduced the concept of pre-certification.
- iv. Later, The High-Level Committee on Corporate Audit and Governance (Naresh Chandra Committee) in its report in 2002, also recommended a system of pre-certification by Company Secretaries to remove defect in documents so that these could be taken on record immediately and reduce the workload on Ministry.
- v. Accordingly, the Companies (Amendment) Bill, 2003 introduced in the Rajya Sabha sought to add a new Section 383C to provide that all documents, returns, forms required to be filed with the Registrar or any statutory authority shall be pre-certified by a company secretary in practice.

- vi. After enactment of the Companies Act, 2013, the provision of Pre-certification was introduced in the Companies (Registration Offices and Fees) Amendment Rules, 2014 which elaborates on the responsibility of professionals certifying the forms.
- vii. The professional certifying the form must verify whether all the requirements as per the provisions of the Act and the rules made thereunder have been complied with and all the attachment to the forms have been duly signed/authenticated, scanned and attached completely and legibly in the PDF Format

## 5. VARIOUS CERTIFICATIONS BY COMPANY SECRETARY IN PRACTICE

### **CERTIFICATIONS UNDER COMPANIES ACT, 2013**

1.	<b>INC 20A</b>	Application for Declaration prior to the commencement of business or exercising borrowing powers
2.	<b>INC-22</b>	Notice of situation or change of situation of registered office
3.	<b>INC-28</b>	Notice of Order of the Court or any other competent authority
4.	<b>PAS-3</b>	Return of Allotment
5.	<b>SH-7</b>	Notice of Registrar of any alteration of share capital
6.	<b>CHG-1</b>	Application for registration of creation, modification of charge (other than those related to debentures)
7.	<b>CHG-4</b>	Particulars for satisfaction of Charge
8.	<b>CHG-9</b>	Charge for Debenture
9.	<b>MGT-14</b>	Filing of Resolutions and agreements to the Registrar
10	<b>DIR-6</b>	Intimation of change in particulars of Director to be given to the Central Government
11.	<b>DIR-12</b>	appointment of Directors and the key managerial personnel and the changes among them
12.	<b>MR-1</b>	Return of appointment of MD/WTD/Manager
13.	<b>MR-2</b>	Form of application to the Central PCMA Government for approval of appointment or reappointment and remuneration or increase in remuneration or waiver for excess or over payment to managing director

		or whole time director or manager and commission or remuneration to directors.
14.	MSC-3	Return of Dormant Company
15.	MSC-1	Application to Registrar for obtaining the status of Dormant Company
16.	MSC-4	Application for seeking status of active company
17.	GNL-1	Applications made to Registrar of Companies
18.	GNL-3	Details of persons/directors/charged/specified "officer who is in default"
19.	ADT-1	appointment of Auditor
20.	NDH-1	Return of Statutory Compliance
21.	NDH-2	Application for Not available extension of Time
22.	NDH-3	Half yearly Return
23.	MGT-7	Annual Return
24.	AOC-4	Financial Statements
25.	DIR-3KYC	KYC of Directors

### PRE-CERTIFICATION UNDER SEBI REGULATIONS

1.	<u>Regulation 40(9) (Listing Obligations and Disclosure Requirements) Regulations, 2015</u>	The listed entity shall ensure that the Share transfer agent and/or the in-house share transfer facility, as the case may be, produces a certificate from a practicing company secretary within thirty days from the end of the financial year, certifying that all certificates have been issued within thirty days of the date of lodgement for transfer, sub-division, consolidation, renewal, exchange or endorsement of calls/ allotment monies.
2.	<u>Regulation 24A (Listing Obligations and Disclosure Requirements) Regulations, 2015</u>	Secretarial audit report given by a company secretary in practice



3.	<u>Regulation SSA SEBI (Depositories and Participants) Regulations, 2018</u>	Audit report by a practicing company secretary on a quarterly basis, for the purposes of reconciliation of the total issued capital
4.	<u>Regulation on 76 SEBI (Depositories and Participants) Regulations, 2018.</u>	Reconciliation of Share Capital Audit Report

### Other Certifications:

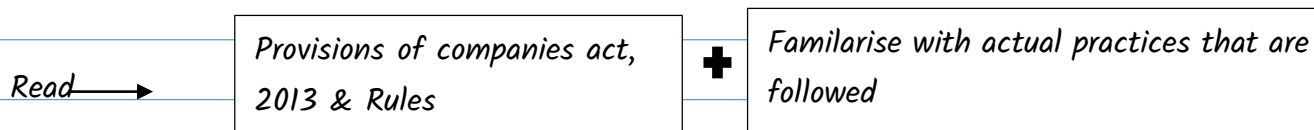
- i. Compliance of Conditions of Corporate Governance
- ii. Offer/allotment of securities to more than 49 to up to 200 investors
- iii. issue certificate of compliance to an investment adviser under SEBI (Investment Advisers) Regulations, 2013.
- iv. conduct annual audit of Research analyst or research entity in respect of Compliance with SEBI (Research Analysts) Regulations, 2014
- v. Certifying that the SEBI (ICDR) Regulations, 2018 for bonus issue has been complied with
- vi. Certificate for receipt of money specifically certifying that the company has received the application/ allotment monies from the applicants of these shares.
- vii. Quarterly certificate specifically certifying that the company has received the application/ allotment monies from the applicants of these shares.
- viii. Certifying that debenture holders have provided their consent for changing the terms of the Debentures whereby mentioning the existing as well as revised terms

### LLP ACT

1.	<u>Form 3</u>	LLP Agreement and changes
2.	<u>Form 4</u>	Change in DP or partners
3.	<u>Form 11</u>	Annual Return of Limited Liability Partnership
4.	<u>Form 15</u>	Shifting of registered office

## 6. PREPARATIONS BEFORE PRE CERTIFICATION

Before undertaking the work of precertification, professional should



### Ensure:

1. Letter of engagement or Board Resolution authorizing the professional for the assignment by the company to be obtained.
2. Maintain a physical/scanned of all documents verified
3. Ensure that all relevant documents and attachments are legible & visible.
4. Verification of the documents from the original records of the company.
5. Correctness of the records and the material departure from the facts.
6. The form is signed by the authorised person of the company.
7. Before certification of any form, the person should be aware about the relevant provisions under the Act and Rules made thereunder, Process to be followed by the company, approval if any required etc.

## 7. COMMON ERRORS NOTICED IN E-FILING

1. Digital signature is not registered / expired.
2. Payment of challan has not been done before the expiry date
3. Duplicate Payments have been made
4. Excess size of the form
5. Approval status of e-form is not verified.
6. Use of outdated version of e-form
7. Incorrect particulars in the e-form
8. Using older versions of Adobe and Java

## 8. CONSIDERATIONS IN FILLING E-FORMS

1. Before filling of e-forms, the professional should always go through the instruction kit provided with every e-form by the MCA on MCA-21 portal.
2. Ensure that latest version of the e-forms has been downloaded from the MCA Website.

3. DIN is mandatory for e-filing of documents thus, details related to DIN of the Directors should be updated on the MCA Portal.
4. Digital Signature is mandatory and same shall be registered on the MCA Portal before it's first use.
5. The attachments to the e-forms should be complete and all pages of the attachment should be page numbered and attached in order.
6. Don't wait for the last days or the due date of the filing of e-forms.
7. Ensure that the all the entries in the forms are correct as option for revision/cancellation of e-forms is not available on MCA Portal once it is taken on Record.
8. Don't forget to pay the filing fees before the expiry date of the challan as non-payment of fees would lead to cancellation of transaction.
9. As a trusted advisor of the Company, keep track of various reportable events and advise the Company regularly to file requisite forms to avoid penalties and regulatory actions
10. Use various inbuilt utilities like "PREFILL" and complete the form by clicking on "CHECK" and "PRE-SCRUTINY" options.

#### **9. REGISTER OF CERTIFICATION**

The Practicing Company Secretary should maintain the register for the all attestation /certification services, which includes:

1. Signing of Annual Return (MGT-7);
2. Certification of Annual Return (MGT-8);
3. Issue of Secretarial Audit Report (MR-3);
4. Certification of E forms of MCA under Companies Act, 2013 / LLP Act, 2008;
5. Internal Audit of Depository Participants/ portfolio Manager/ Stock Broker;
6. Annual Compliance auditor under SEBI (Research Analyst) Regulations, 2014;
7. Issue of certificate of Securities Transfers in compliance with the Listing Agreement with Stock Exchanges;
8. Certificate of reconciliation of capital, updation of Register of Members, etc.
9. Conduct of Internal Audit of Operations of the Depository Participants;
10. Corporate Governance Certification under SEBI (LODR) Regulations, 2015;
11. Information relation to E-forms certified and signed;

## 10. CERTIFICATION OF ANNUAL RETURN

- i. Section 92 of the Act read with rule 11(1) of the Companies (Management and Administration) Rules, 2014, provides that every company shall file its annual return in Form MGT- 7, except One Person Company (OPC) & Small Company which shall file annual return from the financial year 2020- 2021 onwards in Form MGT-7A.
- ii. The Annual Return of a listed company or of a company having a paid up share capital of Rs. 10 Crore or more or turnover of Rs. 50 Crore or more shall be certified by a company secretary in whole time practice in the Form No. MGT-8.
- iii. While certifying the Form No. MGT 8, the PCS shall certify that:  
The Annual Return discloses the facts correctly and adequately and the Company has complied with the provisions of the Act & Rules during the end of financial year in respect of:
  - It's status under the Act
  - Maintenance of registers or records & making entries within the time prescribed.
  - Closure of Register of Members Security holders.
  - Advances or loans to its directors and persons or firms or companies referred in section 185 of the Act.
  - Contracts/arrangements with related parties as specified in section 188 of the Act.
  - Declaration/ payment of dividend or transfer of unpaid/ unclaimed dividend/ other amounts to the Investor Education and Protection Fund.
  - Appointment / reappointment/ filling up casual vacancies of auditors as per the provisions of section 139 of the Act.
  - Alteration of the provisions of the memorandum and / or articles of association of the Company.
  - Issue, allotment, transfer, transmission or buy back of securities.
  - Filing of forms and returns as stated in the Annual Return, with the Registrar of Companies, Regional Director, Central Government, the Tribunal, Court or other authorities within the prescribed time.
  - Signing of audited financial statement and report of directors is as per section 134 of the Act.

## II. SIGNING OF THE ANNUAL RETURN - SECTION 92 (1)

- Annual return is required to be signed by a Director and the Company Secretary, or where there is no company secretary, by a company secretary in practice.
- In case of OPC and small company same shall be signed by the Company Secretary or where there is no company secretary, by the director of the company.

### CASE STUDY

#### Deep Himanshu Desai (petitioners) Vs. Union of Indian (Respondents).

In this matter it was held that the petitioners who were treated as disqualified directors under section 164(2)(a) sought direction to use their Director Identification Number (DIN) and Digital Signature Certificate for purpose of filing annual return. As per the decision of court the respondents were directed to reactivate Director Identification Number (DIN) of petitioner(s) and Digital Signature Certificate to enable petitioner(s) to file necessary annual return and also to discharge their statutory obligations

While signing the Form MGT-7 (Annual Return) Company Secretary/Company Secretary in practice and Director certifies that:

1. The return state the facts, as they stood on the date of the closure of the financial year aforesaid correctly and adequately.
2. Unless otherwise expressly stated to the contrary elsewhere in this return, the Company has complied with applicable provisions of the Act during the financial year.

In case of the Private Company, the Company Secretary/Company Secretary in Practice and Director also certifies that:

3. The company has not, since the date of the closure of the last financial year with reference to which the last return was submitted or in the case of a first return since the date of the Incorporation of the company, issued any invitation to the public to subscribe for any securities of the company.

4. Where the annual return discloses the fact that the number of members, (except in case of a one person company) of the company exceed two hundred, the excess consists of persons who under second proviso to section 2(68)(i) of the Act are not to be included in reckoning the number of two hundred.

Also, Company Secretary/ Company Secretary in Practice and Authorised Director declares that -

1. Whatever is stated in this form and the attachments thereto are true, correct and complete and no information material to the subject matter of this form has been suppressed or concealed and is as per the original records maintained by the Company.
2. All the required attachments to the form, are complete and legible.

#### Time and mode of appointment of Company Secretary

Considering the voluminous work it is advisable that the PCS is appointed by the Board, at the beginning of the respective financial year.

## 12. SCOPE AND EXTENT OF WORK FOR PCS

For the purpose of certification, PCS should carry out a scrutiny of the data available and check the correctness of the same. For ensuring the correctness of information contained in the Annual Return, the primary source documents should be looked into and while doing the detailed scrutiny, he may rely on certified copies of the resolutions, forms, agreements as also certificates from the management.

### Documents to be Obtained/Verified before Certification of Annual Return by Company Secretary in Practice

- i. Memorandum and Articles of Association
- ii. Forms & receipts filed with the Registrar of Companies
- iii. Statutory Registers
  - a. Record of Private Placement PAS-5 (Section 42)
  - b. Register of Members MGT-1 (Section 88)



- c. Register of Debenture holder MGT-2
- d. Register of Directors & their Shareholding (Section 170)
- e. Register of Key Managerial Personnel (Section 170)
- f. Register of Related Party Contracts MBP-4 (Section 188)
- g. Register of Loan and Investment SH-12 (Section 186)
- h. Register of deposit- Section 73 and 76 read with rule 14
- i. Register of Charge CHG-10 (Section 85)
- j. Register of Securities Register of Employee Stock Option Under SH-6 (Section 62)
- k. Register of Buyback under SH-10 (Section 68)
- l. Register of Sweat Equity shares under SH-3 (Section 62).
- iv. Minutes of the Meetings
  - a. Board Meeting
  - b. General Meeting
  - c. Committee Meeting
- v. Notices and agenda papers for convening meetings of the Board and Committees thereof;
- vi. Attendance Registers of all Meetings
- vii. Copy of Latest Financial Statements along with the Board's Report and Auditors Reports;
- viii. Copy of Notice of Annual General Meeting/Extraordinary General Meetings/Postal Ballots/Court convened meetings/Creditors meetings and debenture holders meeting
- ix. Certificate from RTA stating the number of shareholders as on the close of the financial year.
- x. Indebtedness Certificate signed by Company Secretary/CFO/ Statutory Auditors of the company;
- xi. Board Resolution for any type of corporate actions taken by the company
- xii. Corporate Action Forms filed by the company with Depositories
- xiii. Shareholding pattern and its break up
- xiv. List of Promoters

**Thoda Extra gyaaannnn..... Swaad Anusaaar**

Maker and Checker Concept: , it is advisable to have the Annual Return reviewed/verified by a different professional before it is certified, for independent verification of the Returns being certified. where a company is having a Company Secretary then signing of the annual return as per section 92(1) shall be done by the Company Secretary in employment only, but not by the Company Secretary in Practice



### 13. TIME LIMIT FOR FILING ANNUAL RETURN

Under section 92, annual return should be filed within 60 days from the date on which the annual general meeting is held or where no annual general meeting is held in any year within 60 days from the date on which the annual general meeting should have been held together with the statement specifying the reasons for not holding the annual general meeting.

### 14. CONSEQUENCES OF NOT FILING ANNUAL RETURN

#### For the Director

1. **Penalty:** Liable to a penalty of Rs.10,000 and in case of continuing failure, with further penalty of Rs.100 for each day during which such failure continues, subject to a maximum of Rs.2 lakh in case of a company and Rs.50,000 in case of officer in default.
2. **Disqualification:** If the company has not filed its financial statement or Annual Return for continuous period of three financial years, then every person who is or has been director of that company shall not be eligible for re-appointment as Director of that company or appointed in any other company for a period of five years from the date on which the said company fails to do so.
3. **Penalty for misstatement:** If in Annual Return, any Director or any Person makes a statement which is false then he shall be punishable with imprisonment for a term which shall not be less than 6 months but which may extend to 10 years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud.
4. **Class action suit:** Under section 245, the class of shareholders or depositors may file an application with the Tribunal alleging that the management or conduct of the affairs of any company are being conducted in a manner prejudicial to the interest of the company, its members or depositors. Such class action may include suit against the company, its directors, officers, experts or any other person for wrongful or fraudulent act. The order passed by the Tribunal shall be binding on the Company, its directors and officers.

#### **Abbas Maru Vs. Union of India**

It was held that that section 164 does not have a retrospective effect but a prospective effect and defaults contemplated under section with regard to non-filing of financial statements or annual returns for any continuous period of three financial years to be counted from financial year 2014-15 only.

#### **Gautam Mehra Vs. Union of India**

This ruling clarified that directors can be disqualified if they were involved with a defaulting company for any part of the continuous three-year period, and it underscored the swift cancellation of DIN for disqualified individuals. The court's ruling clarified that the disqualification outlined in Section 164(2)(a) is not restricted only to individuals who have served as directors of a company for the entire three-year period during which the company was in default of not filing annual returns. Instead, the disqualification also applies to individuals who have served as directors of the defaulting company for any portion of the relevant continuous three-year period.

#### **For the Company**

1. **Penalty:** Liable to a penalty of Rs.10,000 and in case of continuing failure, with further penalty of Rs.100 for each day during which such failure continues, subject to a maximum of Rs.2 lakh in case of a company and Rs.50,000 in case of officer in default.
2. **Winding up:** If the Company has defaulted in filing Annual Returns for the immediately preceding five financial years, the Company may be wound up by the Tribunal.
3. **Inactive Status:** If the Company has not filed its Annual Return for last two financial years, it will be termed as "inactive company".
4. **Dormant Status:** If the Company has not filed its Annual Return for two financial years consecutively, the Registrar shall issue notice to the Company and enter its name in the Register of Dormant Companies.

#### **CASE STUDY**

#### **AVS Enterprises (P.) Ltd. Vs. Registrar of Companies**

In this matter the appellant company had not filed annual returns with Registrar of Companies from year 2006-07 onwards and, its name was 'struck-off' from Register of Companies. Further, in view of fact that company was carrying on business operation and right to seek restoration of name of company was not extinguished, name of company was to be restored in register of companies subject to filing of all pending statutory documents along with late fee.

**Compounding of Offence:** However, offence can be compounded under section 441 of Companies Act, 2013. According to section 441 of Companies Act, 2013 any offence punishable with fine, imprisonment or fine or imprisonment or fine or both shall be compoundable by NCLT or Regional Director. Offence which is specifically punishable only with imprisonment or with imprisonment and fine is non-compoundable.



### CAN YOU SOLVE THIS?

Whether non-filing of Annual Return is a compoundable?

#### Solution:

If any company fails to file its annual return under section 92 (4), before the expiry of the period specified therein, such company and its every officer who is in default shall be liable to penalty of ten thousand rupees and in case of continuing failure, with further penalty of Rs.100 for each day during which such failure continues, subject to a maximum of Rs.2 lakh incase of a company and Rs.50,000 incase of officer in default. However, the provisions are compoundable as per the procedure specified under section 441 of Companies Act, 2013.

#### 15. CONSEQUENCES OF WRONG CERTIFICATION OF ANNUAL RETURN

Company Secretary will be liable under

- i. Section 447, 448 & 449 of Companies Act, 2013
- ii. Section 92 and will be liable to a penalty of 2 Lac Rs.
- iii. Will be liable for disciplinary actions by the Disciplinary Committee of the ICSI under the provisions of the Company Secretaries Act, 1980.

#### **Thoda Extra gyaaannnn..... Swaad Anusaaar**

##### **Authority to initiate action against Professionals**

Regional director/ ROC would initiate action under section 448 and 449 of the Act in the cases of submitting false or misleading or incorrect information. Further, the cases u/s 448 and 449 may also be referred to the concerned Institute for conducting disciplinary proceedings against the errant member and the MCA may debar the concerned professional from filing any document on the MCA portal in future.



## 16. FILING ANNUAL RETURN WHEN ANNUAL GENERAL MEETING IS NOT HELD

- i. Where no Annual General Meeting is held in a particular year, the Annual Return has to be filed within 60 days from the last day on which the meeting should have been held along with a statement specifying the reasons for not holding the annual general meeting.
- ii. However, as per Section 403 if the Annual return under section 92 is not filed within the due date specified the same can be filed on payment of additional fee which shall not be less than one hundred rupees per day and different amounts may be prescribed for different classes of companies.

## 17. DETAILED SCRUTINY OF ANNUAL RETURN

- i. A PCS has to verify the documents properly as he has to certify the annual return, but the question arises is the extent of detailed verification that has to be resorted to before certifying the Annual Return.
- ii. It is a well-established principle in any auditing practice that an auditor is not expected to carry out a 100% checking of every piece of paper generated by the company, in arriving at the final facts and figures represented in the end document.
- iii. Similarly, a PCS cannot be expected to check every entry of the Registrar of Members or transfer of shares.
- iv. Therefore, certain techniques of sample checking and test checking should be used before forming a opinion that the document being certified projects a true and fair view of the state of affairs of the company.
- v. Professional is ultimately responsible for the documents certified, thus, he should be careful and safeguard himself against any possible charge of negligence in respect of inaccurate or incomplete statements, certified by him.

Below mentioned are few guidelines which can be adopted while deciding about the extent of checking required:

1. **Internal Controls:** The PCS shall perform a detailed review of the internal controls, checks and balances built into the systems and procedures of the Company. If appropriate internal controls exist, and operate effectively, the need for detailed checking is reduced to a large extent.



2. **Materiality:** Similar to any audits, the principle of materiality is another important and relevant concept. The sample chosen for detailed checking should be representative of the whole, or the 'population', in statistical parlance. For example, in share transfers, instances of transfer of large blocks of shares could be chosen for detailed scrutiny. Or, the 'busy' period for transfer of shares in the year could be identified and selected for sample checking.
3. **Risk assessment:** The PCS shall have an overall understanding of the Company, the industry in which it operates, corporate governance practices, etc., and perform risk assessment to identify the 'high risk' areas. These 'High risk' areas shall be subjected to more extensive verifications.

*In conclusion, it may be noted that the ultimate responsibility of the document certified will rest with the professional. While the extent of checking is a matter of professional judgment, he should safeguard himself against any possible charge of negligence in respect of inaccurate or incomplete statements certified by him, by adequately documenting the procedures performed and conclusions drawn.*

#### **Certification with reservation /qualification /observations /adverse remarks**

where material facts are not stated correctly and completely in the Annual Return or where the company has not complied with the provisions of the Companies Act, the PCS may certify annual return with certain reservations /qualifications/ observations/adverse remarks by way of an annexure to his certificate.

While signing the Annual Return of a company, a Company Secretary or a Company Secretary in practice should observe the guidance note on the Certification of the Annual Return as published by the ICSI and take the appropriate professional judgments wherever necessary

#### **18. CORPORATE GOVERNANCE CERTIFICATION BY PRACTICING COMPANY SECRETARY**

- i. This certificate on the compliance of conditions of Corporate Governance by the Company is issued under regulation 46(2) of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015.
- ii. The certificate can be issued either by the statutory auditors or PCS and shall be annexed to the director's report.



- iii. Regulation 27(2) of SEBI(LODR), specifies that the listed entity shall submit **quarterly compliance report on corporate governance** in the format specified by the Board from time to time to recognized Stock Exchange(s) **within twenty one days from close of the quarter.**
- iv. In order to bring about transparency and to strengthen the disclosures around loans/ guarantees/comfort letters/ security provided by the listed entity, directly or indirectly to promoter/ promoter group entities or any other entity controlled by them, SEBI has decided to mandate such disclosures on a half yearly basis, in the Compliance Report on Corporate Governance.
- v. The **format for compliance report** on Corporate Governance shall be as under:
  - a. Annex - I - on quarterly basis
  - b. Annex - II - at the end of a financial year
  - c. Annex - III - at the end of 6 months from the close of financial year
  - d. Annex - IV - on a half yearly basis

**Thoda Extra gyaaannnn..... Swaad Anusaar**

**Compliance with Corporate Governance Reg 46(2) in respect of following:**

1. The listed entity having paid up equity share capital not exceeding rupees 10 crore; and net worth not exceeding rupees 25 crore, as on the last day of the previous financial year.
2. The listed entity which has listed its specified securities on the SME Exchange.

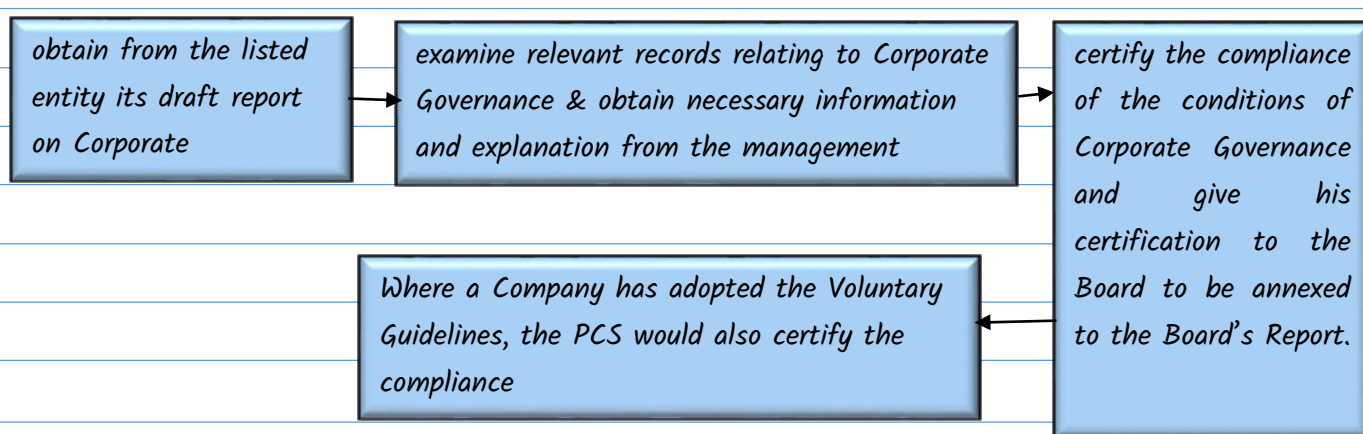


**19. IMPORTANT POINTS RELATED TO CORPORATE GOVERNANCE COMPLIANCE CERTIFICATE**

- i. In order that the PCS can carry out the necessary verification for the purpose of issuing Corporate Governance Compliance Certificate (CGCC), **the Company should provide the PCS access to the registers, books of accounts, papers, documents, reports and records** of the Company wherever kept.
- ii. The CGCC from the PCS **should relate to the financial year of the listed Company** under Report.
- iii. When a PCS is assigned the compliance certification work of the Company for the first time, **he should communicate his appointment to the earlier incumbent, if a PCS, by registered post.**

- iv. The PCS who has issued the CGCC should make himself available at the Annual General Meeting to provide clarifications, on CGCC, if required.
- v. Any failure or lapse on the part of a PCS in issuing a CGCC, may not only attract disciplinary action for professional or other misconduct under the provisions of the Company Secretaries Act, 1980, but also make him liable for any injury caused to any person due to his negligence in issuing the CGCC

## 20. MODE OF ISSUING CORPORATE GOVERNANCE COMPLIANCE CERTIFICATE (CGCC)



## 21. TYPES OF CERTIFICATION

**Unqualified:** issued when the PCS forms the opinion that the conditions of Corporate Governance have been duly complied with by the Company

**Qualified:** issued when the PCS concludes that there are certain specific non-compliances or inadequacies. It should contain a brief description of non-compliances under the act.

- *Qualifications, should be stated in bold type or in italics in the CGCC.*
- *If the PCS is unable to form any opinion with regard to any specific matter, the PCS shall state clearly the fact that he is unable to form an opinion with regard to that matter and the reasons therefor.*
- *If the scope of work required to be performed is restricted on account of limitations imposed by the client, or on account of other limitations (such as certain books or papers being in custody of another person or Government Authority), the certificate may indicate such limitations.*
- *If such limitations are so material that the PCS is unable to express any opinion, the PCS should state that "in the absence of necessary information and records, he is unable to certify compliance or otherwise of the conditions of Corporate Governance by the Company".*

## 22. PENALTY FOR FALSE CORPORATE GOVERNANCE COMPLIANCE CERTIFICATE (CGCC)

- As per section 448 if, in any return, report, certificate, balance sheet, prospectus, statement or other document required by or for the purposes of any of the provisions of the Act, any person makes a statement which is false in any material particular, knowing it to be false or which omits material fact, knowing it to be material, he shall be punishable under section 447.*
- As per section 449 of Companies Act, 2013 penalty of imprisonment for a minimum period of 3 years and a term which may extend to seven years, and fine which may extend to ten lakhs rupees will be imposed if any person intentionally gives false evidence upon any examination on oath or solemn affirmation.*
- As per Section 23H of the Securities Contracts (Regulation) Act, when a person fails to comply with any provision of SCRA, the rules or articles or bye-laws or the regulations of a recognized stock exchange or directions issued by the Securities and Exchange Board of India he shall be liable to a penalty which may extend to one crore rupees, where no specific penalty is provided.*
- Section 23M of the SCRA provides that when any person contravenes or abets the contravention of any offences for which no punishment is provided elsewhere in SCRA, he shall be punishable with imprisonment for a term which may extend to ten years, or with fine, which may extend to twenty-five crore rupees or with both.*

## 23. CORPORATE GOVERNANCE AND SEBI (LISTING OBLIGATIONS AND DISCLOSURE REQUIREMENTS) REGULATIONS, 2015

### CORPORATE GOVERNANCE PRINCIPLES UNDER LISTING REGULATIONS

#### Rights of shareholders

- i. right to participate and be sufficiently informed of, decisions concerning fundamental corporate changes.
- ii. opportunity to participate effectively and vote in general shareholder meetings.
- iii. Being informed of the rules, including voting procedures that govern general shareholder meetings.
- iv. Opportunity to ask questions to the board of directors, place items on the agenda of general meetings, and to propose resolutions, subject to reasonable limitations.
- v. Effective shareholder participation in key corporate governance decisions, such as the nomination and election of members of board of directors.
- vi. exercise of ownership rights by all shareholders, including institutional investors.
- vii. Adequate mechanism to address the grievances of the shareholders.
- viii. Protection of minority shareholders from abusive actions and effective means of redress

#### Timely Information

Listed Entity should provide timely information to Shareholders including:

- i. sufficient and timely information about the date time and location of the meeting and issues discussed in the meeting.
- ii. Capital structures and arrangements that enable certain shareholders to obtain a degree of control disproportionate to their equity ownership.
- iii. rights attached to all series and classes of shares, which shall be disclosed to investors before they acquire shares

#### Equitable Treatment

Equitable treatment should be ensured of all shareholders in following manner:

- i. All shareholders of the same series of a class shall be treated equally.

- ii. Effective shareholder participation in key corporate governance decisions, such as the nomination and election of members of board of directors, shall be facilitated.
- iii. Exercise of voting rights by foreign shareholders shall be facilitated.
- iv. The listed entity shall devise a framework to avoid insider trading and abusive self-dealing.
- v. Processes and procedures for general shareholder meetings shall allow for equitable treatment of all shareholders.
- vi. Procedures of listed entity shall not make it unduly difficult or expensive to cast votes.

### **Role of stakeholders in corporate governance:**

- i. The listed entity shall respect the rights of stakeholders that are established by law or through mutual agreements.
- ii. Stakeholders shall have the opportunity to obtain effective redress for violation of their rights.
- iii. Stakeholders shall have access to relevant, sufficient and reliable information on a timely and regular basis to enable them to participate in corporate governance process.
- iv. The listed entity shall devise an effective vigil mechanism/whistle blower policy enabling stakeholders, including individual employees and their representative bodies, to freely communicate their concerns about illegal or unethical practices.

### **Disclosure and Transparency**

- i. Information shall be prepared and disclosed in accordance with the prescribed standards of accounting, financial and non-financial disclosure.
- ii. Channels for disseminating information shall provide for equal, timely and cost efficient access to relevant information by users.
- iii. Minutes of the meeting shall be maintained explicitly recording dissenting opinions

### **Responsibilities of Board of Directors**

- i. **Disclosure of Information**
  - a. Members of the Board and KMP should disclose where they have a material interest in any transaction
  - b. The board of directors and senior management shall ensure transparency to shareholders and simultaneously ensure good corporate governance

ii. **Key functions of the Board of Directors**

- a. Monitoring the effectiveness of the listed entity's governance practices and making changes as needed.
- b. Selecting, compensating, monitoring and, when necessary, replacing key managerial personnel and overseeing succession planning.
- c. Aligning key managerial personnel and remuneration of board of directors with the longer term interests of the listed entity and its shareholders.
- d. Ensuring a transparent nomination process to the board of directors with the diversity of thought, experience, knowledge, perspective and gender in the board of directors.
- e. Overseeing the process of disclosure and communications
- f. Ensuring the integrity of the listed entity's accounting and financial reporting systems, including the independent audit.
- g. Monitoring and managing potential conflicts of interest of management, members of the board of directors and shareholders, including misuse of corporate assets and abuse in related party transactions.

iii. **Other Responsibilities**

- a. The board of directors shall provide strategic guidance to the listed entity, ensure effective monitoring of the management and shall be accountable to the listed entity and the shareholders.
- b. The board of directors shall set a corporate culture and the values by which executives throughout a group shall behave.
- c. Members of the board of directors shall act on a fully informed basis, in good faith, with due diligence and care, and in the best interest of the listed entity and the shareholders.
- d. The board of directors shall encourage continuing directors training to ensure that the members of board of directors are kept up to date.
- e. Where decisions of the board of directors may affect different shareholder groups differently, the board of directors shall treat all shareholders fairly.
- f. The board of directors shall maintain high ethical standards and shall take into account the interests of stakeholders.
- g. The board of directors shall exercise objective independent judgement on corporate affairs.



- h. The board of directors shall consider assigning a sufficient number of non-executive members of the board of directors capable of exercising independent judgement to tasks where there is a potential for conflict of interest.
- i. The board of directors shall ensure that, while rightly encouraging positive thinking, these do not result in over optimism that either leads to significant risks not being recognised or exposes the listed entity to excessive risk.
- j. The board of directors shall have ability to 'step back' to assist bexecutive management by challenging the assumptions underlying: strategy, strategic initiatives (such as acquisitions), risk appetite, exposures and the key areas of the listed entity's focus.
- k. When committees of the board of directors are established, their mandate, composition and working procedures shall be well defined and disclosed by the board of directors.
- l. Members of the board of directors shall be able to commit themselves effectively to their responsibilities.

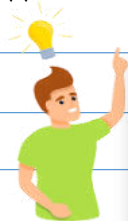
## **24. SIGNING OF FINANCIAL STATEMENTS**

- i. Section 129 and Schedule III of Companies Act, 2013
- ii. Financials statements are laid before the AGM
- iii. As per section 2(40), financial statements should includes:
  - a balance sheet as at the end of the financial year;
  - a profit and loss account, or in the case of a company carrying on any activity not for profit, an income and expenditure account for the financial year;
  - cash flow statement for the financial year;
  - a statement of changes in equity, if applicable;
  - any explanatory note

As per the provisions of Section 134(1) of Companies Act, 2013, the financial statement, including consolidated financial statement, shall be approved by the Board of Directors before they are signed on behalf of the Board and the Financial Statement will be signed by the following:

- (i) Chairperson of the Company (if he is authorized by the board of directors); OR
- (ii) Two Directors (out of which one shall be Managing Director); AND

(iii) Chief Executive Officer/ Company Secretary/ Chief Financial Officer of the Company (on the basis of their appointment in the Company)



### CAN YOU SOLVE THIS?

Is it mandatory to sign financial statement from the company secretary?

### Solution

As per Section 134(1), the company in which the Whole-time Company Secretary is appointed, then it is mandatory that the Financial Statement is signed from the Whole-time Company Secretary. Further if the company appointed Chief Executive Officer or Chief Financial Officer then the financial statement shall also be signed from them.

### CASE STUDY

#### Sourajit Ghosh Vs. Union of India

In the instant case court held that if a director of a company who has failed to file financial statements incurs disqualification for appointment of a director in another company or re-appointment as a director, his right to continue as director in all companies which may have filed financial statements of annual returns as required under Companies Act would immediately be forfeited.

## 25. ADOPTION AND CIRCULATION OF SIGNED FINANCIAL STATEMENTS

The Annual General Meeting of the company can be held within 6 months from the end of the financial year i.e. 30 September and the company is required to adopt the Financial Statement in the Annual General meeting.

Financial Statement along with consolidated financial statement shall be circulated along with:

- any notes or annexure
- the auditor's report; and
- the Board's report

If company fails to comply with the provisions of financial statement **company shall be liable to a penalty of three lakh rupees and every officer of the company who is in default shall be liable to a penalty of fifty thousand rupees.**

## 26. OBLIGATION & PENAL PROVISIONS

### Company:

- The provisions of the Companies Act, 2013 provides for the actions/ fine/ penalty to be imposed on the companies in case of the default made by the company/lits officers.
- Action is taken by the Central Government for compulsory winding up of the company.

### Authorised Representative

- The provisions of the Companies Act, 2013 provides for the actions/ fine/ penalty to be imposed on the companies in case of the default made by the company/lits officers.
- Action may be taken under section 447 & 449 of companies' act, 2013

### Certifying Professional

#### i. Risk on Reputation

Reputation of CS firm will be affected

It can create a bad rift with ICSI and may lead to losing the practice as well.

#### ii. Under the Company Secretaries Act, 1980

- The Second Schedule to the Company Secretaries Act, 1980 provides that "where a Company Secretary in Practice certifies or submits in his name, or in the name of his firm, a report of an examination of the matters relating to company secretarial practice and related statements unless the examination of such statements has been made by him or by a partner, he will be guilty of professional misconduct.
- Where a Company Secretary in Practice while pre-certifying any e-Form or document fails to disclose a material fact known to him in his report, which is material, he will be guilty for professional misconduct.
- If PCS provided any false statement in report, he would be liable for Disciplinary action under Company Secretaries Act, 1980.
- In case he is found guilty of professional or other misconduct mentioned in the second schedule to the Company Secretaries Act, 1980, he will be liable for the following actions:

(a) Reprimand

- (b) Removal of name from the registrar of members permanently or for such period as may be thought fit by the disciplinary committee,
- (c) Fine which may extend to five lakh rupees

### iii. Under the Companies Act, 2013

- i. where any instance of filing document, application or return etc. containing a false or misleading information or omission of material fact, requiring action under section 448 or section 449 is observed, the person shall be liable under section 448 and 449 of the Act.
- ii. The section provide that if in any return, report, certificate, financial statement, prospectus, statement or other document required by, or for the purposes of any of the provisions of this Act or the rules made thereunder, any person makes a statement,
  - which is false in any material particulars, knowing it to be false; or
  - which omits any material fact, knowing it to be material, he shall be liable under section 447
- iii. **447:** any person who is found to be guilty of fraud, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to ten years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud. In case, the fraud in question involves public interest, the term of imprisonment shall not be less than three years.

### Action by Regulators

- i. The Digital Signature Certificate shall be de-activated by the central government if there is any omission or false statement in the report.
- ii. where any instance of filing of documents, application or return or form etc, containing false information or omission of material fact is observed, the Regional Director or the Registrar shall conduct a quick inquiry against the professionals who certified the form and signatory thereof including an officer in default who appears prima facie responsible for submitting false or misleading or incorrect information and a 15 days notice will be served.
- iii. The Regional Director or the Registrar will submit his/her report in respect of the inquiry initiated, irrespective of the outcome, to the E-Governance cell of the Ministry within 15 days of the expiry of period given for submission of an explanation with recommendation in initiating

action under section 447 and 448 and referral of matter to the Institute for Disciplinary proceedings.

- iv. The E-Governance cell will thereafter refer such cases to the concerned Institute for conducting disciplinary proceedings against the errant member as well as debar the concerned professional from filing any document on the MCA portal in future.
- v. The Registrar shall forward a fortnightly report to the concerned Regional Director as well as to the E-Governance Division.
- vi. Thereafter, the Regional Director shall forward a consolidated report to the Joint Secretary E-Governance Division on or before 7<sup>th</sup> of every month.

*The Institute of Company Secretaries of India (ICSI) Disciplinary Committee has taken disciplinary actions against two Company Secretaries for committing professional misconduct in different cases.*

1. In the first case, a Company Secretary was penalized for professional misconduct related to mistakes in a Compliance Certificate issued for a company. The respondent incorrectly indicated that the company had not issued equity shares, made erroneous statements about Board of Directors meetings, and inaccurately stated the applicability of Provident Fund to the company. After an inquiry, it was found that the Compliance Certificate did not accurately reflect an increase in share capital as reported in Form 23AC filed by the company. Additionally, the Board of Directors meeting claims were contradictory to the resignation of two directors, and the Provident Fund information was not accurately verified. The Respondent has stated that the Board of Directors has duly met 4 times during the period under review but it appears that the Board was not constituted as two directors had resigned for which the Respondent has stated that they had written to the ROC, but failed.

The disciplinary committee found the respondent guilty of professional misconduct and imposed a fine of Rs. 15,000. If the fine was not paid within the stipulated time, the respondent would face a 60-day removal from the register.

2. In the second case, another Company Secretary was disciplined for filing Compliance Certificates without proper due diligence. The complaint alleged that the respondent had committed professional and other misconduct while certifying Compliance Certificates for a company. Among the allegations were that the respondent wrongly stated that proper notices for Board

meetings were given and failed to disclose illegal allotment of equity shares and an invalid Annual General Meeting. The disciplinary committee noted laxity on the respondent's part for not verifying notices for all board meetings and other discrepancies. The respondent admitted the lack of due diligence and pleaded guilty.

The committee found the respondent guilty of professional misconduct, but the document cuts off before specifying the penalty imposed.

*In both cases, the disciplinary actions were taken by the ICSI against Company Secretaries for failing to exercise due diligence in certifying Compliance Certificates and making errors or omissions in their professional roles.*



SUMMARISED VERSION (MIND MAP)



## CHAPTER 4 – LEGAL FRAMEWORK GOVERNING COMPANY SECRETARIES

### 1. INTRODUCTION

- i. The Department of Company Affairs conducting examination leading to Government Diploma in Company Secretaryship (GDCA), marked the beginning of the profession of Company Secretaries in an organized manner.
- ii. Later in the wake of substantial increase in the number of candidates for GDCA, the Institute of Company Secretaries of India was set up and registered as a company on 4th October, 1968 under Section 25 of the Companies Act, 1956 (i.e. not for profit company) with its registered office at New Delhi.
- iii. The work relating to Company Secretaries' Examination and all allied matters were taken over by the Institute with effect from 1st January 1969.
- iv. In 1980, the Government moved the Company Secretaries Bill, 1980 to convert the Institute into a statutory body.
- v. Company Secretary (CS) professionals are recognized as Key Managerial Personnel (KMP) under the Companies Act, 2013, wherein they are entrusted with a senior-level position in the management and are an intrinsic part of the Board of corporate entity.

### 2. FUNCTIONS AND DUTIES OF COMPANY SECRETARIES

- i. The Company Secretary is an in-house legal expert and a compliance officer of the company, possessing expertise in corporate laws, securities laws & capital market and corporate governance.
- ii. The Company Secretary is chief advisor to the board of directors on best practices in corporate governance, bearing responsibility for all regulatory compliances of company, corporate planner and strategic manager.
- iii. Expectations are also extended to the areas of Corporate Social Responsibility (CSR), Business Responsibility and Sustainability Reporting (BRSR) and Environment Social Governance (ESG), all of which put together highlights the focus on sustainability, because CS is referred to as a Governance Professionals.

According to the section 205 of the Companies Act, 2013 read with rule 10 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014, the Company Secretary must perform the following functions and duties:

- i. To report to the Board about compliance with the provisions of this Act, the rules made thereunder and other laws applicable to the company
- ii. To provide to the directors of the company, collectively and individually, such guidance as they may require, with regard to their duties, responsibilities and powers
- iii. To facilitate the convening of meetings and attend Board, committee and general meetings and maintain the minutes of these meetings
- iv. To obtain approvals from the Board, general meeting, the government and such other authorities as required under the provisions of the Act
- v. To represent before various regulators, and other authorities under the Act in connection with discharge of various duties under the Act
- vi. To assist the Board in the conduct of the affairs of the company
- vii. To assist and advise the Board in ensuring good corporate governance and in complying with the corporate governance requirements and best practices
- viii. To discharge such other duties as have been specified under the Act or rules
- ix. Such other duties as may be assigned by the Board from time to time
- x. To ensure that the company complies with the applicable secretarial standards

## CASE STUDY

### Mayank Agarwal (Applicant) VS. M/s. Technology Frontiers (India) Private Limited (Respondent Company)

- In this case, the Company Secretary of the respondent company had sent the notice to the applicant under Section 90(5), (who is nominee director of the Respondent Company) on May 3rd, 2021 along with the form to disclose their Ultimate Beneficial Ownership of the shares held. However, the applicant alleged that the company alone is empowered to apply to NCLT under Section-90(7) of the Companies Act, 2013 and Company Secretary has not taken approval from Board of directors to file the present petition.
- CS submitted in his written petition that according to the Board resolution he has the locus standi. He also referred to the provisions of section 205 of the Companies Act 2013, under which he is authorized to represent and that it is his duty to do so.
- Court Ordered : The usage of the words "Company shall give notice" under Section 90(5) makes it amply clear that the Key Managerial Personnel have to do this activity of seeking information; in order to find out the Ultimate Beneficial Owners. The Company Secretary has acted diligently and promptly to ensure compliance of the mandatory provisions. Hence, the application stand dismissed.

Regulation 6(2) of the SEBI (LODR) Regulations, 2015 provides that a listed company is required to appoint a qualified company secretary as the compliance officer who will be responsible for following:

- i. Ensuring compliance with regulatory provisions
- ii. co-ordination with and reporting to the Board, recognised stock exchange(s) and depositories about the compliance with rules, regulations and other directives of these authorities.
- iii. Ensure that the procedures followed are correct and authentic.
- iv. Monitor the grievance redressal mechanism

### **3. COMPANY SECRETARY AS A PART OF SENIOR MANAGEMENT**

The senior management shall mean the officers and personnel of the listed entity who are members of its core management team, excluding the Board of Directors, and shall also

comprise all the members of the management one level below the Chief Executive Officer or Managing Director or Whole-Time Director or Manager (including Chief Executive Officer and Manager, in case they are not part of the Board of Directors) and shall specifically include the functional heads, by whatever name called and the Company Secretary and the Chief Financial Officer- Regulation 16d of SEBI(LODR) Regulations.

Company Secretary has two roles to play:



#### 4. SOME LEGAL TERMINOLOGIES AND INTERPRETATION

- i. "Company Secretary" means a person who is a member of the Institute of Company Secretaries of India.
- ii. "Register" means the Register of members of the Institute maintained under section 19 or the Register of firms of the Institute maintained under section 20B
- iii. Under the Companies Act, 2013 Company Secretary has been defined under section 2(24) as: '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 the Company Secretary under the Companies Act, 2013.
- iv. Section 2(25) of the Companies Act, 2013 defines "Company Secretary in Practice" means a company secretary who is deemed to be in practice under sub-section (2) of section 2 of the Company Secretaries Act, 1980.
- v. "key managerial personnel" means:
  - a. the Chief Executive Officer or the managing director or the manager
  - b. the company secretary
  - c. the whole-time director
  - d. the Chief Financial Officer
  - e. such other officer, not more than one level below the directors who is in whole-time employment, designated as key managerial personnel by the Board; and
  - f. such other officer as may be prescribed.



## 5. ASSOCIATES AND FELLOWS

### Associate Members

As per section 5 of the Company Secretaries Act, 1980, Any person shall, on his name being entered in the Register of members, be deemed to have become an Associate and as long as his name remains so entered, shall be entitled to use the letters "A.C.S." after his name to indicate that he is an Associate.

A person is entitled to enter his name in the Register of Members if:

- i. has passed examinations conducted by the dissolved company and has completed practical training either as prescribed in the earlier regulations or as prescribed in the Company Secretaries (Amendment) Regulations, 2020; or
- ii. has passed the qualifying examinations and completed the practical training as prescribed in these regulations; or
- iii. has passed such other examination and completed such other training outside India as is recognised by the Central Government or the Council as being equivalent to the examination and training prescribed in these regulations; or
- iv. had registered himself as a student with the Institute of Chartered Secretaries and Administrators, London on or before 31st December, 1972 and had passed the Final Examination or Professional Programme Examination of that Institute and had either possessed the required practical experience or undergone the prescribed practical training as stipulated for candidates passing the Final Examination or Professional Programme Examination conducted by the Institute.
- v. is an Indian citizen who is a "person resident outside India" and has become a member of the Institute of Chartered Secretaries and Administrators, London, after passing the qualifying examination conducted by that Institute and had either possessed and required practical experience in India or abroad, or undergone the prescribed practical training as stipulated for the candidates passing the Final Examination or Professional Programme Examination conducted by the Institute.

### Fellow Members

As per section 5 of the Company Secretaries Act, 1980, A person, being an Associate who has been in continuous practice in India as a Company Secretary for at least five years and a

person who has been an Associate for a continuous period of not less than five years and who possesses such qualifications or practical experience as the Council may prescribe with a view to ensuring that he has experience equivalent to the experience normally acquired as a result of continuous practice for a period of five years as a Company Secretary shall, on payment of such fees, as may be determined, by notification, by the Council, and on application made and granted in the prescribed manner, be entered in the Register of members as a Fellow.

Regulation 4(2) of The Company Secretaries Regulations, 1982 as amended by the Company Secretaries (Amendment) Regulations, 2020 prescribes as follows:

No person shall be entitled to have his name entered in the Register of Members as a Fellow unless he:

- a. was a Fellow including Honorary Fellow of the dissolved company immediately before the commencement of the Act; or
- b. was admitted as a Fellow under the earlier regulations; or
- c. is an Associate and has been in continuous practice in India as a Company Secretary for at least five years; or
- d. is an Associate for a continuous period of not less than five years and possesses such qualifications or practical experience as may be determined by the Council.

No Associate member shall be admitted as a fellow member of the Institute, if;

- a. has been found guilty of any professional or other misconduct and his name has been removed from the Register or he has been imposed fine in preceeding 5 years on the date of application.
- b. has not completed such minimum numbers of Professional Development Credit Hours as may be determined by the Council

## **6. CERTIFICATE OF PRACTICE AND DEEMED TO BE IN PRACTICE**

According to section 2(d) of the Company Secretaries Regulations, 1982 'certificate of practice' means a certificate granted under these or earlier regulations entitling the holder to practise as a Company Secretary and a member can practice in India or outside India only after obtaining certificate of practice.

According to section 2(2) of the Company Secretaries Act, 1980, a member of the Institute shall be deemed "to be in practice" when, individually or in partnership with one or more members of the Institute in practice or in partnership with members of such other recognised professions, in consideration of remuneration received –

- i. Engages himself in the practice of the profession of Company Secretaries in relation to any company or,
- ii. Offers to perform or performs services in relation to the promotion, forming, incorporation, amalgamation, reconstruction, reorganization or winding up of companies or,
- iii. Offers to perform or performs such services as may be performed by
  - a. a share transfer agent
  - b. an issue house
  - c. a share and stock broker
  - d. a secretarial auditor or consultant
  - e. an adviser to a company on management, including any legal or procedural matters,
  - f. unauthorized representative of a company with respect to filing, registering, presenting, attesting or verifying any documents on behalf of the company.
- iv. Holds himself out to the public as a Company Secretary in practice or
- v. Renders professional services or assistance with respect to matters of principle or detail relating to the practice of the profession of Company Secretaries or
- vi. Renders such other services as, in the opinion of the Council, are or may be rendered by a Company Secretary in practice.

## **7. REGISTER OF MEMBERS**

Institute will maintain a Register of Members and it should include following:

- a. his full name, date of birth, domicile, residential and professional addresses
- b. membership number and the date on which his name is entered in the Register
- c. his qualifications
- d. whether he holds a certificate of practice

- e. email-id, mobile number, telephone number if any, and such other particulars as may be determined by the Council.

*Any change in these details should be communicated within 30 days of such change.*

### **Removal from Register of Members:**

According to section 20 of the Company Secretaries Act, 1980, name of those member will be removed by the Council:

- a. who is dead;
- b. from whom a request has been received to that effect; or
- c. who has not paid any prescribed fee required to be paid by him; or
- d. who is found to have been subject at the time when his name was entered in the Register of members, or who at any time thereafter has become subject, to any of the disabilities mentioned in section 8, or
- e. who for any other reason has ceased to be entitled to have his name borne on the Register of members.

## **8. DISCIPLINARY MECHNAISM**



### **Board of Discipline**

- i. It is constituted by the Council of Institute under section 21A of Company Secretaries Act, 1980.
- ii. Follows summary disposal procedure in dealing with all the cases before it.
- iii. Where the Borad is of the opinion that member is guilty of misconduct under First Schedule, after giving of Opportunity of being heard, it may take following actions:
  - a. Reprimand the member
  - b. remove the name of the member from the Register up to a period of three months
  - c. impose such fine as it may think fit which may extend to rupees one lakh.

- iv. The Director (Discipline) shall submit before the Board of Discipline all information and complaints where he is of the opinion that there is no prima facie case and the Board of Discipline may close the matter if he agrees or in case it disagrees, it may advise the Director (Discipline) to further investigate the matter.

### Disciplinary Committee

- i. Constituted by the Council.
- ii. The Disciplinary Committee shall consist of the President or the Vice-President of the Council as the Presiding Officer and two members to be elected from amongst the members of the Council and two members to be nominated by the Central Government from amongst the persons of eminence having experience in the field of law, economics, business, finance or accountancy
- iii. Where the Disciplinary Committee is of the opinion that a member is guilty of a professional or other misconduct mentioned in the Second Schedule or both the First Schedule and the Second Schedule, it shall afford to the member an opportunity of being heard before making any order against him and may thereafter take any one or more of the following actions, namely:—
- a. Reprimand the member
- b. Remove the name of the member from the Register permanently or for such period, as it thinks fit
- c. impose such fine as it may think fit, which may extend to rupees five lakhs.

### Disciplinary Directorate

- i. It is headed by an officer of the Institute designated as Director (Discipline) and such other employees for making investigations in respect of any information or complaint received by it.
- ii. Where the Director (Discipline) is of the opinion that a member is guilty of any professional or other misconduct mentioned in the First Schedule, the matter shall be placed before the Board of Discipline and if the member is guilty under second schedule, the matter shall be placed before the Disciplinary Committee.

Thoda Extra gyaaannnn..... Swaad Anusaaar

(Short Note)

Powers of all the three authorities are similar to Civil Court:

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**9. APPEAL TO AUTHORITY**

- i. Any member of the Institute aggrieved by any order of the Board of Discipline or the Disciplinary Committee imposing on him any of the penalties may **within ninety days** from the date on which the order is communicated to him, prefer an appeal to the Authority. (the Appellate Authority constituted under Chartered Accountants Act, 1949, shall be deemed to be the Appellate Authority for the purposes of this Act)
- ii. The Director (Discipline) may also appeal against the decision of the Board of Discipline or the Disciplinary Committee to the Authority if so authorised by the Council, within ninety days.
- iii. The Authority may entertain appeal after the expiry of ninety days, if it is satisfied that there was sufficient cause for not filing the appeal in time.
- iv. The authority may:
  - confirm, modify or set aside the order
  - impose any penalty or set aside, reduce, or enhance the penalty imposed by the order
  - remit the case to the Board of Discipline or Disciplinary Committee for such further enquiry as the Authority considers proper in the circumstances of the case
  - pass such other order as the Authority thinks fit

An opportunity of being heard is to be given to both the parties.



## 10. CERTAIN PROVISIONS RELATING TO MISCONDUCT UNDER THE COMPANY SECRETARIES ACT, 1980

Professional misconduct means any act or omission provided in any of the Schedules. Professional misconduct in relation to members of the Institute is broadly structured under Schedule I and Schedule II of the Act.

The Supreme Court in *Council of the Institute of Chartered Accountants of India and Another v. B. Mukherjee* after examining the nature, scope and extent of the disciplinary jurisdiction under the provisions of the Chartered Accountants Act, 1949 observed if a member of the Institute is found, prima facie, guilty of conduct, which, in the opinion of the Council renders him unfit to be a member of the Institute, even though such conduct may not attract any of the provision of the Schedules, it would still be open to the Council to hold an enquiry against the member in respect of such conduct and a finding against him, in such an enquiry, would justify appropriate action being taken by the High Court.

Following are the examples of other misconduct:

- i. where a Company Secretary retains the records, books of account and documents of the client and fails to return to the client on request without a reasonable cause.
- ii. where a Company Secretary makes a material misrepresentation.
- iii. where a Company Secretary uses the services of his apprentice(s) for purposes other than professional practice
- iv. conviction by a competent court of law
- v. wrong publicity causing damage to the clients
- vi. where in the opinion of the Council member brings disrepute to the profession or the Institute as a result of his action whether or not related to his profession
- vii. member is held guilty by any civil or criminal court for an offence which is punishable with imprisonment for a term not exceeding six months
- viii. furnishing false declaration to the institute or any regulator; and
- ix. non-compliance with Guidelines issued by the Council of the Institute.

**A. Professional misconduct in relation to Company Secretaries in Practice (Part I of the First Schedule to the Act)**

**Clause 1: A Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he - "allows any person to practice in his name as a Company Secretary unless such person is also a Company Secretary in Practice and is in partnership with or employed by him."**

The rule permits another person to practice in the name of a Company Secretary in Practice provided such other person is also a Company Secretary in Practice and is in partnership with or is employed by the Company Secretary in Practice in whose name the work is to be carried out

Two persons are said to be in Partnership when they work together on mutual faith and agency. Sharing of remuneration does not make them partners. Thus an associate who is not a part of decision making process does not become a partner.

Following tests if fulfilled cumulatively may make two persons partners of each other:

- i. Sharing of profits and or losses
- ii. Taking decisions together
- iii. Sharing the responsibilities of such decision making; and iv. Acting on behalf of each other and binding other person with one own acts of commission or omission.

**Clause 2: A Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he— "pays or allows or agrees to pay or allow, directly or indirectly, any share, commission or brokerage in the fees or profits of his professional business to any person other than a member of the Institute or a partner or a retired partner or the legal representative of a deceased partner or a member of any other professional body or with such other persons having such qualifications as may be prescribed, for the purpose of rendering such professional services from time to time in or outside India."**

This clause does not prohibit a Company Secretary in Practice from sharing fees, commission or brokerage in the fees or profits of his professional business, with any other member of the Institute or a partner or a retired partner or the legal representative of a deceased partner.

The term 'partner' used in this rule would include 'ipso facto' another Company Secretary in Practice or a member of any other recognised profession under Section 2(2) of the Act. In regard to sharing of fees with the legal representative of a deceased partner it is desirable that the partnership deed contains a suitable covenanting this behalf.

It may appear that this Clause permits sharing of fees by PCS with members of the Institute who are not employed but are practicing as CA / CWA or an Advocate. However, this does not appear to be the intention. The term "Professional Business" used may be understood as professional activities. A CA who does not hold CP of ICSI, cannot issue Secretarial Audit Report by a multidisciplinary firm even if such CA/ CWA is a partner of PCS for the purposes of Clause 2, 3, 4, & 5 of the First Schedule.

**Clause 3: A Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he— "accepts or agrees to accept any part of the profits of the professional work of a person who is not a member of the Institute**

a Company Secretary in Practice can partake of his profits with other members of the Institute and with members of any other professional bodies specified in this regard or with such other persons having such qualifications as may be prescribed, under clause a Company Secretary in Practice as recipient can enter into profit sharing arrangement with a member of the Institute and/or with a member of such other professional body or other person having qualifications, as is referred to in clause (2)

**Clause 4: A Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if: "he enters into partnership, in or outside India, with any person other than a Company Secretary in Practice or such other person who is a member of any other professional body having such qualifications as may be prescribed, including a resident who but for his residence abroad would be entitled to be registered as a member under clause (e) of sub-section (1) of section 4 - or whose qualifications are recognised by the Central Government or the Council for the purpose of permitting such partnerships .**

This clause prohibits a Company Secretary in Practice entering into partnership with any person other than a Company Secretary in Practice or a member of any other recognised profession. Even entering into partnership with persons, who are not members of the Institute, for the

purposes of carrying on a business and not the profession of Company Secretaries, would attract the mischief of the clause.

**Clause 5: A Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if: "he secures, either through the services of a person who is not an employee of such Company Secretary or who is not his partner or by means which are not open to a Company Secretary, any professional business.**

. The clause covers instances of obtaining professional work by unethical means and by means which are not open to a Company Secretary. Council has issued guidelines for advertisement by PCS. A PCS can, within the parameters of the above guidelines issue advertisement / launch his own website and such action on the part of PCS would not be treated as violation of Clause 5 as well as Clause 6 of the Part I of the First Schedule.

**Clause 6: A Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if: "he solicits clients or professional work, either directly or indirectly, by circular, advertisement, personal communication or interview or by any other means: Provided that nothing herein contained shall be construed as preventing or prohibiting: (i) any Company Secretary from applying or requesting for or inviting or securing professional work from another Company Secretary in practice; or (ii) a member from responding to tenders or enquires issued by various users of professional services a organisations from time to time and securing professional work as a consequence.**

This clause further fortifies the proposition under clause (5) about securing clients or professional work. Solicitation of clients or solicitation of professional work or both, are prohibited. Such a solicitation may be direct or indirect and such a solicitation may further be by means of a circular, advertisement, personal communication or interview or any other means

**Clause 7: A Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he advertises his professional attainments or services, or uses any designation or expressions other than Company Secretary on professional documents, visiting cards, letterheads or signboards, unless it be a degree of a University established by law in India or recognised by the Central Government or a title indicating membership**

of the Institute of Company Secretaries of India or of any other institution that has been recognised by the Central Government or may be recognised by the Council.

This clause covers two aspects -

- (i) advertisement of professional attainments or services by a Company Secretary in Practice; and  
(ii) using the designation 'Company Secretary'.

- As regards the ban on advertisement of professional attainments or services, almost all the professions all over the world had this type of restriction at least to start with. The idea behind this restriction was that advertisement by professionals is incompatible with the qualities of integrity and independence which a professional is expected to possess, especially when these acts are motivated by a desire for personal gain.
- The advertisement of professional attainment or services under this clause is completely prohibited except where the Company Secretary in Practice advertises as per the guidelines issued by the council, through a write up setting forth services provided by him or his firm.
- What amounts to advertisement of professional attainments or services is to be decided on a case to case basis, having regard to the attendant facts. For instance, where in the visiting card or name board or letterhead, a member in practice mentions that he is a specialist or expert in company law, tax law, etc. it would amount to advertisement of professional attainments or services.
- This clause also speaks of using the designation 'Company Secretary' on professional documents, visiting cards, letterheads, sign-boards, etc. This requirement fortifies the provisions of section 7 of the Act and in fact is an extension of the requirement in regard to the use of proper designation. Designations like Company Law Consultant, Income Tax Consultant, Corporate Adviser, Investment Adviser, Management Consultant etc. are prohibited. The use of descriptions indicating membership of the Institute of Chartered Accountants of India, The Institute of Cost and Works Accountants of India and the Bar Councils is permitted provided members are not holding certificate of practice issued by the Institute or using the description 'Company Secretary'. The use of the designation "Practicing Company Secretary". "Company Secretary in whole-time practice", etc. is not violative of this clause.

Clause 8: Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if: "he accepts the position of a Company Secretary in Practice

previously held by another Company Secretary in Practice without first communicating with him in writing.

The primary requirement under this clause is of prior communication with the previous incumbent. This is intended for reasons of professional courtesy.

It would be desirable for the new incumbent to obtain a letter from the company letting him know the name of the earlier incumbent or that no other Company Secretary has been appointed for the same assignment. It would be necessary that the communication, in order to be effective, shall be by a registered letter or by hand with an acknowledgement so that there is positive evidence of the communication having been complete. Members have been held guilty of professional misconduct under this clause for having accepted and commenced the certification of Annual Return of a company without first communicating with the earlier incumbent in writing.

In respect of following it shall not be mandatory (though desirable) to send a prior written communication to the earlier incumbent:

- i. certifying e-forms for various companies.
- ii. giving Due Diligence Certificate for consortium borrowers.
- iii. holding assignment as retainer for a company or group of companies.
- iv. issuing search reports.
- v. Issuing certificates as contemplated under SEBI (LODR) Regulation, 2015.
- vi. Giving legal opinion

In respect of the following, it shall be mandatory to send a prior written communication to the earlier incumbent:

- (i) Signing / Certification of Annual Return.
- (ii) Issuance of Secretarial Audit Report in terms of Section 204 of the Companies Act, 2013.
- (iii) Issuance of Certificate of Securities Transfers.
- (iv) Certificate of reconciliation of capital, updation of Register of Members, etc. as per the Securities & Exchange Board of India's Circular
- (v) Conduct of Internal Audit of Operations of the Depository Participants.
- (vi) Certification of corporate governance under SEBI (LODR) Regulation, 2015.



Clause 9 Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if: "charges or offers to charge, accepts or offers to accept, in respect of any professional employment, fees which are based on percentage of profits or which are contingent upon the findings or results of such employment, except in cases which are permitted under any regulations made under this Act".

Clause 10 Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if: "engages in any business or occupation other than the profession of Company Secretary unless permitted by the Council so to engage: Provided that nothing contained herein shall disentitle a Company Secretary from being a director of a company except as provided in the Companies Act."

This clause is intended to ensure that a PCS does not engage in vocations which are not compatible with the profession of Company Secretary. This has been provided with a view to ensure the profession develops in its true sense. Pursuant to the Company Secretaries Regulations, 1982, the Council has decided not to issue certificate of practice to members engaged in other professions such as Chartered Accountants, Cost Accountants and Advocates and also to members in employment. The said decision was taken by the Council to give an independent identity and status to the profession and a thrust to the concept of Company Secretary in whole-time practice.

The Council has expressly permitted a PCS to take up following vocations:

- (i) Authoring Books and Articles.
- (ii) Holding of Life Insurance Agency License for the limited purpose of getting renewal commission.
- (iii) Holding of public elective offices such as M.P., M.L.A., M.L.C. and others.
- (iv) Honorary office-bearership of charitable, educational or other non-commercial organisations.
- (v) Acting as Justice of Peace, Special Executive Magistrate and the like.
- (vi) Teaching assignment under the Coaching Organisation of the Institute and other Institutes.
- (vii) carrying out valuation of papers, acting as a paper-setter, head examiner or a moderator, for any examination.
- (viii) Acting as editor of professional journals.

Clause II Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he— “allows a person not being a member of the Institute in practice or a member not being his partner to sign on his behalf or on behalf of his firm anything which he is required to certify as a Company Secretary, or any other statements related thereto.

- It is not permissible for a Company Secretary in Practice to allow any person to sign on his behalf or on behalf of his firm anything which he is required to certify as a Company Secretary or any other statement related thereto. The purpose is not to allow a member to have his judgment and expertise substituted by the judgment of any other person who is not a member in practice or his partner in the firm
- For Example: the annual return under Section 92 of the Companies Act, 2013 has to be certified by a Company Secretary in Practice himself. It is not possible to have the certification done by a Company Secretary, say, through a power of attorney holder, even though the holder of the power of attorney is an employee (of the Company Secretary) who has been associated with the checking up of various details furnished in the Annual Return.
- In e-governance era, a PCS on many occasions attaches his Digital Signature to various forms statements. Due care has to be taken that such digital signature is attached only by the PCS himself.

### B. Professional misconduct in relation to members of the Institute in service (Part II of the First Schedule

Part II of First Schedule to the Act deals with professional misconduct of a member of the Institute (other than a member in practice) if he is an employee of any company, firm or person

Part II is made for the members in employment and provides them to observe a code of conduct as well. To be in 'employment' connotes to be in a 'contract of service' and not 'contract for service'. These four factor indicated contract for service:

- a. master's power of selection of his servant
- b. payment of wages or other remuneration
- c. master's right to control the method of doing the work; and
- d. the master's right of suspension or dismissal

Clause 1 of Part II of the First Schedule provides that a member of the Institute (other than member in practice) shall be deemed to be guilty of professional misconduct, if he, being an employee of any company, firm or person— “pays or allows or agrees to pay, directly or indirectly, to any person any share in the emoluments of the employment undertaken by him.”

A member in employment shall not share emoluments of the employment with any other person, not even a member. Both direct and indirect sharing of the emoluments is prohibited. However, it may be noted that under Part I of the First Schedule, a member in practice can share the fee, commission or brokerage or profits with any other member of the Institute who is his partner.

Clause 2 of Part II of the First Schedule provides that a member of the Institute (who is in service) shall be deemed to be guilty of professional misconduct, if he, being an employee of any company, firm or person— “accepts or agrees to accept any part of fees, profits or gains from a lawyer, a Company Secretary or broker engaged by such company, firm or person or agent or customer of such company, firm or person by way of commission or gratification.”

It is an implied term of any employment that the employee concerned shall not secretly benefit from the employment

### C. Professional misconduct in relation to members of the Institute generally (Part III of the First Schedule to the Act)

Clause 1 of Part III of the First Schedule provides that a member of the Institute whether in practice or not shall be deemed to be guilty of professional misconduct, if he— “not being a Fellow of the Institute, acts as a Fellow of the Institute.

This clause prohibits the practice of styling oneself as a Fellow, while in fact he is not a Fellow member

Clause 2 of Part III of the First Schedule provides that a member of the Institute whether in practice or not, shall be deemed to be guilty of professional misconduct, if he— “does not supply the information called for or does not comply with the requirements asked for

by the Institute, Council or any of its Committees, Director (Discipline) Board of Discipline, Disciplinary Committee, Quality Review Board or the Appellate Authority.”

It is the duty of a member to supply information called for or by the Council or any of its Committees and other authorities. Non-compliance with this clause would tantamount to breach of code of conduct.

Clause 3 of Part III of the First Schedule provides that a member of the Institute, whether in practice or not, shall be deemed to be guilty of professional misconduct, if he— “while inviting professional work from another Company Secretary or while responding to tenders or enquiries or while advertising through a write up, or anything as provided for in items (6) and (7) of Part I of this Schedule, gives information knowing it to be false.”

**D. Other Misconduct in relation to members of the Institute generally (Part IV of the First Schedule)**

Clause 1 of Part IV A member of the Institute, whether in practice or not, shall be deemed to be guilty of other misconduct, if he is held guilty by any civil or criminal court for an offence which is punishable with imprisonment for a term not exceeding six months.

Clause 2 of Part IV A member of the Institute, whether in practice or not, shall be deemed to be guilty of other misconduct, if in the opinion of the Council, he brings disrepute to the profession or the institute as a result of his action whether or not related to his professional work.

**Following may amount to misconduct under Clause 2 of Part IV of the First Schedule:**

- a. Sending an e-mail to number of members (e-groups) criticizing the decisions of the Council in derogatory and filthy language.
- b. Discussing through e forums failures of the Council/ president/ secretary by using derogatory and filthy language.
- c. Writing letter(s) in an aggressive, loud and filthy language to the Ministry of Corporate Affairs, about working of ROC offices/ MCA site, inability to upload forms etc.

- d. Arranging DHARANA/ agitations at the gates of the Govt. Offices/Institute's offices in a manner not befitting a professional.
- e. Instigating Students or other members by creating a pandemonium in or around Institute's offices by raising issues pertaining to syllabus, training, examination or any other reason what so ever.
- f. Misusing the confidential data available with the offices of the Institute for personal purposes.
- g. Inviting Govt. Officers for Chapter's / Regional Council's Programs by spending heavily on their travel & stay arrangements, with an intention to get personal mileage.
- h. Tampering with the Books of Accounts/ Minutes of the meetings of the Managing Committees of Chapter/ Regional Councils.

**E. Part 1 of the Second Schedule to the Act Section 21(3), 21(B)(3) and 22) where the matters are to be dealt with by the disciplinary committee constituted by the Council**

- i. Clause 1 Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he— "Discloses information acquired in the course of his professional engagement to any person other than the client so engaging him, without the consent of such client, or otherwise than as required by any law for the time being in force."
- ii. Clause 2 Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he— "certifies or submits in his name or in the name of his firm a report of an examination of the matters relating to Company Secretarial practice and related statements unless the examination of such statements has been made by him or by a partner or any employee in his firm or by another Company Secretary in practice
- iii. Clause 3 Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he— "permits his name or the name of his firm to be used in connection with any report or statement contingent upon future transactions in a manner which may lead to the belief that he vouches for the accuracy of the forecast."
- iv. Clause 4 Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he— "expresses his opinion on any report or statement given to any business enterprise in which he, his firm or a partner in his firm has a substantial interest"
- v. Clause 5 Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he— "fails to disclose a material fact known to him in his report

or statement but the disclosure of which is necessary in making such report or statement, where he is concerned with such report or statement in a professional capacity.”

- vi. Clause 6 Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he— “fails to report a material misstatement known to him and with which he is concerned in a professional capacity.”
- vii. Clause 7 Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he— “does not exercise due diligence, or is grossly negligent in the conduct of his professional duties.
- viii. Clause 8 Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he— “fails to obtain sufficient information which is necessary for expression of an opinion or its exceptions are sufficiently material to negate the expression of an opinion.”
- ix. Clause 9 Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he— “fails to invite attention to any material departure from the generally accepted procedure relating to the secretarial practice.”
- x. Clause 10 Provides that a Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he— “fails to keep moneys of his client other than fees or remuneration or money meant to be expended in a separate banking account or to use such moneys for purposes for which they are intended within a reasonable time.

#### **F. Professional misconduct in relation to members of the Institute generally (Part II of the Second Schedule to the Act)**

**Clause 1 Provides that a member of the Institute whether in practice or not, shall be deemed to be guilty of professional misconduct, if he— “contravenes any of the provisions of this Act or the regulations made there under or any guidelines issued by the Council.”**

It is necessary for all the members to understand the guidelines and follow the same in spirit and letter. Following guidelines have been issued by the council so far:

- a. Display of particulars on website
- b. Approving firm's name
- c. Compulsory attendance at PDP



- d. Dress Code
- e. Issuing Compliance Certificate
- f. Maintenance of Register of attestation services
- g. Issue of advertisement by PCS
- h. Change of Name of a Concern/Firm
- i. Guideline for use of own Logo by PCS

Clause 2 of Part II of Second Schedule Provides that a member of the Institute whether in practice or not, shall be deemed to be guilty of professional misconduct, if he— “being an employee of any company, firm or person, discloses confidential information acquired in the course of his employment, except as and when required by any law for the time being in force or except as permitted by the employer.”

The confidential information, discussions, documents and data should be dealt with utmost care and should not be shared or passed on to undesirable persons / outsiders under any circumstances , directly or indirectly.

Clause 3 of Part II of Second Schedule Provides that a member of the Institute whether in practice or not, shall be deemed to be guilty of professional misconduct, if he— “includes in any information, statement, return or form to be submitted to the Institute, Council or any of its Committees, Director (Discipline), Board of Discipline, Disciplinary Committee, Quality Review Board or the Appellate Authority any particulars knowing them to be false.”

This clause covers situation where a member includes in any statement, return or form to be submitted to the Council any particulars knowing them to be false

Clause 4 of Part II of Second Schedule Provides that: “a member of the Institute whether in practice or not, shall be deemed to be guilty of professional misconduct, if he defalcates or embezzles moneys received in his professional capacity.

### 6. Part III of the Second Schedule

This part is about other misconduct in relation to members of the Institute generally if a member of the Institute, whether in practice or not, shall be deemed to be guilty of other misconduct, if he is held guilty by any civil or criminal court for an offence which is punishable with imprisonment for a term exceeding six months.

#### Regulation 15 of Company Secretaries Act: Complaints and Enquiries relating to Professional or other Misconduct of Members

1. any complaint received against a member of the Institute under Section 21 shall be investigated, and any enquiry relating to misconduct of such member shall be held, by the Disciplinary Committee.
2. A complaint shall be made to the Council in the appropriate form, duly verified as required therein.
3. Every complaint shall contain the following particulars, namely-
  - (a) the acts or omissions which, if proved, would render the member complained against guilty of any professional or other misconduct
  - (b) the oral and/or documentary evidence relied upon in support of the allegations made in the complaint.
4. Every complaint (Except a complaint made by or on behalf of the Central or any State Government) shall be accompanied by a deposit of rupees fifty which shall be forfeited, Council comes to the conclusion that no prima facie case is made or the complaint is either frivolous or has been made with mala fide intention.
5. The Secretary shall return a complaint which is not in the proper form or does not contain the aforesaid particulars or is not accompanied by the deposit of rupees fifty to the complainant for resubmission after compliance with such requirements and within such time as the Secretary may specify.
6. Within sixty days of the receipt of a complaint the Secretary shall,-
  - (a) if it is against an individual member send particulars of the acts of omissions alleged or a copy of the complaint, to member at his address as entered in the Register.

- (b) if it is against a firm, send particulars of the acts or omissions or a copy of the complaint, as the case may be, to the firm concerned at the address of the head office of the firm as entered in the Register of offices
7. A member who has been intimated of the complaint made against him shall, within fourteen days, forward to the Secretary a written statement in his defence.
  8. On a perusal of the complaint and written statement the Secretary may call for such additional particulars or documents connected therewith either from the complainant or the respondent, as he may consider necessary or as may be directed by the President, for perusal of the Council.
  9. Where on a perusal of the complaint, the written statement, if any, of the respondent and other relevant documents and papers, the Council is prima facie of opinion that any member has been guilty of professional or other misconduct, the Council shall cause an enquiry to be made in the matter by the Disciplinary Committee and where the Council is prima facie of opinion that there is no case against the respondent, the case shall be dismissed.
  10. Every notice issued by the Secretary or by the Disciplinary Committee under this Regulation shall be sent to the member or the firm concerned by registered post with acknowledgement due.
  11. If the notice is returned unserved with an endorsement to the effect that the addressee had refused to accept the notice, it shall be deemed to have been served.
  12. If the notice is returned with an endorsement indicating that the addressee cannot be found at the address given, the Secretary shall ask the complainant to supply to him the correct address to the member or firm concerned and send a fresh notice to the member or firm at the address so supplied.

**Procedure in enquiry before the Disciplinary committee- Regulation 18 of the Company Secretaries Regulation, 1982:**

1. It shall be the duty of the Secretary to place before the Disciplinary Committee all facts brought to his knowledge which are relevant for the purpose of any enquiry by the Disciplinary Committee.

2. *The Disciplinary Committee shall have the power to regulate its procedure in such manner as it considers necessary and during the course of enquiry, may examine witnesses on oath and receive evidences on affidavits*
3. *The Disciplinary Committee shall give the complainant and respondent a notice of the meeting at which the case shall be considered by the Committee*
4. *Such complainant and respondent may be allowed to defend themselves before the Disciplinary Committee either in person or through a legal practitioner or any other member of the Institute.*
5. *Where, in the course of a disciplinary enquiry, a change occurs in the composition of the Disciplinary Committee, unless any of the parties to such enquiry makes a demand within fifteen days of receipt of a notice of a meeting of such Disciplinary Committee, that the enquiry be made de novo report of the Disciplinary Committee shall be called in question on the ground that any member of the Disciplinary Committee did not possess sufficient knowledge of the facts relating to such inquiry.*
6. *The Disciplinary Committee shall after investigation report the result of its enquiry to the Council for its consideration.*

*Procedure in a hearing before the Council- Regulation 19 of the Company Secretaries Regulation, 1982.*

1. *The Council shall consider the report of the Disciplinary Committee and if in its opinion, a further enquiry is necessary, may cause such further enquiry to be made and a further report submitted by the Disciplinary Committee.*
2. *After considering such report or further report of the Disciplinary Committee, as the case may be, where the Council finds that the respondent is not guilty of any professional or other misconduct, it shall record its findings accordingly and direct that the proceedings shall be filed or the complaint shall be dismissed as the case may be.*
3. *After considering such report or further report of the Disciplinary Committee, as the case may be, where the Council finds that the respondent has been guilty of a professional or other misconduct, it shall record its findings accordingly and shall proceed in the manner as laid down in the succeeding sub- regulations.*
4. *Where the finding is that the member of the Institute has been guilty of a professional or other misconduct, the Council shall afford to the member an opportunity of being heard before*

orders are passed against him in the case. The Council after hearing the respondent, if he appears in person or after considering the representations, if any, made by him, pass such orders as it may think fit, as provided under Subsection (4) of Section 21.

5. The orders passed by the Council shall be communicated to the complainant and the respondent.

## **II. UDIN**

- i. UDIN is a 17 digit system generated number which is used to verify the authenticity of documents attested / certified by a Company Secretary in Practice. Quoting UDIN on certifications, w.r.t the professional services has been made mandatory w.e.f 1st October, 2019
- ii. A unique number for the identification of documents attested by Company Secretaries in Practice shall be generated at the time of signing the Certificate/ Report which shall mandatorily be mentioned in the Certificate / Report along with the CoP number.
- iii. In case of e-Form-MGT 7 as mentioned in paragraph 3 (b) (xiv) of the ICSI UDIN Guidelines, 2019 or in case of any other e-Form(s), the UDIN shall be mentioned by way of attachment in the optional attachment.
- iv. UDIN shall be generated at the time of signing of Reports, Returns, Certificates and Other Documents or can be generated seven days in advance of the date of such signing.
- v. UDIN guidelines have been issued to:
  - a. Enable the stakeholders to verify the authenticity of various documents certified by Company Secretaries in Practice
  - b. Prevent counterfeiting of various attestations / certifications
  - c. Provide ease of maintaining the Register of Attestation / Certification services rendered by practicing members
  - d. Ensure compliance of the Guidelines issued by the Institute w.r.t ceilings on the number of the various certification / attestation services
  - e. Auto-prefill details of Certification / Attestation services rendered by practicing members in of the form for renewal of Certificate of Practice

## **12. ECSIN**

- i. eCSIN is a system-generated unique number for identification of the Company Secretaries employed in a particular company which shall be generated by the Company Secretary at the time of employment as a Company Secretary (KMP or otherwise), as well as at the time of demitting office in any manner.
- ii. It is an eighteen-digit system generated random unique alphanumeric number.

## **13. ICSI (GUIDELINES FOR ADVERTISEMENT BY COMPANY SECRETARIES), 2020**

- i. It became effective from 1st April, 2020 and shall be applicable to all advertisements by members of the Institute rendering any advisory, consultancy or representation services whether holding Certificate of Practice issued by the Council of the Institute or otherwise
- ii. Only these activities are permitted for a CS in practice for advertisement.
  - a. Display the scope of work on his/her own website.
  - b. Creating a visual identity in compliance with the Guidelines for use of Individual Logo issued by the Council of ICSI.
  - c. Display of Location and décor of the workplace, meeting rooms, etc.
  - d. Display of Firm name, Logo or any other identity on Uniform, Office/s, office stationary & equipments/ material and providing Training to Staff.
  - e. Professional Updates and Write ups in any mode.
  - f. Appearing on local radio or television.
  - g. Giving speeches/lectures at any platform including Seminars, Conferences, training programmes, Workshops, Conventions, etc so organised by any forum.
  - h. Holding professional seminars, conferences and workshops.
  - i. Sponsoring any event (cultural, professional or otherwise) or helping with community programmes or doing voluntary work as a professional for charitable organizations.
  - j. Use of social media like Facebook, Instagram, LinkedIn, Twitter, Youtube, WeChat, Telegram and Whatsapp or any other media of similar nature.

### **No advertisement shall be made in :**

- i. Violation of provisions of Company Secretaries Act, 1980
- ii. false or misleading



- iii. *claim superiority over any or all other Company Secretaries*
- iv. *indecent, sensational or otherwise of such nature which may bring disrepute to the profession or the Institute.*
- v. *contain fabricated or false testimonials or endorsements concerning the Company Secretary*
- vi. *refer the Company Secretaries in the terms such as "specialists" or "experts"; Explanation: The advertisements shall not be self-laudatory and not include the words such as "best," "better" or "cheapest;"*
- vii. *represent that the quality of the professional services to be performed is greater than the quality of professional services performed by other professionals. Statements comparing one professional's services to that of another are not allowed*
- viii. *constitute a guarantee, warranty, or prediction regarding the outcome of any professional assignment;*
- ix. *in no way indicate that the charging of a fee is contingent on outcome, or that no fee will be charged in the absence of the desired outcome*
- x. *not contain any reference to past successes or results which indicates a guarantee, warranty or prediction of result of future professional assignments. eg. We made M/s. Xxx win the case, Meet the master*
- xi. *not be designed for "pleasing customers," which might mislead or eventually harm customers or third parties*
- xii. *not contain any humorous slogans. E.g. Save Rs. Xxxx Come to us, we will tell you how*

### Thoda Extra gyaaannnn..... Swaad Anusaaar

#### (Short Note)

- CS or a firm of CS should not list his/her service(s) on any aggregator website such as Sulekha, Olx, Urbanclap, JustDial, Quikr.
- CS or a firm of CS shall not join or project himself/herself/itself as a member of any networking association(s) or any Multi-Level Marketing Association(s) ("MLM") or any other organisation which require his/her Company Secretary member to add other person as member of the organisation.



#### **14. PROFESSIONAL LIABILITIES**

There are certain liabilities applicable on the company secretary.

as an officer of the company, it is peculiar to work in interest of company and avoid situations leading to conflict of interest and always opt for independent judgment because a Company Secretary may or may not be officer bearer as director, but they will often be accounted for breach of duty in the same manner as Board of Directors.

Various sections in the Companies Act, 2013 provide that, where there is a failure of compliance, 'an offence is committed by every officer of the company who is in default'. If the Company Secretary is the person with main responsibility for the task, he will be the person in default and liable to the fine/penalty.

### **LET'S UNDERSTAND THIS:**

For instance, default in filing annual return of company within sixty days from the date on which the annual general meeting is held, then every officer who is in default shall be liable to a penalty of ten thousand rupees and in case of continuing failure, with further penalty of one hundred rupees for each day during which such failure continues, subject to a maximum of two lakh rupees in case of a company and fifty thousand rupees in case of an officer who is in default. Further, if a company secretary in practice certifies the annual return otherwise than in conformity with the requirements of this section or the rules made thereunder, he shall be liable to a penalty of two lakh rupees



Liability of Company Secretaries can be categorized in two ways:

#### Statutory Liabilities

- i. Maintenance of all records and documents of the company
- ii. Arranging a statutory meetings of the company
- iii. Issuing share certificates, dividend warrants, and bonus share certificates to the shareholders
- iv. Preparation of minutes of various meetings and maintaining minute books,

#### Contractual Liabilities

- i. Liable for breaching or exceeding its authority
- ii. Liable for disclosing secret information of the company to outsiders
- iii. Liable for frauds etc.
- iv. Liable to abide by all terms and conditions of the service contract
- v. Protect the interest of the company.

## CASE STUDY

### Saumil Dilip Mehta v. State of Maharashtra

*The court clarified that directors of public and private limited companies have the right to unilaterally resign. However, the formal process, including completion of forms and communication to the ROC, is the responsibility of the company secretary. The resignation letter should be presented in a board meeting, and the decision of the board should be appropriately documented. The court emphasized the role of the company secretary in ensuring compliance with legal requirements and maintaining accurate company records after a director's resignation.*

SUMMARISED VERSION (MIND MAP)





## CHAPTER 5 – VALUES, ETHICS AND PROFESSIONAL CONDUCT

### 1. INTRODUCTION:

- i. India has a very strong history and deep roots of culture, principles and ethics which have come down to us across generations, through the immortal Shrimad Bhagavad Gita which is useful in getting answers to various complex situations and ethical dilemmas.
- ii. The great epic, Ramayana is also a very important document which has thrown light on aspects like values and character.
- iii. The teachings of Arya Chanakya (Chanakya Neeti) cannot be ignored while talking of character, ethical practices, values and good governance. Aesop's Fables, Panchatantra and Hitopadesh are also fictional sources of moral codes.
- iv. Today's doing business is full of temptations and distractions driven by greed to earn unlimited profits, market share, and of late, this attitude and temperament believing the philosophy "the ends justify the means" has led to a substantial depletion of good character, ethical standards, practices and good governance. This has led to loss of humanity, and ultimately, happiness of self and society.
- v. The term "ethics" is derived from the Greek word "ethos" which refers to character or customs or accepted behaviours.
- vi. In the world of intense competition, every professional work on certain principles and beliefs which are nothing but the values. Likewise, ethics is implemented in the organisation to ensure the protection of the interest of stakeholders like customers, suppliers, employees, society and government.

### 2. TYPES/BRANCHES OF ETHICS



- i. **Descriptive Ethics** deals with what people actually believe (or made to believe) to be right or wrong and accordingly holds up the human actions acceptable or not acceptable or punishable under a custom or law.

**Descriptive ethics: What do people think is right?**

- ii. **Normative Ethics** deals with “norms” or set of considerations how one should act. Thus, it is a study of “ethical action” and sets out the rightness or wrongness of the actions. It is also called prescriptive ethics because it rests on the principles which determine whether an action is right or wrong.

**Normative (prescriptive) ethics: How should people act?**

- iii. **Meta-Ethics** or “analytical ethics” deals with the origin of the ethical concepts themselves. It does not consider whether an action is good or bad, right or wrong. Rather, it questions – what goodness or rightness or morality itself is. It is basically a highly abstract way of thinking about ethics.

**Meta-ethics: What does “right” even mean?**

**Applied Ethics.** This branch of ethics is most important for professionals in different walks of life including doctors, teachers, administrators, rulers and so on.

There are six key domains of applied ethics viz.

- i. **Decision ethics**- ethical decision-making process
- ii. **Professional ethics**- for good professionalism
- iii. **Clinical Ethics**- good clinical practices
- iv. **Business Ethics**- good business practices
- v. **Organizational ethics**- ethics within and among organizations
- vi. **social ethics.**

**Applied ethics: How do we take moral knowledge and put it into practice?**

Business Ethics is one of the branches of Applied Ethics which is mostly used in various organizations & Corporates. It can be defined as, "The application of a moral code of conduct to the strategic and operational management of a business."

**3. KEY DIFFERENCES BETWEEN ETHICS AND VALUES**

The fundamental differences between ethics and value are described in the given below points:

ETHICS	VALUES
Ethics refers to the guidelines for conduct, that address question about morality.	Value is defined as the principles and ideals, which helps them in making the judgement of what is more important.
Ethics is a system of moral principles.	In contrast to values, which is the stimuli of our thinking.
Ethics compels to follow a particular course of action.	On the other hand, Values strongly influence the emotional state of mind. Therefore it acts as a motivator.
Ethics are consistent in nature.	Whereas values are different for different persons, i.e. what is important for one person, may not be important for another person.
Ethics helps us in deciding what is morally correct or incorrect, in the given situation.	Values tell us what we want to do or achieve in our life.
Ethics determines to what extent our options are right or wrong.	As opposed to values, which defines our priorities for life.

### Thoda Extra gyaaannnn..... Swaad Anusaaar

#### (Short Note)

- Ethics are consistently applied over the period and remains same for all the human beings.
- Ethics are moral principles that govern the behavior of individuals and organizations.
- Values have an individualistic approach, i.e. it varies from person to person but remains stable
- Values are the principles and beliefs that guide the behavior and decision-making of individuals and organizations.



#### Examples of ethics:

1. Professional ethics: ethical standards that guide the conduct of professionals in various fields such as medicine, law, accounting, engineering, and journalism.
2. Business ethics: moral principles and values that guide the behavior of individuals and organizations in the business world.
3. Environmental ethics: ethical considerations related to the relationship between humans and the environment, and the responsibility to protect and preserve the natural world.
4. Social ethics: principles and values that guide the behavior of individuals and organizations in relation to social issues such as poverty, inequality, and social justice.
5. Religious ethics: moral principles and values that guide the behavior of individuals and organizations within religious contexts.

#### Examples of values:

1. Respect: treating others with dignity and courtesy.
2. Integrity: acting in a way that is consistent with one's values and beliefs.
3. Responsibility: being accountable for one's actions and decisions.

4. **Honesty:** telling the truth, not lying or deceiving others.
5. **Empathy:** showing concern and understanding for others.
6. **Courage:** standing up for what is right even in the face of difficulty or opposition.
7. **Fairness:** treating people equally and impartially.
8. **Diversity:** valuing and respecting differences in culture, ethnicity, gender, and other characteristics.
9. **Sustainability:** promoting responsible use of natural resources to protect the environment for future generations.

These are just a few examples of values, and different individuals and organizations may have their own unique values that guide their behavior and decision-making. Values can be both personal and cultural, and can play an important role in shaping the way we interact with the world around us.

#### 4. ETHICAL PRACTICES

- i. **Beneficence:** The principle of beneficence guides the decision maker to do what is right and good. This principle stipulates that ethical theories should strive to achieve greatest amount of good because people benefit from the most good.
- ii. **Least Harm:** This theory deals with situations in which no choice appears beneficial. In such cases, decision makers seek to choose to do the least harm possible and to do harm to the fewest people.
- iii. **Utilitarian:** This is a normative ethical theory that places the locus of right and wrong solely on the outcome or consequences of choosing one action/policy over other. As such, it moves beyond the scope of one's own interest and takes into account the interest of others.
- iv. **Autonomy:** This principle states that decision making should focus on allowing people to be autonomous; that is, to be able to make decisions that apply to their own workplace or lives. In other words, people should have control over their own selves as much as possible because they are the only people who completely understand their chosen type of work/life style.
- v. **Justice:** The justice ethical principle states that decision makers should focus on actions that are fair to all those involved. This means that ethical decisions should be consistent with the ethical theory unless extenuating circumstances that can be justified and exist in the case. This

also means that cases with extenuating circumstances must contain a significant and vital difference from other similar cases that justify the inconsistent decision.

**Thoda Extra gyaaannnn..... Swaad Anusaaar (Short Note)**

The schedule VI of the Companies Act, 2013 also states to uphold ethical standards by independent directors. It states Independent Directors shall:

- uphold ethical standards of integrity and probity
- act objectively and constructively while exercising his duties
- exercise his responsibilities in a bona fide manner in the interest of the company



## 5. PROFESSIONAL ETHICS

- Ethics arises from three main factors, moral attitudes as a result of consciousness or awareness-raising, culture as a result of education and the use of know-how and the application of standards as a result of learning and training.*
- The professionals being exclusive custodian of expertise need to profess high ethical and moral values and to redeem their noble traditions.*
- Every professional should desire for introspection and a dynamic movement to promote a value revolution with deeper conviction and creative consciousness, leading himself to be good professional.*
- The principles which govern the conduct of a professional broadly encompasses, Integrity, Professional independence, Professional competence, Objectivity, Ethical behaviour, Conformance to technical standards, if any and Confidentiality of information acquired in the course of professional work.*
- The professionals are expected to conduct themselves in such a manner so as to uphold the grace, dignity and professional standing of the institute.*

## CASE STUDY

### In Re Mahesh Chand Agrawal

the case describes a legal proceeding where a registered valuer, Mr. M had concealed charges and information related to FIRs filed against him by the CBI, which was in violation of professional ethics and relevant regulations. As a result, his registration as a registered valuer was recommended for cancellation..

Companies in the India have begun to fulfill their corporate social responsibility, either voluntarily or in compliance with mandates or statutes, respecting social ethics, thereby, setting up healthy and sensible corporate ethics on the following parameters:

- Complying with the laws of land where business is conducted and engaging in fair practices in the light of social ethics.
- Aiming to become a sensible corporate citizen and striving for harmony with local society.
- Disclosing information in a timely manner and engaging in honest and transparent communications mode.
- Protecting the irreplaceable earth and contributing to the preservation of the environment.
- Respecting fundamental human rights and individuality and building up a corporate culture with a broad vision which fosters the spirit of corporate ethics.

## 6. MODEL ETHICAL PRINCIPLES FOR COMPANY SECRETARIES

- i. Professionalism is the, conduct, aim, value or quality that characterize or marks a profession or professional person; it implies quality of workmanship or service.
- ii. Professionals like the Company Secretaries are highly valued by their profession. For any professional the below can be the Golden Rules of Ethics for Professionals.
- iii. It is recommended to apply these Golden Rules of Professionalism for enjoying a reputable, professional and prosperous career in providing service to the client/ organization:



- **Strive for excellence:** This is the first step to achieving greatness in whatever endeavor one undertakes; it is the quality that marks one's work to stand-out. Excellence is a quality of service which is remarkably good and so it surpasses ordinary standards, it should be made a habit to make a good impression on clients and colleagues.
- **Be trustworthy:** In today's society trust is an issue and one who exhibits trustworthiness is on a fast track to professionalism. It is all about fulfilling an assigned task, not letting down the client's expectations, it is being dependable and reliable when called upon to deliver service. In order to earn this trust, worthiness and integrity it must be sustainably proven over a time-span.
- **Be accountable:** It implies that one should be able to stand tall and be counted upon for all actions undertaken; this is also construed as a quality of being credible and responsible for actions performed and their consequences - good or bad.
- **Be courteous and respectful:** Courteousness is more than being friendly, polite and well-mannered with a gracious consideration towards others. It makes social interactions in the workplace run smoothly; avoid conflicts and earn respect. Respect is a positive feeling of esteem or deference for a person or organization; it is built over span of time and can be lost with one single inconsiderate action; continual courteous interaction is required to be maintained to enhance the respect gained.
- **Be honest, open and transparent:** Honesty is a facet of moral character that connotes positive and virtuous attributes such as truthfulness, straightforwardness, good conduct, loyalty, fairness, sincerity, openness in communication and generally operating in a manner for others to notice the perfection with which actions are performed; a virtue highly appreciated and valued by clients, employers and colleagues because it builds trust and personal reputation.
- **Be competent and improve continually:** Competence is the core ability of a professional to do a job properly. It is a combination of quality of knowledge, skill, acumen and behaviour used to perform. Competency grows through experience and to the extent one is willing to learn and adapt. Continuous self-development is a pre-requisite in offering professional service at all times.

- **Be ethical:** Ethical behaviour is acting within certain moral codes in accordance with the generally accepted code of conduct or rules. It is always safe for a professional to “play by the rules” where the rule book is inadequate; and acting with a clear moral conscience is the right way to adopt.
- **High Integrity:** Honourable action is behaving in a way that portrays “nobility of soul, magnanimity of person” derived from virtuous conduct and integrity in adherence to the dictum of “wholeness or completeness” of character in line with certain values, beliefs and principles with consistency in action and outcome.
- **Be respectful of confidentiality:** Confidentiality is respecting the set of rules or promises that restricts one from further or unauthorized dissemination of information. Over the course of one’s career, information will come to be possessed in strict confidence - either from the organization or from colleagues; and it is important to be true to such confidentiality. One gains trust and respect of those confiding and enhances professional credibility within the organization.
- **Set Good Examples:** Applying the foregoing rules helps one to improve traits of professionalism by imparting knowledge to those around and below the rank and file. One ought to show and lead by setting good exemplary life all along. Modern corporate governance rightly demands a comprehensive, interdisciplinary approach to the management and control of companies. Therefore, professionals need to practice with a sense of responsibility the evolving principles of good corporate governance across the globe on a continual basis.

The ICSA (UK) Code of Professional Ethics and Conduct comprises four core principles to which all Fellows, Associates, graduates, students and affiliated members registered need to follow.

### 1. Integrity

Integrity is the quality of being honest and having strong moral principles. The term has been described judicially as connoting “moral soundness, rectitude, and steady adherence to an ethical

code". It requires that members are impartial, independent and informed. Displaying integrity includes:

- acting professionally in your business dealings;
- displaying a proper understanding and appreciation of your role and responsibilities;
- being respectful of others at all times;
- not accepting or offering improper gifts, hospitality or other inducements;
- avoiding conflicts of interest, or, where a conflict arises, making sure that everyone involved is aware of the interest;
- recognising and considering the ethical issues arising from, and the interests of the groups or stakeholders who may be affected by, your choices, decisions and actions;
- avoiding involvement in any unethical, misleading, illegal or covert behaviour;
- not knowingly ignoring (or turning a blind eye to) unethical, misleading, illegal or obscure behaviour;
- and avoiding bringing the profession into disrepute.

## **2. High standard of service/professional competence**

A high standard of service or professional competence should be delivered throughout one's working life. This involves an understanding of relevant technical, professional and business developments. Professional competence also takes account of the wider implications and expectations of our members. This includes:

- maintaining professional knowledge and skills which are required to perform the role which you are employed to carry out;
- completing CPD as required by the UKRIAT Committee (this does not apply to students); communicating effectively and promptly with your clients, colleagues and stakeholders to ensure that they are able to make informed decisions;
- acting within your level of competence; if this requires an admission to your client that you are unable to perform a task then this should be communicated effectively;
- upholding the requirements of the Royal Charter and byelaws made under it;
- and respecting the confidentiality of information acquired through professional relationships save where there is a legal or regulatory requirement to disclose or report that information.

### 3. Transparency

Transparency requires that members are clear and open in their business and professional conduct. This includes:

- being open and frank in any business dealings;
- not being underhand in any business transaction;
- and treating all work as if it was reported in the public domain.

### 4. Professional behaviour

Professional behaviour requires that members act in a way which conforms to the relevant laws of the jurisdiction in which they are residing and/or undertaking business transactions. It requires them also to pay regard to all regulations which may have a bearing on their actions and to adhere to the byelaws, specifically byelaw which states that the following actions or inactions may result in disciplinary proceedings:

- becoming bankrupt or insolvent;
- being convicted of an offence which might bring discredit on the Institute or the profession;
- failing to uphold the code of professional conduct and ethics;
- behaving, by doing something or not doing something, in a way considered by the Disciplinary Tribunal to bring the Institute or the profession into disrepute;
- disobeying any decisions of the Council or of one of its Divisional Committees;
- breaking any of the Institute's byelaws or Charter or Regulations;
- failing to comply or co-operate with a disciplinary investigation;
- or failing to comply with a decision or any conditions made by a Disciplinary or Appeal Tribunal.

The Singapore Association of the Institute of Chartered Secretaries and Administrators (ICSA) requires members to observe the highest standards of professional conduct and ethical behaviour in all their activities.

As the conduct of an individual member can reflect upon the wider profession of corporate management and the Institute's membership as a whole, the Code sets out what are deemed to be appropriate standards of professional conduct:

- Members are required to uphold the Institute's Charter and comply with the Bye-laws.

- Members shall at all times be cognisant of their responsibilities as professional people toward the wider community.
- Members shall at all times safeguard the interests of their employers, colleagues or clients provided that Members shall not knowingly be a party to any illegal or unethical activity.
- Members shall not enter into any agreement or undertake any activity which may be in conflict with the legitimate interest of their employer or client or which would prejudice the performance of their professional duties.
- Members shall not use any confidential information obtained in the performance of their duties for personal gain nor in a manner which would be detrimental to their employer, client or any other party.
- Members shall ensure the currency of their knowledge, skills and technical competencies in relation to their professional activities.
- Members shall refrain from conduct or action which detracts from the reputation of the Institute.

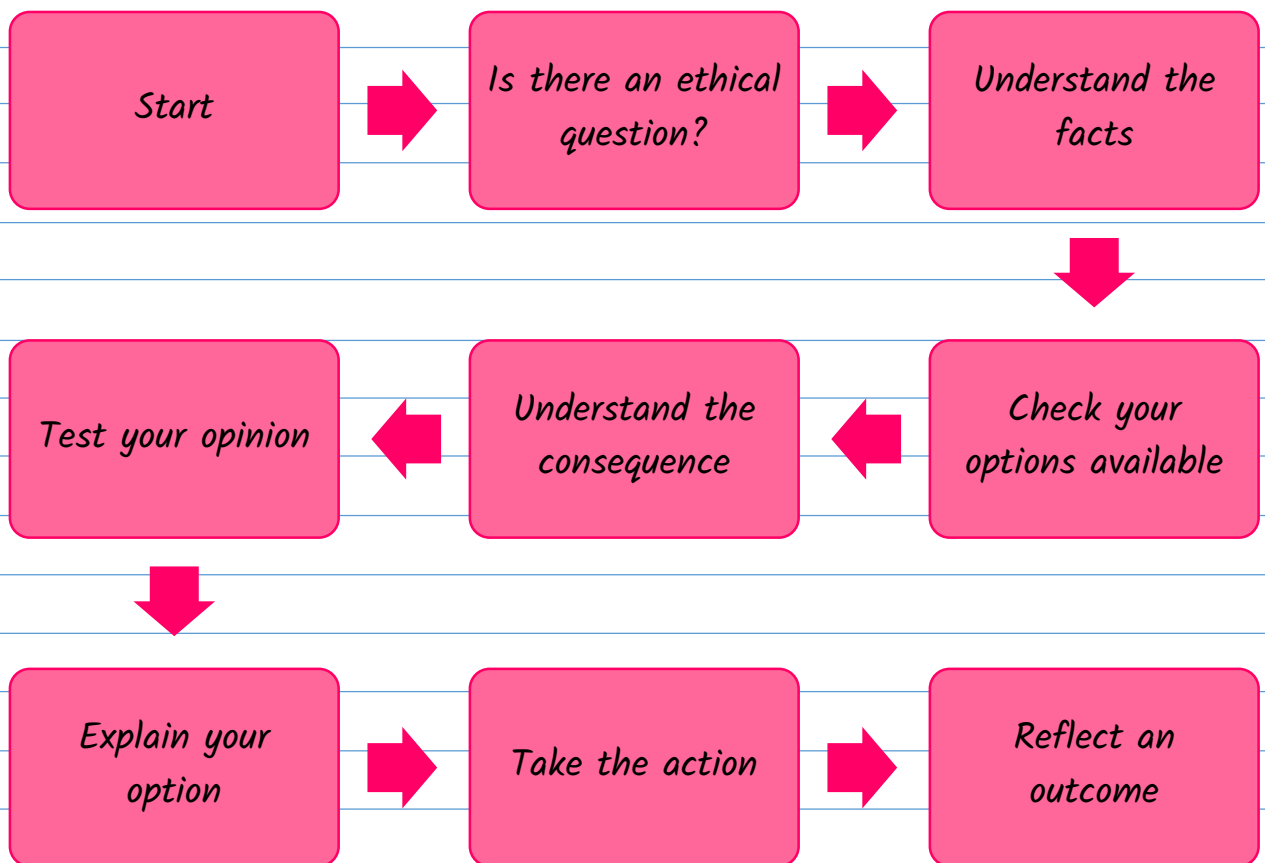
### **Recent disciplinary case studies on values, ethics and professional conduct:**

1. In 2021, the Securities and Exchange Board of India (SEBI) barred a company secretary from practicing for three years for submitting false documents and failing to conduct due diligence in relation to the issuance of securities by a company because CS violated the code of conduct for company secretaries.
2. In 2020 SEBI on receipt of an examination report from the National Stock Exchange (NSE), conducted investigation in the dealings in the scrip of EFSL (Edelweiss Financial Services Limited) in order to examine possible violations of SEBI (Prohibition of Insider Trading) Regulations, for the period of January 2017 to April, 2017. , it was observed that ECap Equities, a wholly-owned subsidiary of EFSL, had acquired Alternative Investment Market Advisors Pvt Ltd (AIMIN), a financial technology company, on April 5, 2017, by entering into a share purchase agreement. The same was disclosed by EFSL to the NSE and the BSE on the same day. The acquisition of AIMIN by ECap was a price-sensitive information that had come into existence on January 25, 2017, upon signing of term sheet. However, Mr. Renganathan, being the compliance officer of the company, failed to close the trading window during the period of January 25, 2017 to April 5, 2017. Hence, SEBI barred company secretary from practicing for three years and imposed a penalty of 5 Lacs.

3. In January 2022, the Disciplinary Committee of ICSI imposed a penalty of R. 10000 and reprimanded the company secretary on account of founding him guilty of professional misconduct under clause (7) of Part II of the Second schedule to the Companies Secretaries Act, 1980 for not exercising due diligence while issuing compliance certificate by stating that there were no allotment/transfer/transmission of securities during the financial year and wrongly certified nominal value per share of the company.
4. In 2018, the Institute of Company Secretaries of India (ICSI) suspended a company secretary from its membership for a period of three months for professional misconduct. The company secretary was found to have issued a certificate without proper verification of documents, which violated the ICSI's code of conduct.
5. In 2021, the Securities and Exchange Board of India (SEBI) imposed a penalty of Rs 10 lakhs on a company secretary for failing to disclose certain material information to the stock exchanges in a timely manner. The company secretary had violated the SEBI's listing obligations and disclosure requirements regulations.
6. In 2020, the Institute of Company Secretaries of India (ICSI) suspended a company secretary from its membership for three months for professional misconduct. The company secretary was found to have violated the ICSI's code of conduct and professional ethics, including making false statements and failing to maintain the confidentiality of client information

### **Ethical Decision Worksheet:**

This worksheet is designed for assisting in making ethically responsible decision:



- i. *Analyse the situation- Analyse the situation? Check whether you have choices? What is at stake?*
- ii. *Understand the facts- What are the facts? Is anything required to be done?*
- iii. *Understand the options available- What options are available? Do any Rule/regulation/laws/professional ethics influence your options?*
- iv. *Understand the consequences of the options- What are the consequences of each available option? Who will be affected by each available option? How will the parties be affected by these option?*
- v. *Test the option you plan to take- Identify the best option. Review the difficulty level of preferred option: Is the option difficult for others to understand? Can I justify my actions on that option? How to implement the decision?*
- vi. *Explain the option you have decided upon- Explain the actions – you should be able to justify them in a logical manner You should have kept records of your decision.*
- vii. *Act on the chosen option- Make a plan to implement your decision?*
- viii. *Reflect on the outcome- How did my decision turn out? Who was affected and how?*



## 7. ICSI CODE OF CONDUCT

The purpose of Code of Conduct is to lay down certain ground rules to promote ethical conduct and good practices to deter wrong-doing and also to make the relationship mutually pleasant and productive and to enhance the sense of community with common values and mission.

The matters covered under the Code are of utmost importance to the Institute of Company Secretaries of India ("Institute"), its members, students and other stakeholders including Government, Regulators, Trade and Industry and other users of services of the Company Secretaries.

### Fundamental duties of Professional

Fair Dealing	Not exploiting undue Professional Opportunity	No Misuse of Mistakes of Other Solicitor	Maintaining Confidentiality
Making Inadvertent Disclosure	Avoid Conflicts	Honour Undertakings of professionals	Maintaining Integrity of evidence
Due care while dealing with Client documents	Dealing with other persons	Promote Anti-discrimination and Anti-Harassment	Dealing with Media

### 1. Fair Dealing

Each member of the institute should endeavour to deal fairly with the Clients, other members and students. No Member of the Institute should take unfair advantage of anyone through manipulation, concealment, abuse of privileged information, misrepresentation of material facts, or any other unfair dealing practice.

**A Professional must also:**

- act in the best interests of a client in any matter in which he represents the client;
- be honest and courteous in all dealings in the course of legal practice;

- *deliver legal services competently, diligently and as promptly as reasonably possible;*
- *avoid any compromise to their integrity and professional independence;*
- *and comply with applicable Rules and the law.*

## **2. Professional Opportunity**

*The professional should not exploit for their own personal gain, opportunities that are discovered through third party, information or position unless the opportunity is disclosed fully in writing and permits to pursue such opportunity.*

## **3. Mistakes of Other Solicitor**

*A professional must not take unfair advantage of the obvious error of another professional or other person, if to do so would obtain for a client a benefit which has no supportable foundation in law or fact.*

## **4. Confidentiality**

*The client's confidential information is a valuable asset. All confidential information must be used for the benefit and in the best interest of client. Every professional must safeguard the confidentiality as above. The confidential information, discussions, documents and data should be dealt with utmost care and should not be shared or passed on to any person/outsider under any circumstances.*

*A professional must not disclose any information which is confidential to a client and acquired by him during the client's engagement to any person who is not:*

- *a partner, promoter, director, or employee of the firm of the professional; or*
- *a professional or an employee of, or person otherwise engaged by, the firm of professional or by an associated entity for the purposes of delivering or administering legal services in relation to the client, except the following:*
  - *the client expressly or impliedly authorises disclosure;*
  - *the professional is permitted or is compelled by law to disclose;*
  - *the professional discloses the information in a confidential setting, for the sole purpose of obtaining advice in connection with the solicitor's legal or ethical obligations;*

- the professional discloses the information for the sole purpose of avoiding the probable commission of a serious criminal offence;
- the professional discloses the information for the purpose of preventing imminent serious physical harm to the client or to another person; or the information is disclosed to the insurer of the professional or its associated entity.

### **5. Inadvertent Disclosure**

A professional who reads part or all of the confidential material before becoming aware of its confidential status must:

- notify the same or the other person immediately;
- and not read any more of the material. If a professional is instructed by a client to read confidential material received in error, the solicitor must refuse to do so.

### **6. Conflicts**

Each professional should avoid any conflict of interests with that of the client. A 'conflict of interest' exists where the interests or benefits of one person or entity conflict with the interests or benefits of the client. The professional must avoid situations involving actual or potential conflict of interest. Any situation that involves or may involve a conflict of interest must be promptly disclosed.

A professional must not act for a client where there is a conflict between the duty to serve the best interests of a client.

A professional must not borrow any money, nor assist an associate to borrow money, receiving a financial benefit from a third party in relation to any dealing where the professional represents a client, or from another service provider to whom a client has been referred by the professional, provided that the professional advises the client:

- (i) that a commission or benefit is or may be payable to the professional in respect of the dealing or referral and the nature of that commission or benefit;
- (ii) that the client may refuse any referral and the client has given informed consent to the commission or benefit received or which may be received.

## 7. Undertakings

*A professional who has given an undertaking in the course of legal practice must honour that undertaking and ensure the timely and effective performance of the undertaking, unless released by the recipient or by a court of competent jurisdiction.*

## 8. Integrity of evidence

*A professional must not:*

- *advise or suggest to a witness that false or misleading evidence should be given nor condone another person doing so;*
- *or coach a witness by advising what answers the witness should give to questions which might be asked;*

*A professional will not have breached by:*

- *expressing a general admonition to tell the truth;*
- *questioning and testing in conference the version of evidence to be given by a prospective witness;*
- *or drawing the witness's attention to inconsistencies or other difficulties with the evidence, but must not encourage the witness to give evidence different from the evidence which the witness believes to be true.*

## 9. Client documents

*A professional with designated responsibility for a client's matter, must ensure that, upon completion or termination of the law practice's engagement:*

- *the client or former client, or another person authorised by the client or former client, is given any client documents, (or if they are electronic documents copies of those documents), as soon as reasonably possible when requested to do so by the client, unless there is an effective lien.*
- *a professional may destroy client documents after a period of 7 years has elapsed since the completion or termination of the engagement, except where there are client instructions or legislation to the contrary.*

## **10. Dealing with other persons**

*A professional must not in any action or communication associated with representing a client:*

- *make any statement which grossly exceeds the legitimate assertion of the rights or entitlements of the client, and which misleads or intimidates the other person;*
- *threaten the institution of criminal or disciplinary proceedings against the other person if a civil liability to the client is not satisfied; or*
- *use tactics that go beyond legitimate advocacy and which are primarily designed to embarrass or frustrate another person.*
- *In the conduct or promotion of a professional practice, the solicitor must not seek instructions for the provision of legal services in a manner likely to oppress or harass a person who, by reason of some recent trauma or injury, or other circumstances, is, or might reasonably be expected to be, at a significant disadvantage in dealing with the solicitor at the time when the instructions are sought.*

## **11. Anti- discrimination and Harassment**

*A professional must not in the course of practice, engage in conduct which constitutes:*

- *discrimination;*
- *sexual harassment;*
- *workplace bullying - "bully by proxy".*

## **12. Dealing with the Media**

- *A professional must not publish or take steps towards the publication of any material concerning current proceedings which may prejudice a fair trial or the administration of justice.*
- *To adhere to practice promotion, advertising and solicitation rules, codes and legislation in use and avoid Conflicts of interest.*
- *Maintaining public confidence and faith in the profession.*

## **8. ETHICAL DILEMMA**

- i. Dilemma means a situation in which a difficult choice has to be made between two courses of action, either of which entails contravening a moral principle.
- ii. An ethical dilemma or ethical paradox is a decisionmaking problem between two possible moral imperatives, neither of which is unambiguously acceptable or preferable.
- iii. An "absolute" or "pure" ethical dilemma only occurs when two (or more) ethical standards apply to a situation but are in conflict with each other.
- iv. In ethical dilemma, if we obey one decision then it would bring about disobeying another.
- v. Ethical dilemma is also known as moral dilemma.
- vi. Ethical dilemmas make the situations too difficult. A person has to choose only one way from two of them - a moral or an immoral way.
- vii. Ethical dilemmas can be seen everywhere in daily lives. However, everybody has their own particular experience towards ethical dilemma.

Some examples of ethical dilemmas include:

- A secretary discovers her boss has been laundering money, and she must decide whether or not to turn him in.
- A doctor refuses to give a terminal patient morphine, but the nurse can see the patient is in agony.
- While responding to a domestic violence call, a police officer finds out that the attacker is the brother of the police chief, and the police chief tells the officer to "make it go away"
- A government contractor discovers that intelligence agencies have been spying on its citizens illegally, but is bound by contract and legalities to keep his confidentiality about the discovery.

### Thoda Extra gyaaannnn..... Swaad Anusaaar (Short Note)

Narayana Murthy Committee, 'Report of the SEBI Committee on Corporate Governance', has conceptualized the concept of corporate governance,

"Corporate Governance is about ethical conduct in business. Ethics is concerned with the code of values and principles that enables a person to choose between right and wrong, and therefore, select from alternative courses of action. Further, ethical dilemmas arise from conflicting interests of the parties involved. In this regard, managers make decisions based on a set of principles influenced by the values, context and culture of the organization.

### Common Causes of Loss of Ethics and Values

1. **Unclear Policies in some cases:** Managers and employees exhibit poor ethical behaviour because the company does not offer a clear model of ethics. Some businesses have no formal ethical policy documents and offer no guidance at all.
2. **Conflict between Organisational & Individual Goal:** When the Organizational & Individual Goals overlap, it becomes difficult to balance things. The problem arises when one thing has to be sacrificed for the sake of others. To achieve Organisational goal, Individual goal, has to be compromised and vice versa so this leads to Ethical Dilemma.
3. **Cultural Value & Background:** Every individual decision is based on background. For some people it may be ethical to give priority for self and then decide about others but for some others it may be other way round. Thus background & value system creates the ethical Dilemma.
4. **Situation when a decision is taken by a manager:** Each Company's culture is different, but some companies stress profits and results above all. In these environments, management may turn a blind eye to ethical breaches if a worker produces results, given the firm's mentality of "the end justifies the means." are not beneficial for all but will benefit the company alone.  
Example - Automation of a plant.



5. **Dynamic & Different Human Nature:** Ethical Dilemma arises due to difference of the opinion among the group of people. Whatever is ethical for one person, may be unethical for another.
6. **Ambition and Discrimination:** Individual workers may be under financial pressure or simply hunger for recognition. If they can't get the rewards they seek through accepted channels, they may be desperate enough to do something unethical, such as falsifying numbers or taking credit for another person's work to get ahead. Though diversity is an important part of business, some people may not be comfortable with people from different backgrounds and possibly be reluctant to treat them fairly. This kind of discrimination is not only unethical but illegal and still remains common.
7. **Pressure from Management:** Each company's culture is different, but some companies stress profits and results above all. In these environments, management may turn a blind eye to ethical breaches if a worker produces results, given the firm's mentality of "the end justifies the means."
8. **Negotiation Skills:** While these factors can cause ethical dilemmas for workers within their own companies, doing business with other firms can also present opportunities for breaches. Pressure to get the very best deal or price from another business can cause some workers to negotiate in bad faith or lie to get a concession.
9. **Conflicting Values:** Ethical dilemmas may occur because of conflicting values between two or more people in an organization. One manager may value product quality over quantity while another may value thriftiness. These managers may discuss changing to a cheaper supplier for a material used in production because of the potential to save money. However, the first manager may object because he knows the cheaper material will produce a product of lesser quality, which is not good for customers. Without a culture of shared values, the least ethical choice may be approved.

**Organisation for Economic Co-operation and Development (OECD)** has also described various principles on "Corporate Governance" one of these Principle includes Disclosure and Transparency, which states "The Corporate Governance framework should ensure that timely and accurate disclosure is made on all material matters regarding the corporation, including the financial situation, performance, ownership, and governance of the company."

An Organization Transparency checklist includes the below mentioned traits:

- Board meetings (Dates, times and locations of Board meetings are conveyed at least one week in advance of the meetings)
- Financial disclosure statements (Non-profits should consider posting their audited financial statements on their website)
- Freedom of information legislation (Rules that guarantee access to data held by the state; they establish a "right-to-know" legal process where requests can be made for government-held information)
- Budgetary reviews
- Annual audits
- Annual Reports (Posted on the organization's website for easy access)
- Strategic plans and priorities
- Board of Directors and names of key staff as well as their contact information (Posted on the organization's website)
- Straight talking leadership
- Open culture and operations (many voices on behalf of the organization)
- Disclosed partnerships
- Frank, open communications including the good and bad
- Core values & Code of conduct.

## 9. HOW TO RESOLVE ETHICAL DILEMMA

Think about outcomes if you find yourself in a situation when this approach doesn't work, you can resolve a right versus right dilemma by finding the highest "right." Kidder wrote that there are three ways to make the best choice when faced with these types of dilemmas:

Resolving Ethical dilemma		
<p><b>Ends-based:</b> Select the option that generates the most good for the most people.</p>	<p><b>Rule-based:</b> Choose as if you' creating a universal standard. Follow the standard that you want others to follow.</p>	<p><b>Care-based:</b> Choose as if you were the one most affected by your decision. Once you've identified an ethical right versus right dilemma, lay out your options according to these three principles. One approach will immediately present itself as the "most right".</p>

## 10. STRATEGY FOR OVERCOMING FROM THE EVILS

For any organization the systematic and rigorous approach coupled with efforts is necessary to keep governance standards at the highest level by nurturing of ethical values and standards well embedded from the inception of the organization. It needs further conscious cultivation during the growth phase.

It is equally important to remember that organizations or institutions act through its own employees. Therefore, the human beings need proper and rigorous grooming. Thus, it is necessary that any attempt to address ethical issues is to be handled by human beings and not machines. The human traits and characteristics shape human behavior and a few probable solutions are explained below:

### i. Satisfaction

To achieve happiness it is essential that the culture of 'being satisfied' is developed. However, the most challenging and unanswerable question on satisfaction is "How much is Enough". The issue is very difficult to resolve especially in the corporate field where expansion is the prime direction in which it is supposed to move; yet it is the need of the hour to understand and remain satisfied with what is achieved within the validly available means.

ii. **Ends not to justify the means**

It is often said that the results matter and what was done to achieve the same is of no consequence. The statement may appear encouraging; but reading between the lines it is not the intention to achieve results by compromising ethics and values. The need of compromising ethics and values arises when there is a dearth of valid means to achieve the end-result. The thirst to succeed, vaulting ambition and flawed education are equally responsible elements. It is essential to note that however worth the cause may be, the means to achieve the same should also be equally valid. An irregular or an unethical action leading to a good outcome may not necessarily justify the method of achieving the goal.

iii. **Ethical Leadership**

The Professional should lead the organisation like Krishna as he led Pandvas to success by guiding them to fight morally. It is the duty of the leader driving the organization to ensure use of proper and ethical means in his conduct. It is equally essential that the leader walks the talk and sets an example of good governance and ethical leadership.

iv. **Character Professional should always consider the old idiom:**

If Character Is Lost Everything Is Lost. The idiom amply highlights the importance of good character. Character is generally built or earned by virtues like courage, honesty, values and ethics. Great leaders and eminent personalities are judged by their character. A good character is synonymous to reliability.

**Recent Cases on Values, Ethics and Professional conduct:**

I. **Punjab National Bank Case**

Punjab National Bank is one of the largest public sector banks in India. The scam of Rs. 11,300 crores in the Punjab National Bank scam has come into the limelight. The PNB scam and irregularities, forgery commenced in the year 2011 and continued for six long years with the knowledge of a few banking officials of PNB. It is a case where Letter of Undertaking (LOU) from Punjab National Bank was taken by Nirav Modi without having a sanctioned credit limit or

collaterals. The dispute mainly started due to illegal LOUs issued to Nirav Modi by few PNB banking officials.

The chronological dates on which the events and transaction concerning the scam took place is briefed as under:

- Punjab National Bank filed an FIR against Nirav Modi, Mehul Chowskhi and other charged with criminal conspiracy and cheating amounting to the tune Rs 11,300 Crores.
- Central Bureau of Investigation (CBI) was handed over the investigation into the matter.
- The Enforcement Directorate (ED) had registered a money laundering case against Nirav Modi and others under the provisions of PMLA based on the FIR registered by CBI under Sections 120-B r/w 420 of IPC, 1860 read with Section 13(2) read with 13(1)(d) of PC Act, 1988
- The Enforcement Directorate seized some movable assets like diamond, gold and jewellery worth Rs. 56.74 billion from the house of Nirav Modi and his office CBI after an investigation into the matter arrested two employees of Punjab National Bank and detained one representation of Nirav Modi Group. Simultaneously, Government of India suspended passport of Nirav Modi and Mehul Choskwi for the involvement in the PNB Scam.
- Subsequently, the Central Bureau of Investigation arrested the Chief Financial Officer (CFO) and two Senior Executives of Nirav Modi firm. It also sealed the Nirav Modi farmhouse at Alibaug, Mumbai.
- CBI seized nine luxurious cars which belong to Nirav Modi and his firm which worth crores of money.
- The Magistrate Court issued first bailable arrest warrant against Nirav Modi and Mehul Chowski. Enforcement Directorate on the same day filed a petition before the Special Court, Mumbai for seeking issuance of a non-bailable warrant (NBW) against the diamantaire - Nirav Modi and his firm.
- Enforcement Directorate moves before the Special Court to issue extradition proceeding against Nirav Modi.
- Government of India sent a letter requesting the UK authorities to initiate extradition proceeding against Nirav Modi.

- CBI officials requested Interpol Manchester to detain Nirav Modi about Nirav Modi presence in the country.
- UK authorities confirm the presence of the accused – Nirav Modi in the country.
- In a British newspaper named as UK Daily Telegraph which published a report on Nirav Modi presence and roaming in London streets. After knowing the incident Enforcement Directorate requested the Government of UK to take further action on the extradition proceeding of Nirav Modi in the UK court.
- Government of UK took action on the request of the Government of India and the Westminster Court, London issued an arrest warrant against Nirav Modi Nirav Modi was arrested in London by Scotland Yard Officers and produced before the Westminster Court. He applied for which was rejected by the Court. The accused Nirav Modi was sent to Her Majesty's Prison (HMP), Wandsworth till 29th March, 2019.
- The Westminster Court rejected the bail petition of the accused /fugitive offender – Nirav Modi on the ground that he may not appear before the Court on the fixed dates for further hearing of the matter. ( 29th March ,2019)
- After the plea made by Enforcement Directorate, Nirav Modi has been declared as Fugitive Offender by the Mumbai Court under the Fugitive Offender Act ,2018. Nirav Modi is currently in Wandsworth Prison in London, from where he is fighting for extradition charges.
- Action taken by RBI after detection of PNB Fraud Reserve Bank of India discontinued the practice of LOUs/ FLCs for trade credits for imports into India.
- RBI also ordered all the banks to reconcile transactions in Nostro accounts on a real-time basis so that unrecorded and illegal transactions can be identified immediately.

## 2. YES Bank Crisis

YES Bank was once the country's fifth-largest private lender by market capitalization. YES Bank was founded by Rana Kapoor and Ashok Kapoor in 2004. Fraud led to the unexpected and sudden fall of YES Bank which was emerging as a good competition to other private banks. The bank had a differentiated business model, with focus on technology, branches network, retail loans etc. and was ranked number 1 bank in the Business TodayKPMG Best Banks Annual Survey 2008.

**What has led to a crisis at YES Bank?**



- i. Promoter of the bank, Rana Kapoor had, over a short period of time, built an overwhelming image in the industry and had developed contacts with top industrialists of the country.
- ii. Most of the decision making on key matters including large loans was centralised in his hands. He had the ambition to make YES Bank the largest private bank of the country. It was this ambition which perhaps led to the sharp downfall in fortunes of the bank, steeper than its rise to an eminent position in the banking industry.
- iii. The bank's loan book on March 31, 2014, was Rs 55,633 crore, and its deposits were Rs 74,192 crore. Since then, the loan book has grown to nearly four times as much, at Rs 2.25 trillion as on September 30, 2019.
- iv. While deposit growth failed to keep pace and increased at less than three times to Rs 2.10 trillion. The bank's asset quality also worsened and it came under regulator RBI's scanner.
- v. Yes bank was lending aggressively disregarding the risk limits and also under-reporting the bad loans. They were lending to corporates that were already in very risky businesses and facing some challenges in their business like the Anil Ambani-led Reliance group, DHFL and IL&FS. All this happened in Rana Kapoor's tenure.
- vi. The exposure of loans to such bad performing companies was huge in Yes Bank's case, and to add up they were hiding the NPAs or misreporting the same.
- vii. After the above fiasco, Ravneet Gill took charge of Yes Bank but struggled to revive as deposits kept depleting and he wasn't able to raise enough capital given the loss of confidence in the market. The tipping point came when one of the bank's independent directors Uttam Prakash Agarwal, resigned from the board in January 2020 citing governance issues.

#### **Several reasons behind the crisis of YES bank were:**

- a. **NPAs:** YES Bank ran into trouble following the central bank's asset quality reviews in 2017 and 2018, which led to a sharp increase in its impaired loans ratio and uncovered significant governance lapses that led to a complete change of management. The bank subsequently struggled to address its capitalisation issues. YES Bank suffered a dramatic doubling in its gross NPAs between April and September 2019 to Rs 17,134 crore.
- b. **NBFC crisis:** The crisis in India's shadow-banking space started with the unravelling of Infrastructure Leasing & Financial Services (IL&FS) and then extended to Dewan Housing Finance Limited (DHFL). YES Bank's total exposure to IL&FS and DHFL was 11.5 per cent as of September



2019. In April 2019, the bank had classified about Rs 10,000 crore of its exposures, representing 4.1 per cent of its total loans under watch list, as potential non-performing loans over the next 12 months.

- c. **Governance issue:** YES Bank faced several governance issues that led to its decline. On January 10, independent director Uttam Prakash Agarwal quit citing deteriorating corporate governance standards and compliance failure at the lender. In 2018-19, the bank under-reported NPAs to the tune of Rs 3,277 crore, prompting RBI to dispatch R Gandhi, one of its former deputy governors, to the board of the bank. Rana Kapoor, who was instrumental in building YES Bank from scratch, was asked to step down as chief executive in January 2019.
- d. **Excessive withdrawals:** YES Bank's financial condition dissuaded many depositors from keeping funds in the bank over a longer term. The bank showed a steady withdrawal of deposits, which burdened its balance sheet and added to its woes. The bank had a deposit book of Rs 2.09 trillion at the end of September 2019.

### **Steps taken by RBI against YES Bank**

- i. RBI has taken over the YES Bank management
- ii. The central has imposed a moratorium on the lender
- iii. RBI announced a draft 'Scheme of Reconstruction' that entails SBI investing capital to acquire a 49% stake in the restructured private lender.

### **3. Infrastructure Leasing & Financial Services Limited (IL&FS) Case**

- i. IL&FS is a systemically important Core Investment Company with the Reserve Bank of India and is engaged in the business of giving loans and advances to its group companies (and holding an investment in such companies).
- ii. IL&FS has a large number of group companies across various sectors such as Energy, Transportation, Financial Services. IL&FS Group, which had approximately over Rs. 91,000 crores in debt, was facing a severe liquidity crisis. Between July 2018 and September 2018, two of the subsidiaries of IL&FS Group reported having trouble in paying back loans and inter-corporate deposits to banks/lenders.
- iii. In July 2018, the road arm of IL&FS was facing difficulty in making repayments due on its bonds. Further, in early September 2018, one of the subsidiaries of IL&FS Group was unable to repay a short-term loan of Rs. 1,000 crore taken from Small Industries Development Bank of India (SIDBI).

Also, certain group companies defaulted in repayments of various short and long-term deposits, intercorporate deposits, and commercial papers.

- iv. IL&FS failed continuously to service its debt and the imminent possibility of a contagion effect in the financial market led the Central Government to move an application under Sections 241 and 242 of the Companies Act, 2013 before the NCLT (National Company Law Tribunal). Section 241 deals with the cases of mismanagement and oppression by company's management.
- v. The NCLT suspended IL&FS board members and management and restrained the suspended members from alienating their personal assets.
- vi. In view of the prima facie findings of ICAI and the SFIO interim report dated November 30, 2018, the Central Government filed a petition before the NCLT, Mumbai Bench under Section 130 of the Companies Act, seeking re-opening of the books of account of IL&FS and its group companies for the past five financial years.
- vii. The NCLT vide its judgment dated January 1, 2019, allowed the petition of the Central Government.
- viii. Upon an application filed by PTC India Financial Services Ltd, the NCLAT has, without going into the rival contention of the parties, made it clear that due to non-payment of dues by IL&FS or its entities including the 'Amber Companies', no financial institution will declare the accounts of IL&FS or its entities as NonPerforming Assets (NPA) without its prior permission.
- ix. By its order dated May 2, 2019, NCLAT allowed the banks to declare as nonperforming assets the accounts of IL&FS and its group companies that have defaulted on payments. However, the tribunal clarified that the banks cannot initiate the recovery process and debit money.
- x. On May 30, 2019 SFIO submitted a chargesheet against 30 parties, including two auditor firms, for concealing information by not flagging the alleged criminal conspiracy and misreporting the financial statements of the IL&FS firms.
- xi. MCA moved against the auditors, Deloitte Haskins and Sells as well as BSR and Associates LLP and their former auditors, under Section 140(5) of the Companies Act, for their role in "perpetuating the fraud" at IFIN, a subsidiary of IL&FS. The Ministry sought debarment of these audit firms and their audit partners. It also sought interim attachment of their properties, including bank accounts and lockers.
- xii. On June 4, the Supreme Court allowed the SFIO to reopen and recast accounts of IL&FS and two of its subsidiary companies for the last five years. The MCA had approached the Supreme Court

seeking a vacation of the stay imposed by the Supreme Court through its order passed on April 29.

### **Reasons for Failure**

- i. IL&FS hadn't disclosed bad loans on its books for years despite a big part of its loan book having soured.
- ii. As it was the shadow bank or NBFC, "Unscrupulous, negligent and dormant management decisions were the main root cause of failure.
- iii. Poor fund management and controls as IL&FS lent funds to insolvent entities and troubled projects.
- iv. "Deficient audit" by the auditors as they failed to issue warnings.
- v. The auditors did not highlight the Reserve Bank of India's (RBI's) inspection report, which had labelled IFIN as over-leveraged, besides failing to report negative cash flows and adverse key financial ratios.
- vi. RBI or any other entity did not strictly regulated NBFCs. The IL&FS crisis has raised concerns over the management of such entities.

### **Steps taken by RBI**

- i. RBI is constantly monitoring NBFC's to prevent systemic shocks.
- ii. RBI is monitoring top 50 NBFCs more closely. These 50 NBFCs represent 75% of the sector.
- iii. Wherever necessary, RBI is making deep dive into their books, their balance sheet and other numbers.

### **4. DHFL Case**

Dewan Housing Finance Corporation Limited (DHFL) is a leading housing finance company, headquartered in Mumbai with branches in major cities across India. Mr. Rajesh Kumar Wadhawan is the Founder of DHFL.

- i. DHFL has sanctioned and paid funds in unsecured and dubious loans.

- ii. Loan amounting to thousands of crores of rupees were given to newly incorporated shell companies. The said loans were provided without any security or collateral and the proceeds were utilized by for private asset creation.
- iii. DHFL has not adequately disclosed the terms of loan and repayment in the financial statements. They also ensured that most of the shell companies have hidden the name of the lender i.e. DHFL.
- iv. Approximately 6 lacs dummy accounts were established at one branch, using the names of borrowers who had already repaid their loans. These accounts were used to issue loans to promoter firms, which were then used to syphon funds. These loans turned out to be non-recoverable in the end.
- v. The act of DHFL ensured that the recovery of such dubious loans would be impossible since the companies or their directors themselves do not own any assets.
- vi. The promoters and their associates used these dubious loans to acquire personal assets which were completely ring-fenced from the recovery process since the companies or their directors themselves do not own any of these assets.
- vii. Due to poor Corporate Governance concerns, the Reserve Bank of India (RBI) superseded the board of debt-laden DHFL.
- viii. RBI has initiated the process of resolution of the Company under the Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Finance Service providers and Application to Adjudicating Authority rules, 2019).

#### **Reasons for failure:**

DHFL case is absolute failure of Corporate Governance.

The act of promoters in diversion of loan amounts to shell company without scrutiny or security shows a complete deviation from the corporate governance policies.

#### **5. Hero MotoCorp**

- i. The country's largest two-wheeler maker Hero MotoCorp has sacked around 30 employees for violation of the company's code of conduct, These executives were found fudging travel expense bills, accepting personal favours, gifts and other benefits from some of vendors, suppliers and dealers in violation of the company's internal 'code of conduct'.

- ii. The executives were given marching orders after “thorough investigations” into the allegations against them, all due legal procedures were followed before taking the final action.
- iii. Third-party independent investigators were appointed to look into these cases once the anomalies were detected in the activity record of these executives.
- iv. Hero MotoCorp’s management was unanimous in its view that the concerned employees could not continue in the company, once it was established.
- v. The employees were given due opportunities to present their cases.
- vi. When confronted with evidence, they owned up to the wrongdoing, official said. He, however, declined to share the names and designations of the sacked employees.

#### **6. Volkswagen’s Emissions Scandal:**

- i. In 2015, it was discovered that Volkswagen had installed “defeat devices” in its diesel cars that enabled the vehicles to cheat emissions tests.
- ii. Many VW cars being sold in America had a “defeat device” - or software - in diesel engines that could detect when they were being tested, changing the performance accordingly to improve results. The German car giant has since admitted cheating emissions tests in the US.
- iii. The scandal resulted in a significant fine for the company and criminal charges for several executives.
- iv. The case raised questions about ethical behaviour and values within the automotive industry, as well as the need for stricter regulations and enforcement.

7. In 2020, the Securities and Exchange Commission (SEC) fined a major financial services company [VALIC Financial Advisors Inc. (VFA)] for failing to disclose conflicts of interest in its investment advice. The SEC charged VFA for making false and misleading statements about, and otherwise failing to disclose, conflicts related to its receipt of millions of dollars of financial benefits from client mutual fund investments. The SEC found that the company had recommended investments that generated higher fees for the company, even if they were not in the best interests of their clients. This violated the company’s fiduciary duty to act in the best interests of their clients.

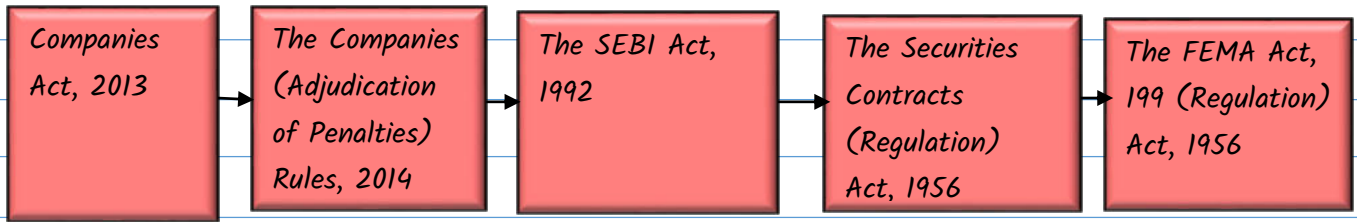
SUMMARISED VERSION (MIND MAP)





## I. INTRODUCTION

### Regulatory Framework:



- i. Non-compliance of law by any section of society will have deleterious effect on the economy, particularly in the case of economic legislations like the Company Law, FEMA, Income-tax Act etc. In order to check such tendencies, penal provisions form an integral part of any statute and they are administered by the courts, tribunals etc.
- ii. The Companies Act, 2013('Act') provides for various compliance norms that are essential for corporate operation and protecting the rights of stakeholders. Violations of such norms lead to offences with associated penalties and other consequences.
- iii. To understand these provisions, it is essential to understand the **meaning of terms - civil law and criminal law:**

<u>Particulars</u>	<u>Civil Law</u>	<u>Criminal Law</u>
<u>Deals with</u>	Private disputes or defaults.	Offences that are committed against the society
<u>Objective</u>	To resolve or redress and to make good the loss or damages suffered by one party on account of any act or omission by other party	To punish the offender and is reflection of the public policy of a country
<u>Power of Court</u>	Order can be passed for damage and compensation	In these cases the court is empowered to charge a fine, imprison the guilty of a crime, or discharge the defendant.



**CAN YOU SOLVE THIS?**

*Companies Act is a Civil Law or a Criminal Law?*

**Solution:**

The Companies Act, 2013 is mixture of both civil as well as criminal provisions. The civil and criminal provisions under the Act can be identified by observing the language used by Act, for consequences of non-compliances/contravention of its provisions. The words “liable to penalties” denote civil nature of non-compliances, whereas the words “punishable with fine and/or imprisonment and/or both” denote criminal nature of non-compliances

**2. NON-COMPLIANCES UNDER COMPANIES ACT, 2013**

- i. Non-adherence of any of the provisions of the Companies Act attracts fine at the first place for the delayed compliance and penalty at the second place for the violation / non-adherence of the provisions of the Act.
- ii. Delay in compliances with laws does not means that there is no violation. Violation is continued unless the company complies with the law and attracts penalty under the provisions of the Companies Act for the delay.
- iii. Companies Act also provides the option of compounding for setting right the complaint, which can be filed either suo motto or the Regulator could take the required action later.

**iv. Difference between fine and penalty**

<u>Fine</u>	<u>Penalty</u>
A fine is a penalty of money that a court of law or other authority decides has to be paid as punishment for a crime or other offense.	Penalty is “a punishment imposed for breaking a law, rule, or contract.” In general language a penalty is imposed by an appropriate authority when a person have not complied with the law but have not committed any offence.

Fine has been used as punishment for criminal offence.	Penalty has been used to indicate civil offence
Fine can be imposed only by a court of law.	Penalty may be imposed even by an administrative officer
Fine is imposed as a punitive measure	Penalty is imposed as a compensatory measure or for breach of civil obligation.

### 3. OFFENCES TO BE NON-COGNIZABLE

- i. As per **Section 2(n)** of the **Code of Criminal Procedure, 1973 (CrPC)**, an Offence is defined as "any act or omission made punishable by any law for the time being in force"
- ii. A **non-cognizable offence as per section 2(l)** of the **CrPC** means an offence for which, a police officer has no authority to arrest without a warrant.
- iii. An Offence in a company may be done either by connivance i.e. when the officers of the Company are aware of an unlawful act being committed or by inadvertence i.e. when it was done accidentally or unknowingly. **Section 439** of the Act prescribes that all the offences under the Act shall be non-cognizable except for the offences prescribed under **section 212(6)** i.e. those involving fraud.
- iv. According to **section 439** of the act:
  - No court shall take cognizance of any offence under this Act which is alleged to have been committed by any company or any officer thereof, except on the complaint in writing of the Registrar, a shareholder or a member of the company, or of a person authorised by the Central Government in that behalf (**Provided that the court may take cognizance of offences relating to issue and transfer of securities and non-payment of dividend, on a complaint in writing, by a person authorised by the SEBI**)  
(**Provided further that nothing in this sub-section shall apply to a prosecution by a company of any of its officers.**)

- Where the complainant mentioned above is the Registrar or a person authorised by the Central Government, the presence of such officer before the Court trying the offences shall not be necessary unless the court requires his personal attendance at the trial.
- The provisions mentioned above shall not apply to any action taken by the liquidator of a company in respect of any offence alleged to have been committed in respect of any of the matters in Chapter XX or in any other provision of this Act relating to winding up of companies.

#### **4. OFFENCES TO BE COGNIZABLE AND NON-BAILABLE UNDER SECTION 212(6)**

- i. As per **Section 2(c) of the Code of Criminal Procedure, 1973** “cognizable offence” means an offence for which, and a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant.
- ii. **Section 212(6) provides, offence covered under section 447 of the Companies Act, 2013 shall be cognizable and no person accused of any offence under those sections shall be released on bail or on his own bond unless-**
  - the Public Prosecutor has been given an opportunity to oppose the application for such release; and
  - where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.
- iii. A person, who, is **under the age of sixteen years or is a woman or is sick or infirm**, may be released on bail, if the Special Court so directs.
- iv. However, the Special Court shall not take cognizance of any offence referred to this subsection except upon a complaint in writing made by –
  - the Director, Serious Fraud Investigation Office;
  - or any officer of the Central Government authorized, by a general or special order in writing in this behalf by that Government.

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Classification of offences:

- All the offences under Companies Act, 2013 are classified as:
  - a) fine only, or
  - b) fine or imprisonment, or
  - c) fine or imprisonment or both, or
  - d) imprisonment only or
  - e) fine and imprisonment
- For the purpose of punishment offences are categorised as
  - a) offences involving fraud
  - b) offences not involving fraud
- Offences can be further categorized to
  - a) Compoundable offences
  - b) Non-Compoundable offences
- wherever any section of the Act is silent on quantum of punishment or penalty for non-compliances, Section 450 of the Act comes into play and makes all such non-compliances are liable to a penalty of ten thousand rupees, and in case of continuing contravention, with a further penalty of one thousand rupees for each day after the first during which the contravention continues, subject to a maximum of two lakh rupees in case of a company and fifty thousand rupees in case of an officer who is in default or any other person.

**5. DECRIMINALISATION OF OFFENCES UNDER THE COMPANIES ACT, 2013- REDUCTION IN PENALTIES**

- i. The MCA has constituted a review committee under the chairmanship of Mr. Injeti Srinivas, to review the offences which are prescribed under the Act and to analyse, examine and peruse the need to decriminalize some of the offence by making recommendation to the Central

Government inter-alia on re-categorisation of certain 'acts' punishable as compoundable offences to 'acts' carrying civil liabilities, improvements to be made in the in-house adjudication mechanism etc.

- ii. Based on the recommendations made by the Committee, the Central Government brought in relevant changes by passing of the Companies (Amendment) Act, 2019.
- iii. Despite the ease in penal pressure brought about by the above enactment, the Government continued to feel the acute need to further liberalise and relax the stringent penal provisions of the Act.
- iv. Considering this the urge to promote ease of doing business and to foster growth of corporates, led to the constitution of the Company Law Committee in September 2019, which recommended decriminalisation of Companies Act, 2013.
- v. The Companies (Amendment) Act, 2020 removes the imprisonment for certain offenses, substitutes fine by penalty in and reduces amount of payable as penalty across the board. In certain minor omissions, etc. penal consequence has been omitted.
- vi. Default or non-compliance may lead to restrictions of withdrawal of benefits, For e.g., default or failure in compliance with the provisions of section 92 (Annual Return) and/or section 137 (filing of financial statements) might result into:
  - a. withdrawal of exemptions available to a private company
  - b. company becoming ineligible to undertake buy-back of its equity shares or other specified securities
  - c. disqualification of directors, and
  - d. company being classified into an inactive company etc.

## **6. SECTION 447-PUNISHMENT FOR FRAUD**

Corporate fraud is a fraud in relation to affairs of a company or any corporate body as defined in Section 447 of Companies Act 2013, includes-

- any act,
- omission
- concealment of any fact or
- abuse of position

committed with any person or any other person with connivance

- *with intent to deceive*
- *to gain undue advantage*
- *injure the interests of*
  - *company*
  - *Shareholders*
  - *Creditors or*
  - *any other person*

*Whether or not there is any wrongful gain or loss*

### Wrongful Gain

*“wrongful gain” means the gain by unlawful means of property to which the person gaining is not legally entitled.*

### Wrongful Loss

*“wrongful loss” means the loss by unlawful means of property to which the person losing is legally entitled.*

*If amount involved in the fraud is **at least ten lakh rupees or one percent of the turnover**, whichever is less,*

*imprisonment from six months to ten years **and** fine ranging from the amount involved in the fraud to three times such amount  
(If the fraud **involves public interest**, the imprisonment will **not be less than three years**)*

*If the amount involved is **less than ten lakh rupees or one percent of the turnover and the fraud does not involve public interest***

*imprisonment up to five years **or** fine up to fifty lakh rupees **or both***



## CASE STUDY

### Komal Chadha Vs. Serious Fraud Investigation Office,

The case outlines a legal case where the accused-petitioner, Komal Chadha, is seeking regular bail in a matter involving allegations of fraudulent activities conducted by a company she was a director of. The case revolves around violations of the Companies Act, including financial misconduct and diversion of funds.

The gravamen of the offences alleged under section 447 of the Companies Act, 2013 was that the company, which was engaged in the trade of plastic granules, indulged in cash sales, in fictitious sale of food grain and in creation of accommodation/adjustment accounting entries, apart from misuse of cheque discounting facilities. It was also alleged that the company manipulated financial statements, to project substantial growth in its revenues, to mislead banks, so as to induce them to extend and enhance credit limits, which monies were not used towards the business activity of the company but were diverted and siphoned-off to other entities, with no genuine underlying business transactions, thereby indulging in fraudulent diversion of funds to sister concerns.

SFIO filed complaint against petitioner making petitioner the officer in default, since the petitioner was the director of the company and was liable for the affairs of the company.

It was held that since there was no allegation against petitioner either intimidating any witnesses or tampering with evidence or otherwise interfering in course of investigation, she was to be admitted to regular bail

## **7. PUNISHMENT FOR FALSE STATEMENT**

If in any return, report, certificate, financial statement, prospectus, statement or other document required by, or for, the purposes of any of the provisions of this Act or the rules made thereunder, any person makes a statement,—

- i. which is false in any material particulars, knowing it to be false; or
- ii. which omits any material fact, knowing it to be material,

he shall be liable under section 447

## CASE STUDY

### ***Usha Martin Telematics Ltd. Vs. Registrar of Companies***

*In the instant case, the petitioner company applied to Reserve Bank of India for being registered as Core Investment Company (CIC) pursuant to Core Investment Companies (Reserve Bank) Directions, 2011 following which Reserve Bank of India sought certain clarifications and documents from petitioner company.*

*A meeting of Board of Directors of company was held and in course of preparing minutes of said meeting in compliance with section 118(1), it was erroneously recorded in minutes that company submitted application with Reserve Bank of India for its de-registration as NBFC and registration as a CIC. Such recording was an inadvertent/typographical error as company was not a registered Non-Banking Financial Company (NBFC) at relevant time and question of de-registration as NBFC did not arise, however, said error was detected by company subsequently and in a meeting of its Board of Directors said error was rectified.*

*A complaint case was filed by opposite party before Special Court, for offence punishable under section 118, read with section 448.*

*It was held that the typographical/inadvertent error in recording of minutes which was rectified subsequently could not be termed as offence. The complaint lodged by opposite party did not prima facie reflect intent to deceive, gain undue advantage or injure interest of company or any person connected, hence the complaint was quashed.*

### **8. PUNISHMENT FOR FALSE EVIDENCE**

*If any person intentionally gives false evidence –*

- i. upon any examination on oath or solemn affirmation, authorized under this Act; or*
- ii. in any affidavit, deposition or solemn affirmation, in or about the winding up of any company under this Act, or about any matter arising under this Act,*

*He shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to seven years and with fine which may extend to ten lakh rupees.*

### **9. PUNISHMENT WHERE NO SPECIFIC PENALTY OR PUNISHMENT IS PROVIDED**

- i. If a company or any officer of a company or any other person contravenes any of the provisions of this Act, rules or any condition, limitation or restriction subject to which any approval, sanction, consent, confirmation, recognition or exemption in any matter has been granted, and for which no penalty or punishment is provided elsewhere in this Act, the company and every officer of the company who is in default or such other person **shall be liable to a penalty of ten thousand rupees,**
- ii. **In case of continuing contravention,** with a further penalty of **one thousand rupees for each day after the first** during which the contravention continues, **subject to a maximum of two lakh rupees in case of a company and fifty thousand rupees in case of an officer who is in default or any other person.**

### CASE STUDY

#### **Doha Brokerage & Financial Services Ltd. Vs. Registrar of Companies**

In the instant case, it was held that the petitioner sought compounding of offence punishable under section 450, wherein petitioner-company allotted equity shares to its subsidiary company in violation of section 19 (Subsidiary Company not to Hold Shares in its Holding Company), each officer in default as members of Board of Directors was to be subjected to a fine of Rs. 5000 as a deterrent for not repeating default in future and offence was ordered to be compounded subject to remittance of compounding fee imposed.

#### **10. PUNISHMENT IN CASE OF REPEATED DEFAULT.**

If a company or an officer of a company commits an offence punishable either with fine or with imprisonment and where the same offence is committed for the second or subsequent occasions within a period of three years, then, that company and every officer thereof who is in default shall be punishable with **twice the amount of fine** for such offence in addition to any imprisonment provided for that offence.

**Pahuja Takii Seed Ltd. Vs. Registrar of Companies**

In the instant case, it was held that there is no bar on preferring a single application for compounding same offence committed during different financial years by company and its officers

**II. PUNISHMENT FOR WRONGFUL WITHHOLDING OF PROPERTY**

- i. If any officer or employee of a company -
  - wrongfully obtains possession of any property, including cash of the company; or
  - having any such property including cash in his possession, wrongfully withholds it or knowingly applies it for the purposes other than those authorised by this Act,  
He shall, on the complaint of the company or of any member or creditor or contributory, be punishable with **fine which shall not be less than one lakh rupees but which may extend to five lakh rupees.**
- ii. The Court trying an offence under sub-section (1) may also order such officer or employee to deliver up or refund, within a time to be fixed by it, any such property or cash wrongfully obtained or wrongfully withheld or knowingly misapplied, **the benefits that have been derived from such property or cash or in default, to undergo imprisonment for a term which may extend to 2 years.**
- iii. Imprisonment of such officer or employee, shall not be ordered for wrongful possession or withholding of a dwelling unit, if the court is satisfied that the company has not paid to that officer or employee, any amount relating to-
  - provident fund, pension fund, gratuity fund or any other fund for the welfare of its officers or employees, maintained by the company;
  - compensation or liability for compensation under the Workmen's Compensation Act, 1923 in respect of death or disablement

**12. PUNISHMENT FOR IMPROPER USE OF "LIMITED" OR "PRIVATE LIMITED"**

If any person trade or carry on business under any name or title, of which the word "Limited" or the words "Private Limited" are the last words, that person shall, unless duly incorporated with limited liability, or unless duly incorporated as a private company with limited liability,

punishable with fine which shall not be less than five hundred rupees but may extend to two thousand rupees for every day for which that name or title has been used.

### **13. COMPREHENSIVE LIST OF PENALTIES UNDER THE COMPANIES ACT, 2013**

Provided at the end of the chapter.

### **14. ESTABLISHMENT OF SPECIAL COURTS**

- i. In the Report of Companies Law Committee chaired by Shri Tapan Ray dated February 1, 2016 noted that the establishment/designation of Special Courts under the Act would result in faster prosecution of defaulting companies. The Committee recommended the early establishment/ designation of the Special Courts
- ii. Section 435(1) stipulates that the Central Government may, for the purpose of providing speedy trial of offences under this Act, except under section 452, by notification establish or designate as many Special Courts as may be necessary
- iii. Section 435 to 438 & 440 deals with provisions related to special courts.
- iv. A Special Court should consist of:
  - a single judge holding office as **Session Judge or Additional Session Judge**, in case of offences punishable under this Act with **imprisonment of two years or more**; and
  - a **Metropolitan Magistrate or a Judicial Magistrate of the First Class**, in the case of other offences.
- v. Special Court is **appointed by Central Government in Consultation with Chief Justice of High Court**.

### **15. OFFENCES TRIABLE BY SPECIAL COURTS**

- i. All offences specified under section 435(1) shall be triable only by the Special Court established for the area in which the registered office of the company in relation to which the offence is committed or where there are more Special Courts than one for such area, by such one of them as may be specified in this behalf by the High Court concerned.
- ii. Where a person accused of, or suspected of the commission of, an offence under this Act is forwarded to a Magistrate under section 167 of the Code of Criminal Procedure, 1973, such Magistrate may authorise the detention of such person in such custody as he thinks fit for a

period not exceeding 15 days in the whole where such Magistrate is a Judicial Magistrate and 7 days in the whole where such Magistrate is an Executive Magistrate. However, where such Magistrate considers that the detention of such person upon or before the expiry of the period of detention is unnecessary, he shall order such person to be forwarded to the Special Court having jurisdiction.

- iii. The Special Court may exercise the same power as a Magistrate may exercise under section 167 of the Code of Criminal Procedure, 1973 in relation to an accused person who has been forwarded to him under that section; and
- iv. A Special Court may, upon perusal of the police report of the facts constituting an offence under this Act or upon a complaint in that behalf, take cognizance of that offence without the accused being committed to it for trial.

### Thoda Extra gyaaannnn..... Swaad Anusaaar

#### Power of Special Court

- The Special Court may, if it thinks fit, try in a summary way any offence under this Act which is punishable with imprisonment for a term not exceeding three years provided, in case of any conviction in a summary trial, no sentence of imprisonment for a term exceeding 1 year shall be passed.
- Further, when at the commencement of, or in the course of, a summary trial, it appears to the Special Court that the nature of the case is such that the sentence of imprisonment for a term exceeding 1 year may have to be passed or that it is, for any other reason, undesirable to try the case summarily, the Special Court shall, after hearing the parties, record an order to that effect and thereafter recall any witnesses who may have been examined and proceed to hear or rehear the case in accordance with the procedure for the regular trial



## CASE STUDY

### S. Satyanarayana Vs. Energo Masch Power Engineering & Consulting (P.) Ltd.

This case deals with the jurisdiction of a Special Court when multiple persons are accused of offenses under both a special enactment (like the Companies Act) and the Indian Penal Code for the same transaction or set of facts. The Supreme Court held that to avoid multiple proceedings, the Special Court maintains jurisdiction to try all offenses arising from the same transaction, even if they fall under different legal statutes. This decision ensures efficient legal proceedings and prevents confusion due to the multiplicity of cases.

## CASE STUDY

### SFIO v. Rahul Modi & ors

As per the provisions of Section 212(3) of the Companies Act, any investigation ordered to SFIO is supposed to be completed on the specified time. But the issue is, if investigation is not completed on time, what are the consequences and if any investigation is conducted after the given time whether it is legal.

Court while deciding declared that no it is not illegal. The time frame mentioned is to complete the investigations in a time bound manner but the said time can be extended from time to time by the same authority.

## **16. ADJUDICATION OF OFFENCES-(Genesis of Adjudication)**

- i. Adjudication is the process by which a judge reviews arguments and evidences of both the parties and after providing them an opportunity of being heard passes all necessary decisions.
- ii. Section 454 of the Act read with the Companies (Adjudication of Penalties) Rules, 2014 deals with the manner and procedure of adjudication of penalties.
- iii. The Registrar of Companies (ROC) has been shouldered with the responsibility of adjudicating officer for their respective jurisdiction.



- iv. Earlier the penal provisions which were in existence in many of the sections could not be implemented due to lack of judicial or quasi-judicial powers with the administrative authorities. The show cause notice issued by ROC on the defaulting company or the officers in default led to legal proceedings against them before a Magistrate.
- v. The J.J. Irani Committee Report which is essentially the backbone of the Companies Act, 2013, recommended *in house adjudication and empowerment of the Registrar of Companies* in levying penalties for offences under various sections of the Act, to simplify the legal process.
- vi. Thus, was born the formal adjudicating power which got vested with the Central Government in the form of section 454.

## **17. ADJUDICATION PROCESS UNDER THE COMPANIES ACT, 2013**

### **Step 1** **ISSUE OF SHOW CAUSE NOTICE TO COMPANY AND OFFICER IN DEFAULT**

- i. Before adjudging penalty, the adjudicating officer will issue a show cause notice to the company or officer in default, which is for not less than 15 days and maximum 30 days, to show cause why the penalty should not be imposed on it or him.
- ii. Every notice issued, shall clearly indicate the nature of non-compliance or default under the Act alleged to have been committed by such company or officer in default and draw attention to the relevant penal provisions of the Act and the maximum penalty which can be imposed on the company, and each of the officers in default.
- iii. Reply to such notice should be received in the specified days in electronic mode only.  
(Adjudicating Officer might extend the time period by 15 days if there is a sufficient cause)

### **Step 2** **ENQUIRY BY ADJUDICATION OFFICER- NOTICE FOR HEARING**

- i. If after submitting the reply by company or officer in default the adjudicating officer is of the opinion that physical appearance is required, he shall issue a notice, within a period of ten working days from the date of receipt of reply fixing a date for the appearance of such company, through its authorised representative, or officer of such company, or any other person.

- ii. If any person, to whom a notice is issued, desires to make an oral representation, whether personally or through his authorised representative and has indicated the same while submitting his reply in electronic mode, the adjudicating officer shall allow such person to make such representation after fixing a date of appearance.

### MCA Compliance Monitoring system

- i. Compliance Monitoring System (MCACMS Portal) is an Artificial Intelligence initiative under system in MCA 21 by Ministry of Corporate Affairs to make compliance process easier and to ensure regular enforcement of Compliance requirements under Companies Act, 2013.
- ii. Purpose: issuing show cause notices electronically for non compliances under Companies Act, 2013 and submitting replies from companies / directors with their clarifications and submissions.
- iii. Based on the replies / submissions, the Register of Companies, Ministry of Corporate Affairs shall initiate penal actions for violations referred in the show cause notices.
- iv. Following are the steps for filing reply to the SCN

- 1) Visit the MCA CMS portal
- 2) Click on 'Reply for Show Cause Notice Tab;
- 3) Click the relevant section for which SCN has been issued
- 4) Fill the CMS Reference number written on the SCN & click search. The system will validate the number.
- 5) After validation click on 'Send OTP' tab.
- 6) OTP will be sent on the email id on which SCN was received;
- 7) Click on 'Submit Reply' tab and reply once submitted cannot be altered;
- 8) The system will show a confirmation message and the 'Action' tab will show reply status.

### STEP 3 DATE OF HEARING

- i. On the date fixed for hearing and after giving a reasonable opportunity of being heard to the person concerned, the adjudicating officer may pass the order in writing as he thinks fit including an order for adjournment.

- ii. After hearing, adjudicating officer may require the concerned person to submit his reply in writing on certain other issues related to the notice, relevant for determination of the default

**STEP 4**  
**ORDER OF ADJUDICATING AUTHORITY**

- i. The adjudicating officer shall pass the order within 30 days where physical appearance was not required and within ninety days of the date of issue of notice where any person appeared before the adjudicating officer.
- ii. In case the order is passed after the given duration, the reasons for delay shall be recorded in writing and order shall not be invalid merely because it was passed after the expiry of 30 days or 90 days.
- iii. Every order of the adjudicating officer shall be duly dated and signed by him and shall clearly state the reasons for requiring the physical appearance.
- iv. The adjudicating officer shall send a copy of the order passed to the concerned company, officer who is in default or any other person, to the Central Government and a copy of the order shall also be uploaded on the website.

**Power of Adjudicating Authority**

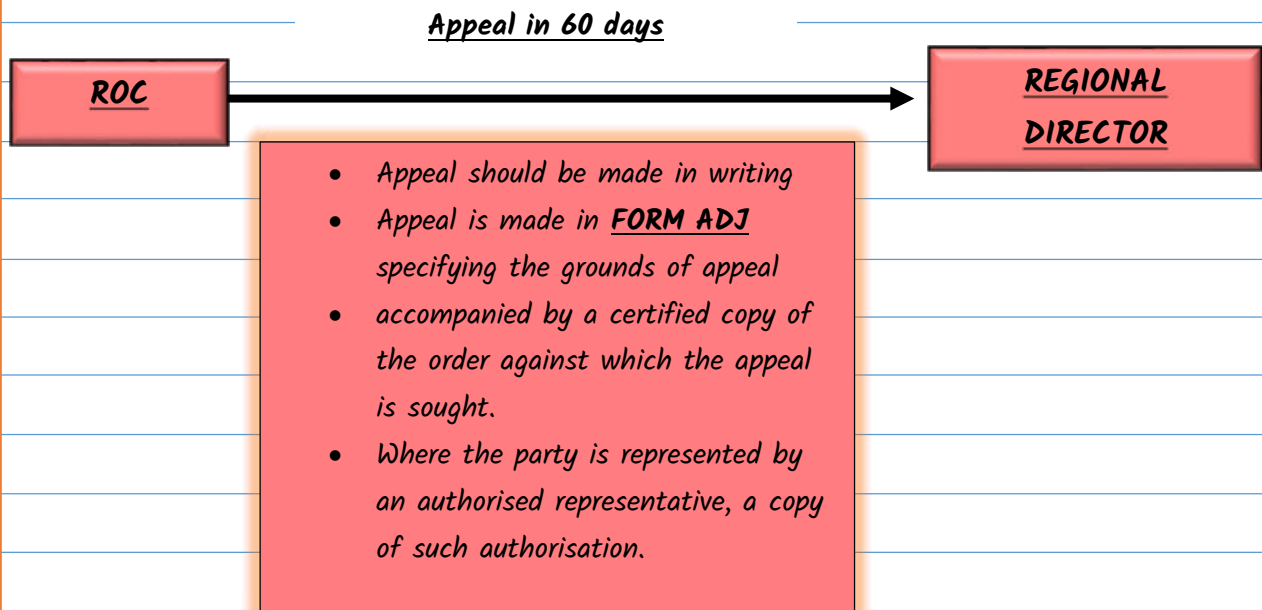
To summon and enforce the attendance of any person acquainted with the facts and circumstances of the case after recording reasons in writing.

To order for evidence or to produce any document, which in the opinion of the adjudicating officer, may be relevant to the subject matter.

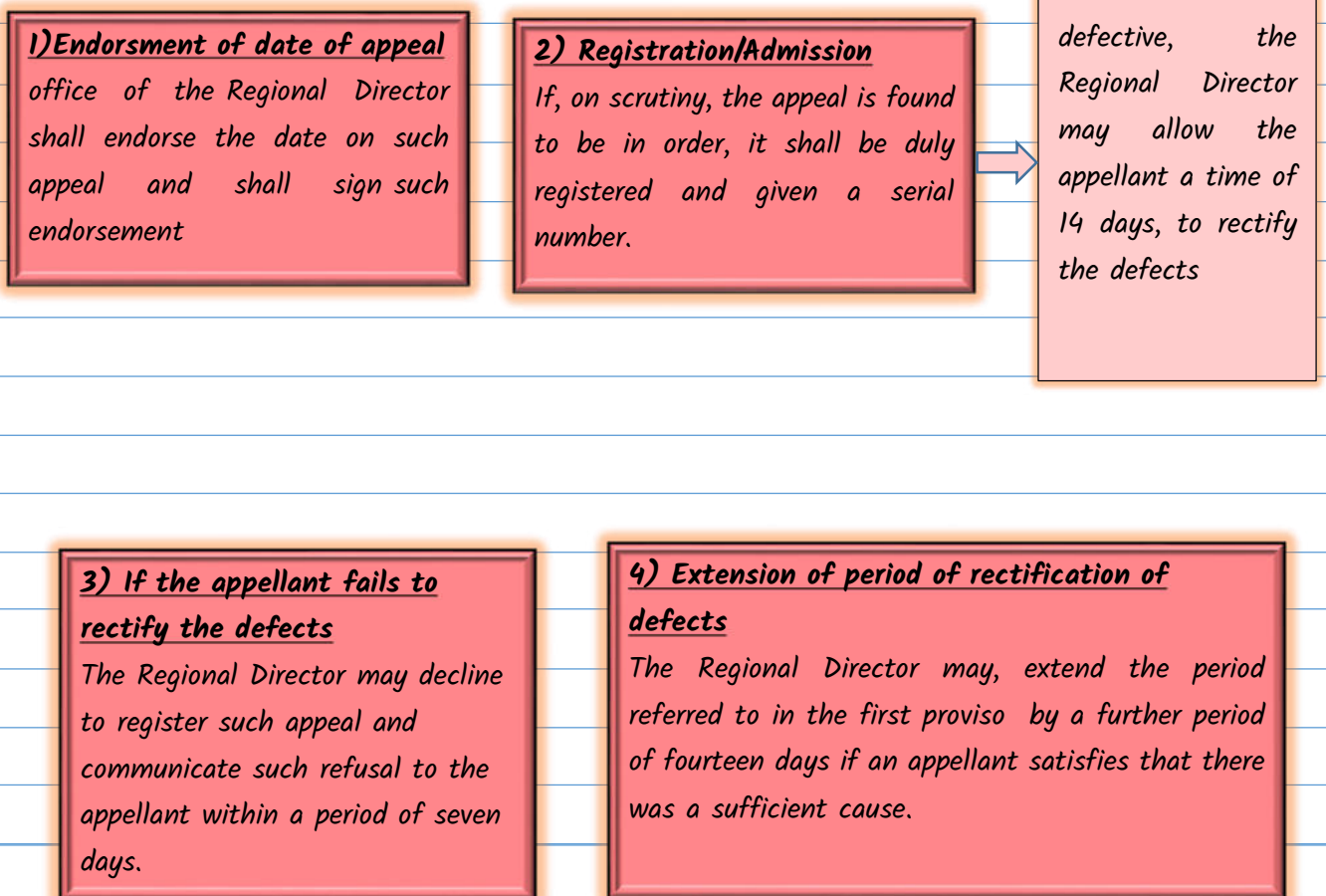
### **Penalty Imposed by Adjudicating Authority**

- i. The adjudicating officer **may impose penalty** on company or officer in default **or order** the company or officer in default **to rectify the default**.
- ii. If **any person fails to reply or neglects or refuses to appear** as required before the adjudicating officer, the **adjudicating officer may pass an order imposing the penalty**.
- iii. While adjudging quantum of penalty, the adjudicating officer should consider following factors:
  - a. size of the company
  - b. nature of business carried on by the company
  - c. injury to public interest
  - d. nature of the default
  - e. repetition of the default
  - f. the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default; and
  - g. the amount of loss caused to an investor or group of investors or creditors as a result of the default
- iv. In case a fixed sum of penalty is provided for default of a provision, **the adjudicating officer shall impose that fixed sum**
- v. **Penalty shall be paid through Ministry of Corporate Affairs portal only**
- vi. All sums realized by way of penalties under the Act **shall be credited to the Consolidated Fund of India**.
- vii. In case the default relates to non-compliance of sub-section (4) of **section 92** or sub-section (1) or subsection (2) of **section 137** and **such default has been rectified either prior to, or within thirty days of, the issue of the notice by the adjudicating officer, no penalty shall be imposed** in this regard and all proceedings under this section in respect of such default shall be deemed to be concluded.
- viii. The adjudicating officer shall, before imposing any penalty, give a reasonable opportunity of being heard to such company, the officer who is in default or any other person.

## 18. APPEAL AGAINST THE ORDER OF ADJUDICATING OFFICER



## 19. REGISTRATION OF APPEAL



## **20. DISPOSAL OF APPEAL BY REGIONAL DIRECTOR**

- i. **Copy of Notice to Adjudication officer:** On admission of appeal, Regional Director will serve a 21 days' notice to adjudicating officer, against whom appeal has been filed, to file his reply within the given time period. RD may extend the period with 21 days if there is sufficient cause for delay.
- ii. **Reply of Adjudication officer:** A copy of every reply, application or written representation filed by the adjudicating officer before the Regional Director shall be forthwith served on the appellant by the adjudicating officer.
- iii. **Intimation of Date of Hearing by RD:** The Regional Director shall notify the parties, the date of hearing of the appeal which shall not be a date earlier than thirty days following the date of such notification for hearing of the appeal.
- iv. **Hearing by RD:** On the date fixed for hearing the Regional Director may, subject to the reasons to be recorded in writing, pass any order as he thinks fit including an order for adjournment of the hearing to a future date.
- v. **Ex-parte hearing:** In case the appellant or the adjudicating officer does not appear on the date fixed for hearing, the Regional Director may dispose of the appeal ex-parte.
- vi. **Setting aside ex-parte order:** Where the appellant appears afterwards and satisfies the Regional Director that there was sufficient cause for his non-appearance, the Regional Director may make an order setting aside the ex-parte order and restore the appeal.
- vii. **Order:** The Regional Director may, after giving the parties to the appeal an opportunity of being heard, pass such order as he thinks fit, confirming, modifying or setting aside the order appealed against.
- viii. **Signing of Order:** The Regional Director may, after giving the parties to the appeal an opportunity of being heard, pass such order as he thinks fit, confirming, modifying or setting aside the order appealed against.
- ix. **Communication of order:** A certified copy of every order passed by the Regional Director shall be communicated to the adjudicating officer and to the appellant forthwith and to the Central Government.
- x. **Fine:** Where company fails to comply with the order within a period of ninety days from the date of the receipt of the copy of the order, the company shall be punishable with fine



which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees.

## 21. SOME RECENT ORDERS OF ADJUDICATING AUTHORITY

### Kodagu Heritage

- i. In this case, M/s Kodagu Heritage, a private limited company, **was found to have violated Section 12 of the Companies Act, 2013**. The violation pertained to the company's failure to furnish the verification of its registered office within the stipulated timeframe as required by Section 12(2) of the Companies Act, 2013.
- ii. As per Section 12(2) of Companies Act, 2013 the company, as soon as it is incorporated, shall furnish to the registrar the verification of registered office within thirty days in Form INC-22. But **the company filed the form after the three years that's on January 1, 2019**.
- iii. The **company and its officers in default had admitted** that they have violated the provision of Section 12(2) of Companies Act, 2013.
- iv. The **adjudicating authority issued a notice to the company and its officers in default to appear before the authority along with their representatives** before September 5, 2019, in the chamber of a registrar of the company.
- v. The adjudicating authority **determined that the company and its officers in default should each pay a penalty of INR 1 lakh**. The authority justified this decision by invoking Section 454(1) and (3) of the Companies Act, 2013. Additionally, the authority considered the delay in compliance, which amounted to 621 days.

### Ms Joy Ice Cream (Bangalore) Private Limited

- i. In the case of Ms. Joy Ice Cream (Bangalore) Private Limited, **the company was found to be in violation of Section 12(1) of the Companies Act, 2013**. This section requires that a newly incorporated company must establish a registered office within thirty days of its incorporation. The registered office must be capable of receiving and acknowledging all communications and notices addressed to the company. **If there is any change in the registered office's address, the company must notify this change within thirty days of incorporation and submit Form INC 22 to the registrar.**



- ii. On the verification of the record, the authority came to the conclusion that it has not filed the Form INC 22.
- iii. When the office issued a letter on July 27, 2018, for seeking reply with regard to complaints received against the company. The letter was returned unserved with no such firm.
- iv. The adjudicating authority issued a notice to the company and the officers in default under section 454 of Companies Act, 2013 for violation of Section 12 of Companies, Act 2013.
- v. **Non appearance:** The Company and its officers in default were called upon along with the representatives to present before the registrar of companies. But none of them was present on the said date.
- vi. **Penalty Imposed:** In response to the company's non-compliance and absence, the adjudicating authority, under Section 454(3) of the Companies Act, 2013, imposed a penalty of INR 1 lakh on each director and the company itself. These penalties were required to be paid through the Ministry of Corporate Affairs (MCA) portal, and proof of payment was to be provided within thirty days from the date of receiving the order.
- vii. **Consequences of Non-Payment:** If the company fails to pay the penalty within ninety days, as specified under Section 454(8) of the Companies Act, 2013, it becomes liable to pay a fine. This fine can range from a minimum of INR 25,000 to a maximum of INR 5 lakhs. Additionally, officers in default or any other individuals involved in the default can face penalties that include imprisonment for up to six months or a fine ranging from INR 25,000 to INR 1 lakh, or both.

### **Narang International Hotels Private Limited**

In the matter of Narang International Hotels Private Limited, the company filed an application for adjudication of penalties under Section 454 of the Companies Act, 2013, citing a violation of Section 173(1) of the same Act. Section 173(1) mandates that every company should hold its first Board of Directors meeting within thirty days of its incorporation and subsequently conduct a minimum of four such meetings each year with not more than one hundred and twenty days between consecutive meetings.

### Facts of the Case:

- *Narang International Hotels Private Limited failed to hold the required minimum of four Board of Directors meetings during the financial year ending in 2020-21.*
- *An extension of the allowed interval between consecutive meetings to 180 days was granted by the Ministry of Corporate Affairs (MCA) through a circular dated 24.03.2020.*
- *However, the company's actual interval between two consecutive meetings of the Board of Directors, from 13.12.2019 to 11.09.2020, was 273 days, exceeding the prescribed 180 days even with the extension.*
- *The delay in conducting the Board meetings was calculated from 10.06.2020, as per the extension granted by the Ministry, resulting in a delay of 943 days.*

### Adjudication Process:

- *The Regional Director, in line with the powers conferred by sub-Section 3 of Section 454 of the Companies Act, 2013, issued a hearing notice on 18.03.2021 to the company and the officers in default. This provided them with an opportunity to present their case.*
- *In response to the hearing notice, the company's representative appeared on 25.03.2021 and consented to the necessary orders being passed according to the provisions of the Companies Act, 2013.*

### Factors Considered for Penalty

- *The amount of disproportionate gain or unfair advantage, if quantifiable, resulting from the default.*
- *The amount of loss incurred by investors or groups of investors due to the default.*
- *The repetitive nature of the default.*

### Order:

- *After considering the case, the Adjudicating Officer imposed a penalty of Rs. 25,000/- (Rupees Twenty-Five Thousand only) on each of the company's directors for violating the provisions of Section 173 of the Companies Act, 2013.*
- *It was noted that there was no available information on disproportionate gain or loss caused to investors as a result of the default, making it difficult to quantify these aspects in this particular case.*

### **Sunshakti Solar Power Projects Private Limited**

In the matter of Sunshakti Solar Power Projects Private Limited, the case involves a violation of Section 39(4) of the Companies Act, 2013, read with Rule 12(1) of the Companies (Prospectus and Allotment of Securities) Rules, 2014. Here is a summary of the case:

#### **Facts of the Case:**

- The company and its director(s) initially filed an application for compounding of an offense under Section 441 of the Companies Act, 2013.
- However, as the matter was under adjudication under Section 454 of the Act, the company submitted a letter to the office, dated 12.04.2022, requesting that the previously filed application for compounding (e-form GNL-1) be treated as filed for adjudication.
- The company explained that during the financial year ending on 31.03.2018, they issued 37,500 10% Compulsorily Convertible Debentures (CCDs) on a private placement basis, with a face value of Rs. 10,000 each, totaling Rs. 37,50,00,000. This issuance was made in compliance with Section 62 and Section 42 read with the Companies (Prospectus and Allotment of Securities) Rules, 2014.
- The company approved the issuance of these CCDs through a special resolution in its Annual General Meeting on 30.09.2017.
- The CCDs were allotted to Sky Power Southeast Asia III Investment Limited on 06.01.2018, after receiving the subscription money in the company's escrow account.
- While the Return of Allotment (Form PAS-3) for the CCDs was filed on 31.03.2018, the Letter of Offer (in PAS-4) and the related documents were filed with delays of 151 days and 69 days, respectively.

#### **Adjudication Process:**

- The company and its officers in default submitted their replies to the show cause notice issued by the office on 20th June 2022.
- An authorized representative of the company appeared for a hearing on 09.11.2022.

#### **Penalty Adjudication:**

- The delay in filing the Return of Allotment (Form PAS-3) and the Letter of Offer (in PAS-4) resulted in a default. However, the default related to the late filing of the Return of Allotment was not subject to penalty under Section 42(10) of the Act at the time of the default.

- Therefore, the penalty was imposed under Section 39(5) for the violation of Section 39(4) read with Rule 12(1) of the Companies (Prospectus and Allotment of Securities) Rules, 2014.

**Order:**

- In consideration of the facts and responses received, the Regional Director imposed a penalty on the company and its officers in default for the violation of Section 39(4) read with Rule 12(1) of the Companies (Prospectus and Allotment of Securities) Rules, 2014.

## **22. PENALTIES AND ADJUDICATION UNDER SEBI ACT, 1992**

SEBI has been authorised to levy penalties for adjudication of matter if it finds any statutory contravention has occurred. However, if a person is aggrieved by the orders passed by the SEBI it can make an appeal to Securities Appellate Tribunal. Securities Appellate Tribunal is a statutory body established under the provisions of Section 15K of the Securities and Exchange Board of India Act, 1992 to hear and dispose of appeals against orders passed by the Securities and Exchange Board of India or by an adjudicating officer under the Act; and to exercise jurisdiction, powers and authority conferred on the Tribunal.

The **Enforcement Department** is responsible for handling Appeals against SEBI orders filed before the Hon'ble Securities Appellate Tribunal (SAT), Appeals filed against the SAT order in the Hon'ble Supreme Court, Criminal Complaints filed by SEBI in appropriate Courts and Settlement Proceedings.

The Enforcement Directorate consists of mainly three divisions:

- SAT Litigation Division
- Prosecution Division
- Settlement Division

### SAT LITIGATION DIVISION

1. This division handle appeals against orders of SEBI and its Adjudicating officers made to SAT.
2. It collaborates with senior advocates, law firms to represent SEBI or Adjudicating officers in front of SAT.
3. It assist SEBI in filing affidavits/written submissions, as and when needed, while attending hearings.

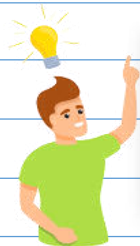
### PROSECUTION

#### DIVISION

This division handles the work relating to filing prosecution proceedings under the Court.

### SETTLEMENT DIVISION

The Settlement Division is responsible for handling Registration of Settlement Application, Calculation of Settlement amount as per the Settlement Regulations, organizing Internal Committee Meeting between the Applicants and Internal Committee Members for formulating the settlement amount/terms, Organizing High Powered Advisory Committee (HPAC) Meeting, placing the recommendation of HPAC before the Panel of Whole Time Members for approval.



### CAN YOU SOLVE THIS?

Whether adjudicating officer can impose penalty on non-compliance or default under the provisions of Companies Act, 2013?

### Solution

Yes, as per Section 454(3) Adjudicating officer can impose penalty on non-compliance or default under the provisions of Companies Act, 2013 and direct such Company, or officer who is in default, or any other person, as the case may be to rectify the default, wherever he considers fit. Only in cases of Section 92(4) or Section 137, if non compliance is rectified prior to, or within 30 days of, the issue of notice by the Adjudicating officer, no penalty shall be imposed



### CAN YOU SOLVE THIS?

Arun, an individual shareholder of M/s. BEL Ltd. is holding 2% of the voting rights. He made a complaint before the Adjudicating Authority that investments proposed to be made by the Company are without any adequate security and prayed for injunction to restrain the company from making such investments. Whether Arun will succeed in his attempt? Explain with decided case law.

### **Solution**

Where the directors representing the majority of shareholders perform an illegal or ultra vires act, an individual shareholder has right to bring an action. The majority of shareholders have no right to confirm an illegal or ultra vires transaction of the company. In such case a shareholder has the right to restrain the company by an order or injunction of the court from carrying out an ultra vires act.

In *Bharat Insurance Ltd. vs. Kanhya Lal*, the plaintiff was a shareholder of the Bharat Insurance Company. One of the objects of the company was "To advance money at interest on the security of land, houses, machinery and other property situated in India..." The plaintiff complained that "several investments had been made by the company directors on behalf of the company without adequate security and contrary to the provisions of the memorandum and therefore, prayed for perpetual injunction to restrain it from making such investments" The court observed that although company is the best judge of its affairs but since directors are acting ultra vires, case will be maintained. Hence, Arun will succeed.

### Power of SEBI to issues directions and levy penalty

If SEBI is satisfied after making or causing to be made an enquiry, that it is necessary in the interest of investors or to prevent the affairs of any intermediary or other persons being conducted in a manner detrimental to the interests of investors or securities market to secure the proper management of any such intermediary or person, SEBI may issue directions to any person or class of persons, or associated with the securities market or to any company in respect of matters relating to issue of capital, transfer of securities and other matter incidental



thereto, as may be appropriate in the interests of investors in securities and the securities market.

### Penalties under SEBI

<p><b>ISA</b></p>	<p><i>Penalty for failure to furnish information, return, etc.</i></p> <p>(a) person fails to furnish return or furnishes any false documents or statements or fails to maintain any books of accounts</p> <p>(b) to file any return or furnish any information, books or other documents within the time specified therefor in the regulations, fails to file return or furnish the same within the time specified therefor in the regulations or who furnishes or files false, incorrect or incomplete information, return, report, books or other documents,</p> <p>(c) to maintain books of account or records, fails to maintain the same.</p>	<p>penalty which shall not be less than one lakh rupees but which may extend to one lakh rupees for each day during which such failure continues subject to a maximum of one crore rupees</p> <p>shall be liable to a penalty which shall not be less than one lakh rupees but which may extend to one lakh rupees for each day during which such failure continues subject to a maximum of one crore rupees</p> <p>penalty which shall not be less than one lakh rupees but which may extend to one lakh rupees for each day during which such failure continues subject to a maximum of one crore rupees</p>
<p><b>ISB</b></p>	<p><i>Penalty for failure by any person to enter into agreement with clients.</i></p>	<p>penalty which shall not be less than one lakh rupees</p>



	if any intermediary, suppose to enter into an agreement with the client, fails to enter into such agreement	but which may extend to one lakh rupees for each day during which such failure continues subject to a maximum of one crore rupees
<b>ISC</b>	<b>Penalty for failure to redress investors' grievances.</b> if a company fails to address the grievances of investors	penalty which shall not be less than one lakh rupees but which may extend to one lakh rupees for each day during which such failure continues subject to a maximum of one crore rupees
<b>ISD</b>	<b>Penalty for certain defaults in case of mutual funds.</b> (a) If a person carrying on collective investment scheme fails to obtain a certificate, or comply with the conditions of the certificate or fails to invest money collected through the collective investment scheme as specified  (b) registered with the Board as a collective investment scheme, including mutual funds, for sponsoring or carrying on any investment scheme, fails to comply with the terms and conditions of certificate of registration.	penalty which shall not be less than one lakh rupees but which may extend to one lakh rupees for each day during which such failure continues subject to a maximum of one crore rupees  he shall be liable to a penalty which shall not be less than one lakh rupees but which may extend to one lakh rupees for each day during which such failure continues subject to a maximum of one crore rupees;

	<i>(c) registered with the Board as a collective investment scheme, including mutual funds, fails to make an application for listing of its schemes as provided for in the regulations governing such listing.</i>	<i>shall be liable to a penalty which shall not be less than one lakh rupees but which may extend to one lakh rupees for each day during which such failure continues subject to a maximum of one crore rupees;</i>
	<i>(d) registered as a collective investment scheme, including mutual funds, fails to despatch unit certificates of any scheme in the manner provided in the regulation governing such despatch.</i>	<i>he shall be liable to a penalty which shall not be less than one lakh rupees but which may extend to one lakh rupees for each day during which such failure continues shall be liable to a penalty</i>
	<i>(e) registered as a collective investment scheme, including mutual funds, fails to refund the application monies paid by the investors within the period specified in the regulations.</i>	<i>which shall not be less than one lakh rupees but which may extend to one lakh rupees for each day during which such failure continues subject to a maximum of one crore rupees</i>
	<i>(f) registered as a collective investment scheme, including mutual funds, fails to invest money collected by such collective investment schemes in the manner or within the period specified in the regulations.</i>	<i>he shall be liable to a penalty which shall not be less than one lakh rupees but which may extend to one lakh rupees for each day during which such failure continues subject to a maximum of one crore rupees</i>
<b>ISE</b>	<b><i>Penalty for failure to observe rules and regulations by an asset management company.</i></b>	<i>shall be liable to a penalty which shall not be less than one lakh rupees but which</i>

	where any asset management company of a mutual fund registered under this Act, fails to comply with any of the regulations providing for restrictions on the activities of the asset management companies, such asset management company.	may extend to one lakh rupees for each day during which such failure continues subject to a maximum of one crore rupees.
	<b>Penalty for default in case of alternative investment funds, infrastructure investment trusts and real estate investment trusts.</b>	
<b>ISEA</b>	where any person fails to comply with the regulations made by the Board in respect of alternative investment funds, infrastructure investment trusts and real estate investment trusts or fails to comply with the directions issued by the Board,	shall be liable to penalty which shall not be less than one lakh rupees but which may extend to one lakh rupees for each day during which such failure continues subject to a maximum of one crore rupees or three times the amount of gains made out of such failure, whichever is higher.
	<b>Penalty for default in case of investment adviser and research analyst</b>	
<b>ISEAB</b>	where an investment adviser or a research analyst fails to comply with the regulations made by the Board or directions issued by the Board, such investment adviser or research analyst.	shall be liable to penalty which shall not be less than one lakh rupees but which may extend to one lakh rupees for each day during which such failure continues subject to a maximum of one crore rupees.
	<b>Penalty for default in case of stock brokers.</b>	
<b>ISF</b>	(a) If broker fails to issue a contract note If broker fails to deliver any security or fails to make payment of the amount due to the investor	penalty which shall not be less than one lakh rupees but which may extend to

		one lakh rupees for each day during which such failure continues subject to a maximum of one crore rupees.
	(b) charges an amount of brokerage which is in excess of the brokerage specified	penalty which shall not be less than one lakh rupees but which may extend to five times the amount of brokerage charged in excess of the specified brokerage, whichever is higher.
	(c) fails to deliver any security or fails to make payment of the amount due to the investor in the manner within the period specified in the regulations, he shall be liable to a penalty which shall not be less than one lakh rupees but which may extend to one lakh rupees for each day during which such failure continues subject to a maximum of one crore rupees;	he shall be liable to a penalty which shall not be less than one lakh rupees but which may extend to one lakh rupees for each day during which such failure continues subject to a maximum of one crore rupees;
156	<b>Penalty for insider trading.</b> (a) If any insider communicates any un-published price sensitive information OR (b) either on his own behalf or on behalf of any other person, deals in securities of a body corporate listed on any stock	penalty which shall not be less than ten lakh rupees but which may extend to twenty-five crore rupees or three times the amount of profits made out of insider

	exchange on the basis of any unpublished price-sensitive information; OR (c) communicates any unpublished price-sensitive information to any person, with or without his request for such information except as required in the ordinary course of business or under any law;	trading, whichever is higher.
<b>ISH</b>	<b>Penalty for non-disclosure of acquisition of shares and takeovers.</b> if any person, who is required under this Act or any rules or regulations made thereunder, fails to,— (i) disclose the aggregate of his shareholding in the body corporate before he acquires any shares of that body corporate; or (ii) make a public announcement to acquire shares at a minimum price; or (iii) make a public offer by sending letter of offer to the shareholders of the concerned company; or (iv) make payment of consideration to the shareholders who sold their shares pursuant to letter of offer, <b>Penalty for fraudulent and unfair trade practices.</b>	shall be liable to a penalty which shall not be less than ten lakh rupees but which may extend to twenty-five crore rupees or three times the amount of profits made out of such failure, whichever is higher
<b>ISHA</b>	if any person indulges in fraudulent and unfair trade practices relating to securities.	shall be liable to a penalty which shall not be less than five lakh rupees but which may extend to twenty-five crore rupees or three times the amount of profits made out of such practices, whichever is higher.
	<b>Penalty for alteration, destruction, etc., of records and failure to protect the electronic database of Board.</b>	

<p><b>ISHAA</b></p>	<p>(a) knowingly alters, destroys, mutilates, conceals, falsifies, or makes a false entry in any information, record, document (including electronic records), which is required under this Act or any rules or regulations made thereunder, so as to impede, obstruct, or influence the investigation, inquiry, audit, inspection or proper administration of any matter within the jurisdiction of the Board.</p> <p>Explanation.—For the purposes of this clause, a person shall be deemed to have altered, concealed or destroyed such information, record or document, in case he knowingly fails to immediately report the matter to the Board or fails to preserve the same till such information continues to be relevant to any investigation, inquiry, audit, inspection or proceeding, which may be initiated by the Board and conclusion thereof.</p> <p>(b) without being authorised to do so, access or tries to access, or denies of access or modifies access parameters, to the regulatory data in the database;</p> <p>(c) without being authorised to do so, downloads, extracts, copies, or reproduces in any form the regulatory data maintained in the system database;</p> <p>(d) knowingly introduces any computer virus or other computer contaminant into the system database and brings out a trading halt;</p> <p>(e) without authorisation disrupts the functioning of system database;</p> <p>(f) knowingly damages, destroys, deletes, alters, diminishes in value or utility, or affects by any means, the regulatory data in the system database; or</p> <p>(g) knowingly provides any assistance to or causes any other person to do any of the acts specified in clauses (a) to (f), shall be liable to a penalty which shall not be less than one lakh rupees but which may extend to ten crore rupees or three times the amount of profits made out of such act, whichever is higher.</p>	<p>Penalty which shall not be less than one lakh rupees but which may extend to ten crore rupees or three times the amount of profits made out of such act, whichever is higher.</p>
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	<p><i>Explanation.—In this section, the expressions “computer contaminant”, “computer virus” and “damage” shall have the meanings respectively assigned to them under section 43 of the Information Technology Act, 2000</i></p> <p><b>penalty for contravention where no separate penalty has been provided.</b></p> <p><i>where no provision has been provided for the contravention:</i></p>	
<b>ISHB</b>		<p><i>penalty which shall not be less than one lakh rupees but which may extend to one crore rupees.</i></p>

### **23. POWER TO ADJUDICATE**

- i. For the purpose of adjudging, the Board may appoint any officer not below the rank of a **Division Chief** to be an adjudicating officer for holding an inquiry and imposing any penalty.
- ii. Adjudicating officer so appointed has the power to call for any other information, documents or issue summons to any other person who is well aware of the facts of the case. If the person fails to comply with the order of the officer then he may levy penalty for the same.
- iii. Board can anytime call for the order of the officer and if it is found that the order passed by the officer is wrong to such an extent that it is not in favor of securities market, board may, after making enquiry increase the amount of penalty. (It is mandatory for the Board to give an opportunity of being heard).

#### **Holding of Enquiry**

- i. AO will issue a notice of atleast 14 days to show cause why an inquiry should not be held against him.
- ii. If, after considering the cause, if any, shown by such person, the Board or the adjudicating officer is of the opinion that an inquiry should be held, he shall issue a notice fixing a date for the appearance of that person either personally or through his lawyer or other authorised representative.
- iii. On the date fixed, the Board or the adjudicating officer shall explain to the person proceeded against or his lawyer or authorised representative, the offence, alleged to have been committed by such person.



- iv. AO will give an opportunity to the party to produce evidence relevant for inquiry.
- v. While holding an inquiry under this rule the Board or the adjudicating officer shall have the power to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document.
- vi. If any person fails, neglects or refuses to appear before the Board or the adjudicating officer, the Board or the adjudicating officer may proceed with the inquiry in the absence of such person after recording the reasons.

#### **24. FACTORS TO BE TAKEN INTO ACCOUNT WHILE ADJUDGING QUANTUM OF PENALTY**

- i. The amount of disproportionate gain or unfair advantage made as a result of the default.
- ii. The amount of loss caused to an investor or group of investors as a result of the default.
- iii. The repetitive nature of the default.

*All sums realised by way of penalties under this Act shall be credited to the Consolidated Fund of India.*

#### **25. SETTLEMENT OF ADMINISTRATIVE AND CIVIL PROCEEDINGS**

- i. Any person, against whom any proceedings have been initiated or may be initiated under section 11, section 11B, section 11D, sub-section (3) of section 12 or section 15-1, may file an application in writing to the Board proposing for settlement of the proceedings initiated or to be initiated for the alleged defaults.
- ii. The Board may, after taking into consideration the nature, gravity and impact of defaults, agree to the proposal for settlement, on payment of such sum by the defaulter or on such other terms as may be determined by the Board.
- iii. The settlement proceedings under this section shall be conducted in accordance with the procedure specified in the regulations made under this Act.
- iv. All settlement amounts, excluding the disgorgement amount and legal costs, realised under this Act shall be credited to the Consolidated Fund of India.
- v. No appeal should lie against the order of settlement

**26. PENALTIES UNDER SECURITIES CONTRACTS (REGULATION) ACT, 1956**

1.	23	<p>Section 23 Any person who- (a) without reasonable excuse (the burden of proving which shall be on him) fails to comply with any requisition made under sub-section (4) of section 6; or (b) enters into any contract in contravention of any of the provisions contained in section 13 or section 16; or (c) contravenes the provisions contained in section 17 or section 17A, or section 19; or (d) enters into any contract in derivative in contravention of section 18A or the rules made under section 30; (e) owns or keeps a place other than that of a recognised stock exchange which is used for the purpose of entering into or performing any contracts in contravention of any of the provisions of this Act and knowingly permits such place to be used for such purposes; or (f) manages, controls, or assists in keeping any place other than that of a recognised stock exchange which is used for the purpose of entering into or performing any contracts in contravention of any of the provisions of this Act or at which contracts are recorded or adjusted or rights or liabilities arising out of contracts are</p>	<p>shall, without prejudice to any award of penalty by the Adjudicating Officer or the Securities and Exchange Board of India under this Act, on conviction, be punishable with imprisonment for a term which may extend to ten years or with fine, which may extend to twenty-five crore rupees, or with both.</p>
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		<p><i>adjusted, regulated or enforced in any manner whatsoever; or (g) not being a member of a recognised stock exchange or his agent authorised as such under the rules or bye-laws of such stock exchange or not being a dealer in securities licensed under section 17 wilfully represents to or induces any person to believe that contracts can be entered into or performed under this Act through him; or (h) not being a member of a recognised stock exchange or his agent authorised as such under the rules or bye-laws of such stock exchange or not being a dealer in securities licensed under section 17, canvasses, advertises or touts in any manner either for himself or on behalf of any other persons for any business connected with contracts in contravention of any of the provisions of this Act; or (i) joins, gathers or assists in gathering at any place other than the place of business specified in the bye-laws of a recognised stock exchange any person or persons for making bids or offers or for entering into or performing any contracts in contravention of any of the provisions of this Act</i></p>	
<b>2.</b>	<b>23 A</b>	<p><i>If any person fails to furnish any books, return, information</i></p>	<p><i>penalty which shall not be less than one lakh rupees but which</i></p>

		document etc or fails to maintain books of account etc	may extend to one lakh rupees for each day during which such failure continues subject to a maximum of one crore rupees.
		(b) to maintain books of account or records, as per the listing agreement or conditions, or bye-laws of a recognised stock exchange, fails to maintain the same,	shall be liable to a penalty which shall not be less than one lakh rupees but which may extend to one lakh rupees for each day during which such failure continues subject to a maximum of one crore rupees
3.	23 B	If any person is required to enter into an agreement with its clients, fails to enter into such agreement	penalty which shall not be less than one lakh rupees but which may extend to one lakh rupees for each day during which such failure continues subject to a maximum of one crore rupees.
4.	23 C	If any broker or company, listed on stock exchange fails to redress the grievances of its investors	penalty which shall not be less than one lakh rupees but which may extend to one lakh rupees for each day during which such failure continues subject to a maximum of one crore rupees.
5.	23 D	If a broker or sub-broker fails to segregate the money of its clients and uses that money for its own purpose	penalty which shall not be less than one lakh rupees but which may extend to one lakh rupees for each day during which such failure continues subject to a maximum of one crore rupees.
6.	23 E	If a company or any person managing collective investment scheme or mutual fund or real estate investment trust or	penalty which shall not be less than five lakh rupees but which may extend to twenty-five crore rupees.

		infrastructure investment trust or alternative investment fund], fails to comply with the listing conditions or delisting conditions or grounds or commits a breach thereof,	
7.	<b>23 F</b>	If any issuer dematerialises securities more than the issued securities of a company or delivers in the stock exchanges the securities which are not listed in the recognised stock exchange	penalty which shall not be less than five lakh rupees but which may extend to twenty-five crore rupees.
8.	<b>23 G</b>	If a recognised stock exchange fails or neglects to furnish periodical returns or furnishes false, incorrect or incomplete periodical returns to the Securities and Exchange Board of India	penalty which shall not be less than five lakh rupees but which may extend to twenty-five crore rupees.
9	<b>23GA</b>	Where a stock exchange or a clearing corporation fails to conduct its business with its members or any issuer in accordance with rules and regulations made by SEBI	penalty which shall not be less than five crore rupees but which may extend to twenty-five crore rupees or three times the amount of gains made out of such failure, whichever is higher.
9.	<b>23 H</b>	When a person fails to comply with the provisions of this act, and no penalty has been provided for the same	penalty which shall not be less than one lakh rupees but which may extend to one crore rupees

### Power to Adjudicate under SCRA

Same as above .

### Factors to be taken into account while adjudging quantum of penalty.

Same as above .

### Recovery of Amounts

- If any person fails to pay the penalty or fails to comply with the order of disgorgement or fails to pay fees due to the board, the recovery officer may draw a certificate specifying the amount due and shall proceed to recover the same through following modes:
  - i. attachment and sale of the person's movable property;
  - ii. attachment of the person's bank accounts;
  - iii. attachment and sale of the person's immovable property;
  - iv. arrest of the person and his detention in prison;
  - v. appointing a receiver for the management of the person's movable and immovable properties.
- Recovery officer means any officer of the Board authorised by the Board to act as recovery officer.
- Recovery of amounts by a recovery officer will have priority over any other claim against such person.

### Continuance of proceedings

- i. When a person dies, his legal representative will be liable to pay any sum which the deceased would have been liable to pay, if he was not dead.
- ii. Any proceeding for disgorgement, refund or an action for recovery before the Recovery Officer under this Act, except a proceeding for levy of penalty, initiated against the deceased before his death shall be deemed to have been initiated against the legal representative, and may be continued against the legal representative from the stage at which it stood on the date of the death of the deceased.
- iii. Any proceeding for disgorgement, refund or an action for recovery before the Recovery Officer under this Act, except a proceeding for levy of penalty, which could have been initiated against

the deceased if he had survived, may be initiated against the legal representative and all the provisions of this Act shall apply accordingly.

- iv. If legal representative, while he was liable to pay any sum on behalf of deceased, creates a charge on the estate of the deceased, he shall be personally liable for any sum payable by him limited to the value of charge created.
- v. The liability of a legal representative under this section shall, be limited to the extent to which the estate of the deceased is capable of meeting the liability.

### Appeal to Securities Appellate Tribunal

- i. Every person aggrieved by the orders of Adjudicating authorities or SEBI can make an appeal to Securities Appellate Tribunal (SAT) within 45 days from date of receiving order by SEBI or AO.
- ii. The Securities Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.
- iii. SAT on receiving an application will give an opportunity of being heard to both the parties and pass an order to confirm, modify or set aside any order.
- iv. Copy of order is send to both the parties.
- v. Appeal filed before SAT has to be disposed off as soon as possible and finally within 6 months from date of receipt of appeal.

### Offences & Composition of certain offences

- If any person **contravenes or attempts to contravene or abets the contravention** of the provisions of this Act or any rules or regulations or bye-laws for which no punishment is provided elsewhere in this Act, he **shall be punishable with imprisonment for a term which may extend to ten years, or with fine, which may extend to twenty-five crore rupees or with both.**
- If any person **fails to pay the penalty** imposed by the adjudicating officer or SEBI he shall be punishable with imprisonment for a term which shall not be less than one month but which **may extend to ten years, or with fine, which may extend to twenty-five crore rupees, or with both.**
- Any offence punishable under this Act, not being an offence punishable with imprisonment only, or with imprisonment and also with fine, may either before or after the institution of



any proceeding, be compounded by a Securities Appellate Tribunal or a court before which such proceedings are pending.

### Power to grant immunity

- i. If on recommendation of SEBI, central government is of the opinion that any person who has violated any provisions of this act has made a full disclosure, then it may grant to such person, subject to certain restrictions, immunity from prosecution of any offence under this act and penalty.
  - a. no such immunity shall be granted by the Central Government in cases where the proceedings for the prosecution for any such offence have been instituted before the date of receipt of application for grant of such immunity.
  - b. recommendation of the Securities and Exchange Board of India shall not be binding upon the Central Government.
- ii. Central government can anytime revoke this immunity if it is satisfied that terms and conditions on the basis of which immunity was given have not been complied with or the person has attained immunity by presenting false evidences.

## 27. THE SECURITIES CONTRACTS (REGULATION) (PROCEDURE FOR HOLDING INQUIRY AND IMPOSING PENALTIES) RULES, 2005.

- i. **Appointment of Adjudicating Officer for holding Inquiry:** SEBI may appoint any of its officers not below the rank of Division Chief to be an adjudicating officer for holding an inquiry whenever SEBI is of the opinion that there are grounds for adjudging penalties and adjudication under SEBI Act, 1992.
- ii. **Show cause Notice:** In holding an inquiry SEBI or adjudicating officer shall first issue a notice to such person requiring him to show cause within such period as may be specified in the notice (being not less than fourteen days from the date of service thereof) why an inquiry should not be held against him.
- iii. **Content of Notice:** Every notice to any such person shall indicate the nature of offence alleged to have been committed by him.

- iv. **Date of Appearance:** If the SEBI or adjudicating officer is of the opinion that an inquiry should be held, he shall issue a notice fixing a date for the appearance of that person either personally or through his lawyer or other authorised representative.
- v. **Personal Hearing:** On the date fixed the SEBI or adjudicating officer shall explain to the person proceeded against or his lawyer or authorised representative, the offence, alleged to have been committed by such person indicating the provisions of the Act, rules or regulations in respect of which contravention is alleged to have taken place.
- vi. **Opportunity to produce Evidence:** The SEBI or adjudicating officer shall then give an opportunity to such person to produce such documents or evidence as he may consider relevant to the inquiry and if necessary, the hearing may be adjourned to a future date and in taking such evidence the SEBI or the adjudicating officer shall not be bound to observe the provisions of the Evidence Act, 1872.
- vii. **Enforcement of Attendance:** While holding an inquiry the SEBI or adjudicating officer shall have the power to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document which in the opinion of the SEBI or adjudicating officer, may be useful for or relevant to the subject matter of the inquiry.
- viii. If any person fails, neglects or refuses to appear before the adjudicating officer, the SEBI or adjudicating officer may proceed with the inquiry in the absence of such person after recording the reasons for doing so.

#### **Order of the Board or the adjudicating officer**

- i. **Imposition of Penalty:** If, upon consideration of the evidence produced before the adjudicating officer, the SEBI or adjudicating officer is satisfied that the person has become liable to penalty, he may, by order in writing, impose such penalty as he thinks fit in accordance with the provisions of the relevant section or sections specified in the Act.
- ii. **Quantum of Penalty:** The amount of Penalty should be imposed on the basis of :
  - a. the amount of disproportionate gain or unfair advantage
  - b. the amount of loss caused
  - c. the repetitive nature of the default

- iii. **Content of Order:** Every order made shall specify the provisions of the Act in respect of which default has taken place and shall contain brief reasons for such decisions.
- iv. **Date & Sign:** Every such order shall be dated and signed by the SEBI or adjudicating officer.
- v. **Rectification of Error:** The SEBI or the adjudicating officer who has passed an order, may rectify any error apparent on the face of record on such order, either on its own motion or where such error is brought to his notice by the affected person within a period of fifteen days from the date of such order.
- vi. The SEBI or adjudicating officer shall send a copy of every order made by it to the person concerned and to the SEBI

## 28. CONTRAVENTION AND PENALTIES, ADJUDICATION AND APPEAL UNDER FOREIGN EXCHANGE MANAGEMENT ACT (FEMA), 1999

### Penalties

	Person contravenes any provision of this Act, or contravenes any rule, regulation, notification, direction or order issued in exercise of the powers under this Act, or contravenes any condition subject to which an authorisation is issued by the Reserve Bank	penalty up to thrice the sum involved in such contravention where such amount is quantifiable, or up to two lakh rupees where the amount is not quantifiable, and where such contravention is a continuing one, further penalty which may extend to five thousand rupees for every day after the first day during which the contravention continues
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	<p>Person is found to have acquired any foreign exchange, foreign security or immovable property, situated outside India, of the aggregate value exceeding the threshold prescribed under the Act</p>	<p>penalty up to three times the sum involved in such contravention and confiscation of the value equivalent, situated in India, the Foreign exchange, foreign security or immovable property.  in addition to the penalty person shall be punishable with imprisonment for a term which may extend to five years and with fine</p>
	<p>If any person is found to have acquired any foreign exchange, foreign security or immovable property, situated outside India, of the aggregate value exceeding the threshold prescribed under the proviso to subsection (1) of section 37A,</p>	<p>shall be, in addition to the penalty imposed under sub-section (1A), punishable with imprisonment for a term which may extend to five years and with fine.</p>
	<p>Any Adjudicating Authority adjudging any contravention under sub-section (1), may, if he thinks fit in addition to any penalty which he may impose for such contravention direct that any currency, security or any other money or property in respect of which the contravention has taken place shall be confiscated to the Central Government and further direct that the foreign exchange holdings, if any, of the persons committing the contraventions or any part thereof, shall be brought back into India or shall be retained outside India in accordance with the directions made in this behalf</p>	

	<p><i>. Explanation.- For the purposes of this sub-section, "property" in respect of which contravention has taken place, shall include - (a) deposits in a bank, where the said property is converted into such deposits; (b) Indian currency, where the said property is converted into that currency; and (c) any other property which has resulted out of the conversion of that property.</i></p>	
<p><i>If the Adjudicating Authority and if the Director of Enforcement, deems fits, he may, after recording the reasons in writing, recommend for the initiation of prosecution by filing a Criminal Complaint against the guilty person.</i></p>		

### **Enforcement of the orders of Adjudicating Authority**

- i. *If any person fails to make full payment of the penalty imposed on him within a period of ninety days from the date on which the notice for payment of such penalty is served on him, he shall be liable to civil imprisonment.*
- ii. *No order for the arrest and detention of a defaulter shall be made unless the Adjudicating Authority has issued and served a notice upon the defaulter, calling him to appear before him on the date specified in the notice and to show cause why he should not be committed to the civil prison.*
- iii. *A warrant for the arrest of the defaulter may be issued by the Adjudicating Authority if the Adjudicating Authority is satisfied, by affidavit or otherwise, that with the object or effect of delaying the execution of the certificate the defaulter is likely to abscond or leave the local limits of the jurisdiction of the Adjudicating Authority.*
- iv. *Every person arrested by a warrant of arrest shall be brought before the Adjudicating Authority issuing the warrant as soon as practicable, within twenty-four hours of his arrest. However, if the defaulter pays the amount due to the officer arresting him, such person shall be immediately released.*
- v. *When a defaulter appears before the Adjudicating Authority pursuant to a notice to show cause or is brought before the Adjudicating Authority after issuing warrant of arrest, the Adjudicating*

Authority shall give the defaulter an opportunity showing cause why he should not be granted civil imprisonment.

- vi. Upon the conclusion of the inquiry, the Adjudicating Authority may make an order for the detention of the defaulter in the civil prison and if he is not already under arrest, shall cause him to be arrested.
- vii. When the Adjudicating Authority does not make an order of detention under sub-section (9), he shall, if the defaulter is under arrest, direct his release.
- viii. A person is detained in the civil prison on execution of certificate:
  - a) where the certificate is for a demand of an amount exceeding rupees one crore: up to three years, and
  - b) in any other case: up to six months.
- ix. A defaulter released from detention under this section shall not, merely by reason of his release, be discharged from his liability for the arrears, but he shall not be liable to be arrested under the certificate in execution of which he was detained in the civil prison.

### **Power of recover arrears of penalty**

The Adjudicating Authority may, by order in writing, authorise an officer of Enforcement not below the rank of Assistant Director to recover any arrears of penalty from any person who fails to make full payment of penalty imposed on him under section 13 within the period of ninety days from the date on which the notice for payment of such penalty is served on him.

### **Appointment of Adjudicating Authority**

- i. The Central Government may, may appoint as many officers of the Central Government as it may think fit, as the Adjudicating Authorities for holding an inquiry after giving a reasonable opportunity of being heard to the person alleged to have committed contravention.
- ii. Central Government while appointing the adjudicating officers will specify the jurisdiction.
- iii. No Adjudicating Authority shall hold an enquiry under sub-section (1) except upon a complaint in writing made by any officer authorized by a general or special order by the Central Government.
- iv. The said person may appear either in person or take the assistance of a legal practitioner or a chartered accountant of his choice for presenting his case before the Adjudicating Authority



- v. Powers of adjudicating authority will be same as civil court.
- vi. Every Adjudicating Authority shall deal with the complaint as expeditiously as possible and endeavour shall be made to dispose of the complaint finally within one year from the date of receipt of the complaint.
- vii. If the order cannot be disposed of in the said period, the AO shall record the reasons in writing.

### Appeal to Special Director (Appeals)

- i. Appeal against the orders of Central Government will be made to special director of appeals.
- ii. Every appeal shall be **filed within forty-five days** from the date on which the copy of the order made by the Adjudicating Authority is received by the aggrieved person. Provided that the Special Director (Appeals) may entertain an appeal after the expiry of the said period of forty-five days, if he is satisfied that there was sufficient cause for not filing it within that period.
- iii. Special director (appeals) would provide reasonable opportunity of being heard to both the parties and pass any necessary order confirming, modifying or setting aside the order appealed against.
- iv. A copy of order will be sent to both the parties.

### Appellate Tribunal & Appeal to Appellate Tribunal

- i. The Appellate Tribunal constituted under section 12(1) of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976, shall be the appellate Tribunal for FEMA.
- ii. Central Government or any person aggrieved by the order of the adjudicating authority or special director (appeals) can make an appeal to the Appellate Tribunal. However, the person filing appeal has to deposit the amount of penalty levied by such authorities. If Appellate Tribunal is of the opinion that deposit of penalty would cause undue hardship, it may dispense with such deposit subject to conditions as it may deem fit.
- iii. Every appeal has to be made **within 45 days** from the date of receiving the order.
- iv. Tribunal would provide reasonable opportunity of being heard to both the parties and pass any necessary order confirming, modifying or setting aside the order appealed against. A copy of order will be sent to both the parties.



- v. Tribunal will make an attempt to dispose off the cases as soon as possible but not later than **one hundred eighty days from the date of filing of appeal.**

### Procedure & Powers of Appellate Tribunal & Special Director (Appeals)

The Appellate Tribunal and Special Director (Appeals) will have same power as vested with the civil courts under Civil Procedure Code. Powers of Civil Courts are as following;

1. summoning and enforcing the attendance of any person and examining him on oath;
2. requiring the discovery and production of documents
3. receiving evidence on affidavits
4. subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), requisitioning any public record or document or copy of such record or document from any office
5. issuing commissions for the examination of witnesses or documents;
6. reviewing its decisions
7. dismissing a representation of default or deciding it ex parte
8. setting aside any order of dismissal of any representation for default or any order passed by it ex parte and
9. any other matter which may be prescribed by the Central Government.

The Tribunal and Special Director (Appeals) are not bound by any procedure laid down under Civil Procedure Code. They are guided by the provisions of natural justice.

### Civil Court not to have jurisdiction

Civil Court does not have jurisdiction to entertain the suit or proceeding in respect of any matter which an Adjudicating Authority or the Appellate Tribunal or the Special Director (Appeals) is empowered.

### Appeal to High Court

Any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the **High Court within sixty days** from the date of communication of the decision or order of the Appellate Tribunal to him on any question of law arising out of such order. Provided that

the High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within **a further period not exceeding sixty days.**

### **Appeal to Special Director (Appeals)**

1. Appeal shall be in Form I, in triplicate, accompanied by three copies of the order appealed against and a fee of Rupees five thousand in the form of cash or demand draft payable in favour of the Special Director (Appeals).
2. Grounds of appeal should be presented and numbered consecutively.
3. Where the appeal is presented after the expiry of the period of forty-five days it shall be accompanied by a petition, in triplicate, duly verified and supported by the documents, showing cause how the applicant had been prevented from preferring the appeal within the said period of forty five days.

### **Procedure before Special Director (Appeals)**

- i. Shall send a copy of the appeal, together with a copy of the order appealed against, to the Director of Enforcement.
- ii. Issue notices to the applicant and the Director of Enforcement fixing a date for hearing of the appeal.
- iii. On the date fixed the applicant as well as the presenting officer of the Directorate of Enforcement shall be heard.
- iv. If the date fixed is adjourned and the applicant fails to present the appeal, the Special Director (Appeals) may decide the appeal on the merits of the case within one hundred and eighty days from the date of such appeal.

### **Service of notices, requisitions or orders**

- i. by delivering or tendering the notice or requisition or order to that person or his duly authorised person
- ii. by sending the notice or requisition or order to him by registered post with acknowledgment due to the address of his place of residence or his last known place of residence or the place where he carried on or last carried on, business or personally works or last worked for gain.

- iii. by affixing it on the outer door or some other conspicuous part of the premises in which the person resides or is known to have last resided or carried on business or personally works or last worked for gain and that written report thereof should be witnessed by two persons
- iv. if the notice or requisition or order cannot be served under clause (a) or clause (b) or clause (c), by publishing in a leading newspaper (both in vernacular and in English) having wide circulation of area or jurisdiction in which the person resides or is known to have last resided or carried on business or personally works or last worked for gain.

### Appeal to the Appellate Tribunal

1. Appeal shall be in form 11, signed by the applicant, in triplicate accompanied by 3 copies of order appealed against.
2. Appeal shall be accompanied by a fee of Rupees 10000
3. The appeal should specify the grounds of objection to the order appealed against, which shall be numbered consecutively.
4. Where the appeal is presented after the expiry of the period of forty-five days, it shall be accompanied by a petition, in triplicate showing cause how the applicant had been prevented from preferring the appeal within the said period of forty-five days.

### Procedure before Appellate Tribunal

- i. The Appellate Tribunal shall send a copy of the appeal together with a copy of the order appealed against, to the Director of Enforcement.
- ii. The Appellate Tribunal shall, then, issue notices to the applicant and the Director of Enforcement fixing a date for hearing of the appeal.
- iii. On the date fixed, the applicant as well as the officer of Directorate of Enforcement will be heard.
- iv. If the applicant or the officer fails to present, the appeal the Appellate Tribunal may decide the appeal on the merits of the case.

## 29. FOREIGN EXCHANGE MANAGEMENT (ADJUDICATION PROCEEDINGS AND APPEAL) RULES, 2000

The Central Government has made the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000 for holding enquiry for the purpose of imposing penalty.

### Appointment of Adjudicating Authority (Rule 3)

Central Government will appoint the adjudicating authorities for holding inquiries under the Act.

### Holding of inquiry (Rule 4)

#### Issue of Show Cause Notice

Adjudicating authority shall issue the notice to show cause (being not less than ten days from the date of service thereof) why an inquiry should not be held against him.

#### Content of Notice

Every notice shall indicate the nature of contravention alleged to have been committed by him.

#### Date of Appearance

If after considering the reply AO is of the opinion that an inquiry should be held he shall issue a notice fixing a date for the appearance of that person.

#### Personal Hearing

On the date fixed, the Adjudicating Authority shall explain to the person, contravention committed .

#### Opportunity to produce Evidence

AO will give an opportunity to produce evidence relevant for the inquiry & shall not be bound to observe the provisions of the Indian Evidence Act, 1872.

#### Power to summon and enforce attendance

The Adjudicating Authority shall have the power to summon and enforce attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document which in the opinion of the Adjudicating Authority may be useful for or relevant to the subject matter of the inquiry.

If the person fails to appear, the AO may proceed with the adjudication in absence of such person.

**Order by the Adjudicating Authority**

- If AO is satisfied that there is contravention, he may pass the necessary order and impose such penalty as he thinks fit.
- Every order made under sub-rule (3) of the rule 4 shall specify the provisions of the Act or of the rules and shall contain reasons for such decisions.
- Order shall be dated and signed.

**30. PENALTY FOR REPEATED DEFAULT**

Where a company or an officer of a company or any other person having already been subjected to penalty for default under any provisions of this Act, again commits such default **within a period of three years** from the date of order imposing such penalty passed by the adjudicating officer or the Regional Director, he shall be liable for the second or subsequent defaults for an amount equal to **twice the amount of penalty** provided for such default under the relevant provisions of this Act

**31. DIFFERENCES BETWEEN SECTION 441 AND SECTION 454 UNDER THE COMPANIES ACT, 2013**

<u>Compounding (Section 441)</u>	<u>Adjudication (Section 454)</u>
<u>Regional Director or on an authorized officer of the Central Government can compound offence upto Rs. 25 Lakhs; and NCLT can compound offence above Rs. 25 Lakhs</u>	There are no monetary limits
Compounding is with <u>consent of both the parties</u> and compounding authority has the final say on the quantum of penalty	Order is more <u>arbitrary and not on consensus</u> , though a reasonable opportunity may be given to the company and the officer in default before imposing penalty.
compounding order is generally <u>not appealable</u> .	<u>Appeal can be filed</u> against the order of adjudicating officer.



### CAN YOU SOLVE THIS?

Under what circumstances can adjudication be ordered u/s 454? Or in short what triggers an action u/s 454? Is it on the findings of the MCA that an offence has occurred following an inspection u/s 206 or on scrutiny of the Balance Sheet or from the statutory auditors' report or from the secretarial audit report?

### **Solution:**

- i. Section 454 is triggered when there is a default or non compliance with the provisions of Companies Act, 2013.
- ii. The default can be identified by the ROC or can be reported from inspection or inquiry under section 206 or from Statutory and Secretarial Auditor's Report.
- iii. Those sections which have fine are not in the purview of section 454. Section 454(3) clearly authorizes the adjudicating officer with a power to impose only penalty and it is implied that he has to take cognizance of the penalty stipulated under the section which has been violated. In whichever fines have been stipulated, the defaulting parties can take recourse to seeking compounding of the offence whether a show-cause notice is issued or not.



### CAN YOU SOLVE THIS?

Who orders adjudication proceedings u/s 454? Can the RoC himself order?

### **Solution:**

- i. Either ROC himself on scrutiny of documents filed with him, or on conclusion of Inspection or Inquiry under section 206 of Companies Act, 2013 or on the report of Statutory and Secretarial Auditor conclude that there has been non compliance with the relevant provisions of Companies Act, 2013 and identify the nature of non-compliance and default.
- ii. In all these cases, he himself cannot initiate any adjudicating proceedings if he is the adjudicating officer even as he may be clothed with a power of adjudication. Therefore, if

adjudicating powers are under his jurisdiction, any other officer who is independent of his office has to identify the existence of violation. This is a grey area of law that needs to be addressed by CG.



### CAN YOU SOLVE THIS?

When there is a provision for compounding u/s 441 how does section 454 come into play? Does Section 454 override Section 441 since it is a later section? Or do both sections play parallelly? Which section prevails?

### Solution:

- i. Both these sections are independent of each other. The question of one section overriding the other does not arise, as they operate concurrently.
- ii. Section 441 deals with compounding and Section 454 deals with adjudication. The adjudicating officer has no power to compound. The Regional Director alone can compound.
- iii. The adjudicating officer u/s 454 can only adjudicate on the quantum of penalty. He has no right to go into the merits and demerits of the default.



### CAN YOU SOLVE THIS?

When a suo motto application for compounding is made, how does Section 454 come into play?

### Solution:

- i. Prima facie section 454 will not come into play. The ROC who has forwarded the compounding application to either of them with his report has to seek directions from the RD/NCLT in such a case. The Regional Director/NCLT may agree for adjudication after giving justifiable reasons for his choice for adjudication overriding the compounding application in a speaking manner. But this decision can be challenged before the same RD under section 454(5) by the applicants to a suo moto compounding application if the ROC, being the adjudicating officer exercises his power u/s 454, on the grounds that the defaulting party itself has identified the non-compliance.



- ii. There is no contradiction between section 441 and 454 as they operate under their own separate spheres. Section 454 gives administrative powers in the hands of ROC to impose penalty rather than launching a criminal proceeding in the court of Magistrate, as was being done earlier, unless the offence falls under the purview of Special Court established under section 435 of Companies Act, 2013.
- iii. On the other hand RD/NCLT are vested with the power of compounding under section 441 of Companies Act, 2013

### **32. COMPLAINT BY REGISTRAR AND SERIOUS FRAUD INVESTIGATION OFFICE**

- i. SFIO is a multi-disciplinary organization under the Ministry of Corporate Affairs, consisting of experts in the field of accountancy, forensic auditing, banking, law, information technology, investigation, company law, capital market and taxation, etc. for detecting and prosecuting or recommending for prosecution white-collar crimes/frauds.
- ii. The SFIO is headed by a Director, who shall be an officer not below the rank of a Joint Secretary to Government of India having knowledge and experience in Corporate Affairs, and consist of expertise in the fields of investigations, cyber forensics, financial accounting, management accounting, cost accounting and any other fields as may be necessary for the efficient discharge of Serious Fraud Investigation Office (SFIO) functions under the Act.
- iii. The Headquarter of SFIO is in New Delhi, with five Regional Offices in Mumbai, New Delhi, Chennai, Hyderabad & Kolkata
- iv. Investigation is offered to SFIO under section 210 of Companies Act, 2013, where Govt is of the opinion that it is necessary to investigate into the affairs of a company -
  - a. on receipt of a report of the Registrar or inspector under section 208 of the Companies Act, 2013
  - b. on intimation of a special resolution passed by a company that its affairs are required to be investigated
  - c. in public interest, it may order an investigation into the affairs of the company
  - d. Where an order is passed by a court or the Tribunal in any proceedings before it that the affairs of a company ought to be investigated, the Central Government shall order an investigation into the affairs of that company.

### **Investigation by SFIO**

SFIO investigates under section 212 in following cases:

- a. on receipt of a report of the Registrar or inspector under section 208 of the Companies Act, 2013
- b. on intimation of a special resolution passed by a company that its affairs are required to be investigated
- c. in public interest, it may order an investigation into the affairs of the company.
- d. on request from any Department of the Central Government or a State Government.
  - i. The Central Government may, assign the investigation into the affairs of the said company to the Serious Fraud Investigation Office and its Director, may designate such number of inspectors, as he may consider necessary for the purpose of such investigation.
  - ii. Where case has been assigned to SFIO no other agency of government interfere and if the case has already been initiated, will transfer all the documents and records to SFIO.
  - iii. The Director SFIO shall cause the affairs of the company to be investigated by an investigating officer, who shall have the powers of the Inspector under section 217 of the Companies Act, 2013.
  - iv. It shall be the responsibility of the company, its officers and employees, who are or have been in the employment of the company to provide all information, explanation, documents and assistance to the investigating officer as he may require for conduct of business.
  - v. Section 212(6) provides, offence covered under section 447 of the Companies Act, 2013 shall be cognizable and no person accused of any offence under those sections shall be released on bail or on his own bond unless-
    - the Public Prosecutor has been given an opportunity to oppose the application for such release; and
    - where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.
  - vi. A person, who, is under the age of sixteen years or is a woman or is sick or infirm, may be released on bail, if the Special Court so directs.
  - vii. However, the Special Court shall not take cognizance of any offence referred to this sub-section except upon a complaint in writing made by -

- the Director, Serious Fraud Investigation Office;
- or any officer of the Central Government authorized, by a general or special order in writing in this behalf by that Government.

### Power to Arrest

- i. If any officer, not below the rank of Additional Director, of SFIO has a reason to believe that any person is guilty of any offence punishable under Section 447 of the Companies Act, 2013 on basis of material in his possession, the office can arrest that person and will inform him the grounds of such arrest
- ii. The copy of arrest order is forwarded to the officer of SFIO in sealed envelope.
- iii. Every person arrested by the SFIO officer shall within twenty-four hours be taken to Special Court or Judicial Court or Metropolitan Magistrate.

### Companies (Arrests in connection with investigations by SFIO) Rules, 2017

- i. Where the Director investigating into the affairs of a company other than a Government company or foreign company has, *reason to believe that any person has been guilty of any offence punishable under section 212 of the Act, he may arrest such person.*
- ii. In case of an arrest being made by Additional Director or Assistant Director, *the prior written approval of the Director SFIO shall be obtained* as Director SFIO shall be the competent authority for all decisions pertaining to arrest.
- iii. Where an arrest of a person is to be made in connection with *a Government company or a foreign company* under investigation, such arrest shall be *made with prior written approval of the Central Government.*
- iv. The *copy of arrest* order along with the material in possession and all the other documents including personal search memo, shall be *forwarded to the office of Director SFIO* in a sealed envelope, so as to reach the office of the Director, SFIO *within twenty four hours* through the quickest possible means.
- v. An *arrest register* shall be maintained in the office of Director, SFIO and it should be ensured that entries with regard to particulars of the arrestee, date and time of arrest and other relevant information pertaining to the arrest are made in the arrest register.

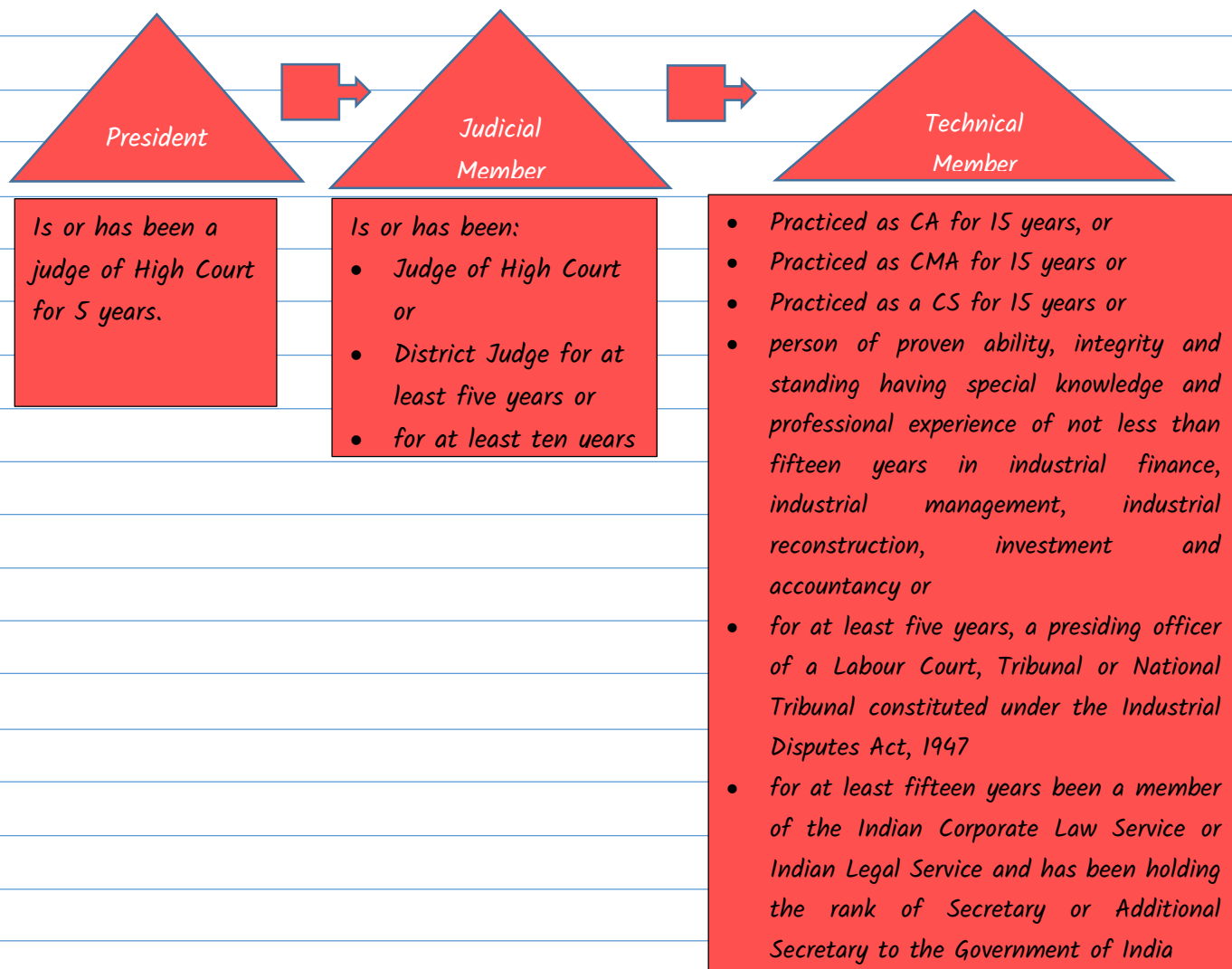
- vi. The office of Director, SFIO shall preserve the **copy of arrest order** together with supporting materials for a period of **five years**, from the date of judgment or final order of the Trial Court, in cases where the said judgment has not been impugned in the appellate court or from the date of disposal of the matter before the final appellate court, in cases where the said judgment or final order has been impugned, whichever is later.

### **Report to Central Government**

- i. SFIO will submit the interim report to the Central Government unless the investigation is concluded and after the completion of investigation final report is submitted.
- ii. On receipt of the Investigation Report, the Central Government will examine the report and after taking legal advice, direct SFIO to initiate proceedings against the company and its officers or employees, who have been directly or indirectly connected with the affairs of the company.
- iii. the Central Government may file an application before the Tribunal for appropriate orders with regard to disgorgement of asset, property or cash and also for holding director, key managerial personnel, other officer or any other person liable personally without any limitation of liability, if it is found that directors or key managerial personnel have taken undue advantage from the company.
- iv. The investigation report filed with the Special Court for framing of charges against any person shall deemed to be a report filed by a Police Officer under Section 173 of the Code of Criminal Procedure, 1973.

### 33. TRIBUNALS

#### Qualification of president and members of Tribunal



#### Qualification of President and Members of Appellate Tribunal

- i. The chairperson shall be a person who is or has been a Judge of the Supreme Court or the Chief Justice of a High Court.
- ii. A Judicial Member shall be a person who is or has been a Judge of a High Court or is a Judicial Member of the Tribunal for five years.
- iii. A technical member shall be a person of proven ability, integrity and standing having special knowledge and professional experience of not less than twenty-five years in industrial finance, industrial management, industrial reconstruction, investment and accountancy.

### **Selection of Members of Tribunal and Appellate Tribunal**

- i. The President of the Tribunal and the chairperson and Judicial Members of the Appellate Tribunal, shall be appointed after consultation with the Chief Justice of India.
- ii. The Members of the Tribunal and the Technical Members of the Appellate Tribunal shall be appointed on the recommendation of a Selection Committee consisting of
  - (a) Chief Justice of India or his nominee—Chairperson
  - (b) a senior Judge of the Supreme Court or Chief Justice of High Court— Member
  - (c) Secretary in the Ministry of Corporate Affairs—Member; and
  - (d) Secretary in the Ministry of Law and Justice—Member.
- iii. Where in a meeting of the Selection Committee, there is equality of votes on any matter, the Chairperson shall have a casting vote.
- iv. The Secretary, Ministry of Corporate Affairs shall be the Convener of the Selection Committee.
- v. The Selection Committee shall determine its procedure for recommending persons under sub-section (2).
- vi. No appointment of the Members of the Tribunal or the Appellate Tribunal shall be invalid merely by reason of any vacancy or any defect in the constitution of the Selection Committee

### **Term of Office of President, Chairperson and Other Members**

- i. The President and other members of Tribunal will hold the office for 5 years and will be eligible for reappointment.
- ii. President will hold the office until he attains the age of 67 years and members until they attain the age of 65 years.
- iii. The Chairperson and other members of Appellate Tribunal will hold the office for 5 years and will be eligible for reappointment.
- iv. Chairman will hold the office until he attains the age of 67 years and members until they attain the age of 65 years.

### **Procedure Before Tribunal and Appellate Tribunal**

- i. Tribunal and Appellate Tribunal are bound by the procedure under Civil Procedure Code and are guided by the principles of natural justice.

- ii. Tribunal and Appellate Tribunal will exercise the same powers as are vested in a civil court under the Code of Civil Procedure, 1908
- summoning and enforcing the attendance of any person and examining him on oath
  - requiring the discovery and production of documents
  - receiving evidence on affidavits
  - subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872, requisitioning any public record or document or a copy of such record or document from any office
  - issuing commissions for the examination of witnesses or documents
  - dismissing a representation for default or deciding it ex parte
  - setting aside any order of dismissal of any representation for default or any order passed by it ex parte; and
  - any other matter which may be prescribed.
- iii. All proceedings before the Tribunal or the Appellate Tribunal shall be deemed to be judicial proceedings.

<u>Form No.</u>	<u>Particulars</u>
NCLT-1	Petition or application or reference shall be filed with the Tribunal with attachments thereto accompanied by Form No. NCLT.2
NCLT-4	The general heading for Proceedings
NCLT-6	General Affidavits verifying Petition
NCLT-5	Notice to be issued by the Tribunal to the opposite party
NCLT-12	Memorandum of Appearance

### **Orders of Tribunal**

- Tribunal will give a reasonable opportunity of being heard to both the parties and then pass the necessary order.
- If there is a mistake apparent on record, Tribunal may rectify the mistake within 2 years and amend the orders passed by it.
- No such amendment shall be made in respect of any order against which an appeal has been preferred.



iv. Copy of order passed is sent to both the parties.

### **Appeal from Orders of Tribunal**

- i. Any person aggrieved by an order of the Tribunal may prefer an appeal to the Appellate Tribunal.
- ii. No appeal shall lie to the Appellate Tribunal from an order made by the Tribunal with the consent of parties.
- iii. Every appeal shall be filed within a period of forty-five days from the date on which a copy of the order of the Tribunal is made available to the person aggrieved.
- iv. The Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days, if there has been a sufficient cause for delay.
- v. After giving reasonable opportunity of being heard, Tribunal may either confirm, modify or set aside the order appealed against.
- vi. Copy of order passed is sent to both the parties.

### **Appeal to Supreme Court**

Any person aggrieved by any order of the Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of receipt of the order of the Appellate Tribunal to him on any question of law arising out of such order. However, if there is sufficient cause for the delay the time period will be extended from Sixty days.

### **34. SAT (Securities Appellate Tribunal)**

Securities Appellate Tribunal (SAT) is a statutory body established under the provisions of Section 15K of the Securities and Exchange Board of India Act, 1992 to hear and dispose of appeals against orders passed by the Securities and Exchange Board of India or by an adjudicating officer under the Act; and to exercise jurisdiction, powers and authority conferred on the Tribunal by or under SEBI Act, 1992.

Additional Information- Penalties under Companies Act, 2013

Sections	Particulars	Penalty
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1.	Section 4(5) - Reservation of Name	After reservation of name, if information given is not correct then: If the company has not been incorporated, the reserved name shall be cancelled; and	the person making application shall be liable to a penalty which may extend to Rs. 1 Lakh.
2.	Section 10A -Commencement of business etc.	If any default is made in complying with the requirements of this section	the company shall be liable to a penalty of Rs.50,000 and every officer who is in default shall be liable to a penalty of Rs.1000 for each day during which such default continues but not exceeding an amount of Rs. 1 Lakh.
3.	Section 12(8)- Registered office of company	If any default is made in complying with the requirements of this section	the company and every officer who is in default shall be liable to a penalty of Rs.1000 for every day during which the default continues but not exceeding Rs. 1 Lakh.
4.	Section 15(2)-Alteration of Memorandum or Articles to be noted in every copy	Default in noting alteration made in the memorandum or	the company and every officer who is in default shall be liable

		articles of a company in every copy of the memorandum or articles	to a penalty of Rs.1000 for every copy of the memorandum or articles issued without such alteration.
5.	Section 16(3)- Rectification of Name of Company	If a Company makes any default in registration of name as in the opinion of Central Government the name for registration is identical to the name of company already registered	the Central Government shall allot a new name to the company in such manner as prescribed and the Registrar shall enter the new name in the register of companies in place of the old name and issue a fresh certificate of incorporation with the new name, which the company shall use thereafter
6.	Section 17(2)- Copies of memorandum, articles, etc., to be given to members	If on request of member, company has not provided them a copy of: (i) MOA; (ii) AOA; and (iii) every agreement and every resolution referred in sub-section (1) of section 117	the company and every officer of the company who is in default shall be liable for each default, to a penalty of Rs.1000 for each day during which such default continues or Rs. 1

			lakh, whichever is less
7.	Section 33(3)- Issue of Application Forms for Securities	Any default in complying with the provisions of this section	Company shall be liable to a penalty of Rs.50,000 for each default.
8.	Section 39(5)-Allotment of Securities by Company	(i) If the company has not returned the application money received (ii) If a company having a share capital has not filed return of allotment with Registrar	the company and its officer who is in default shall be liable to a penalty, for each default, of Rs.1000 for each day during which such default continues or Rs. 1 Lakh, whichever is less.
9.	Section 42(9)- Offer or invitation for subscription of securities on private placement	Defaults in filing the return of allotment within the period prescribed	the company, its promoters and directors shall be liable to a penalty for each default of Rs.1000 for each day during which such default continues but not exceeding Rs.25 Lakh.
10.	Section 42(10)- Offer or invitation for subscription of securities on private placement	If a company makes an offer or accepts monies in contravention of this section	the company, its promoters and directors shall be liable for a penalty which may extend to

			the amount raised through the private placement or Rs.2 Crore, whichever is lower, and the company shall also refund all monies with interest to subscribers within a period of thirty days of the order imposing the penalty
11.	Section 53(3)-Prohibition on issue of shares at discount	Failure of company to comply with the provisions of this section	such company and every officer who is in default shall be liable to a penalty which may extend to an amount equal to the amount raised through the issue of shares at a discount or Rs.5 Lakhs, whichever is less, and the company shall also be liable to refund all monies received with interest at the rate of 12% per annum from the date of issue of such shares to the persons

			to whom such shares have been issued.
12.	Section 56(6)- Transfer and Transmission of Securities	If a Company make any default in the provisions of transfer of Shares	the company and every officer of the company who is in default shall be liable to a penalty of Rs.50,000.
13.	Section 60(2)-Publication of authorised, subscribed and paid-up capital	If any default is made in complying with the provisions of publication of Authorised, Subscribed and Paid-Up Capital on Companies letter heads, business heads	the company shall be liable to pay a penalty of Rs.10,000 and every officer of the company who is in default shall be liable to pay a penalty of Rs.5000, for each default.
14.	Section 64(2)-Notice to be Given to Registrar for Alteration of Share Capital	If a Company fails to send notice to Registrar after alteration of Share Capital	such company and every officer who is in default shall be liable to a penalty of Rs.500 for each day during which such default continues, subject to a maximum of Rs.5 Lakh in case of a company; and Rs.1 Lakh in case of an officer who is in default.

15.	Section 86- Punishment for contravention of provisions of Charges	If a Company contravenes the provisions of Chapter VI Registration of Charges	the company shall be liable to a penalty of Rs.5 Lakh; and every officer of the company who is in default shall be liable to a penalty of Rs.50,000.
16.	Section 88(5)- Register of Members, etc.	If a company does not maintain a register of members or debenture-holders or other security holders or fails to maintain them in accordance with the provisions of subsection (1) or sub-section (2)	the company shall be liable to a penalty of Rs.3 Lakhs; and every officer of the company who is in default shall be liable to a penalty of Rs.50,000.
17.	Section 89-Declaration in Respect of Beneficial Interest in any Share	(i) If any person fails to make a declaration (ii) If a company, required to file a return under sub-section (6), fails to do so before the expiry of the time specified therein	he shall be liable to a penalty of Rs.50000 and in case of continuing failure, with a further penalty of Rs.200 for each day after the first during which such failure continues, subject to a maximum of Rs.5 Lakhs. the company and every officer of



			the company who is in default shall be liable to a penalty of Rs.1000 for each day during which such failure continues, subject to a maximum of Rs. 5 Lakhs in the case of a company and Rs. 2 Lakhs in case of an officer who is in default.
18.	Section 90- Register of significant beneficial owners in a company	(i) If any person fails to make a declaration as required under sub-section (1) (ii) If a company, required to maintain register under sub-section (2) and file the information under subsection (4) or required to take necessary steps under sub-section (4A), fails to do so or denies inspection as provided therein	he shall be liable to a penalty of Rs.50,000 and in case of continuing failure, with a further penalty of Rs.1000 for each day after the first during which such failure continues, subject to a maximum of Rs. 2 Lakhs. the company shall be liable to a penalty of Rs.1Lakh and in case of continuing failure, with a further penalty of Rs. 500 for

			each day, after the first during which such failure continues, subject to a maximum of Rs. 5 Lakh; and every officer of the company who is in default shall be liable to a penalty of Rs. 25,000 and in case of continuing failure, with a further penalty of Rs. 200 for each day, after the first during which such failure continues, subject to a maximum of Rs. 1 Lakh.
19.	Section 91(2)-Power to Close Register of Members or Debenture-Holders or Other Security Holders.	If the register of members or of debenture-holders or of other security holders is closed without giving the notice as provided in sub-section (1), or after giving shorter notice than that so provided, or for a	the company and every officer of the company who is in default shall be liable to a penalty of Rs.5000 for every day subject to a maximum of Rs.1 Lakh during which the register is kept closed.

		<i>continuous or an aggregate period in excess of the limits specified in that subsection</i>	
20.	<i>Section 92(5)-Annual Return</i>	<i>(i) If any company fails to file its annual return , before the expiry of the period specified therein (ii) If a company secretary in practice certifies the annual return otherwise than in conformity with the requirements of this section or the rules made thereunder</i>	<i>such company and its every officer who is in default shall be liable to a penalty of Rs.10,000 and in case of continuing failure, with further penalty of Rs.100 for each day during which such failure continues, subject to a maximum of Rs.2Lakhs in case of a company and Rs.50,000 in case of an officer who is in default. he shall be liable to a penalty of Rs.2 Lakhs</i>
21.	<i>Section 94(4)-Place of keeping and Inspection of Registers, Returns, etc.</i>	<i>If Company refuses to give copy of registers or to take extract thereof or deny inspection</i>	<i>the company and every officer of the company who is in default shall be liable, for each such default, to a penalty of Rs.1000 for every day</i>

			subject to a maximum of Rs.1 Lakh during which the refusal or default continues.
22.	Section 99-Punishment for default in complying with provisions of sections 96 to 98.	If Company defaults in holding meeting in accordance with Section 96, 97 or 98 or in complying with any directions of the Tribunal	the company and every officer of the company who is in default shall be punishable with fine which may extend to Rs.1 Lakh and in the case of a continuing default, with a further fine which may extend to Rs.5000 for every day during which such default continues.
23.	Section 102(S)-Statement to be Annexed to Notice.	if any default is made in complying with the provisions of this section,	every promoter, director, manager or other key managerial personnel of the company who is in default shall be liable to a penalty of Rs.50,000 or five times the amount of benefit accruing to the promoter, director, manager or

			other key managerial personnel or any of his relatives, whichever is higher.
24.	Section 105(3)-Proxies	If any officer fails to annex a statement along with notice with regard to proxy.	every officer of the company who is in default shall be liable to penalty of Rs.5000
25.	Section 111(5)- Circulation of Members' Resolution	If any default is made in complying with the provisions of this section	the company and every officer of the company who is in default shall be liable to a penalty of Rs.25,000.
26.	Section 117(2)-Resolutions and Agreements to be Filed	If any company fails to file the resolution or the agreement under sub-section (1) before the expiry of the period specified therein	such company shall be liable to a penalty of Rs.10,000 and in case of continuing failure, with a further penalty of Rs.100 for each day after the first during which such failure continues, subject to a maximum of Rs.2 Lakhs; and every officer of the company who is in default including liquidator of the company, if any, shall

			be liable to a penalty of Rs.10,000 and in case of continuing failure, with a further penalty of Rs.100 for each day after the first during which such failure continues, subject to a maximum of Rs.50,000
27.	Section 118-Minutes of proceedings of general meeting, meeting of Board of Directors and other meeting and resolutions passed by postal ballot	If Company is not complying with the provisions of minutes of general meeting, Board Meeting and other meeting and resolutions passed by postal ballot	the company shall be liable to a penalty of Rs.25,000; and every officer of the company who is in default shall be liable to a penalty of Rs. 5000.
28.	Section 119-Inspection of minute-books of general meeting	If Company refuses for inspection or copy of minutes of general meeting is not furnished within the time specified therein	the company shall be liable to a penalty of Rs.25,000; and every officer of the company who is in default shall be liable to a penalty of Rs.5000 for each such refusal or default, as the case may be.

29.	Section 121-Report on Annual General Meeting	If the company fails to file the report to the ROC before the expiry of the period specified therein	Company shall be liable to a penalty of Rs.1 Lakh and in case of continuing failure, with further penalty of Rs.500 for each day after the first during which such failure continues, subject to a maximum of Rs. 5 Lakhs; and Every officer of the company who is in default shall be liable to a penalty which shall not be less than Rs.25000 and in case of continuing failure, with further penalty of Rs.500 for each day after the first during which such failure continues, subject to a maximum of Rs. 1 Lakh.
30.	Section 124(7)- Unpaid Dividend Account	If a company fails to comply with any of the requirements of this section	Company shall be liable to a penalty of Rs. 1 Lakh and in case of



			<p>continuing failure, with a further penalty of Rs.500 for each day after the first during which such failure continues, subject to a maximum of Rs. 10 Lakhs; and Every officer of the company who is in default shall be liable to a penalty of twenty-five thousand rupees and in case of continuing failure, with a further penalty of one hundred rupees for each day after the first during which such failure continues, su</p>
31.	Section 134(8)- Financial Statement, Board's Report, etc	If a company is in default in complying with the provisions of this section	Company shall be liable to a penalty of Rs. 3 Lakhs; and Every officer of the company who is in default shall be liable to a penalty of Rs. 50,000

32.	Section 135-Corporate Social Responsibility	If a company is in default in complying with the provisions of sub-section (5) or sub-section (6) of this Section	Company shall be liable to a penalty of twice the amount required to be transferred by the company to the Fund specified in Schedule VII or the Unspent Corporate Social Responsibility Account, as the case may be, or Rs. 1 Crore, whichever is less, and Every officer of the company who is in default shall be liable to a penalty of one-tenth of the amount required to be transferred by the company to such Fund specified in Schedule VII, or the Unspent Corporate Social Responsibility Account, as the case may be, or Rs. 2 Lakhs, whichever is less.
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33.	Section 136(3)- Right of Member to Copies of Audited Financial Statement	If any default is made in complying with the provisions of this section	The company shall be liable to a penalty of Rs.25,000; and Every officer of the company who is in default shall be liable to a penalty of Rs.5000.
34.	Section 137(3)- Copy of Financial Statement to be Filed with Registrar	If a company fails to file the copy of the financial statements under sub-section (1) or sub-section (2), as the case may be, before the expiry of the period specified therein	The company shall be liable to a penalty of Rs.10,000 and in case of continuing failure, with a further penalty of Rs.100 for each day during which such failure continues, subject to a maximum of Rs.2 Lakhs; and The managing director and the Chief Financial Officer of the company, if any, and, in the absence of the managing director and the Chief Financial Officer, any other director who is charged by the Board with the responsibility of

			<p>complying with the provisions of this section, and, in the absence of any such director, all the directors of the company, shall be liable to a penalty of Rs.10,000 and in case of continuing failure, with further penalty of Rs.100 for each day after the first during which such failure continues, subject to a maximum of Rs.50,000.</p>
35.	<p>Section 140(3)- Removal, Resignation of Auditor and Giving of Special Notice</p>	<p>Failure of the auditor to intimate regarding his resignation</p>	<p>he or it shall be liable to a penalty of Rs.50,000 or an amount equal to the remuneration of the auditor, whichever is less, and in case of continuing failure, with further penalty of Rs. 500 for each day after the first during which such failure continues, subject to a</p>

			maximum of Rs. 2 Lakhs
36.	Section 143(15)- Powers and Duties of Auditors and Auditing Standards	If any auditor, cost accountant, or company secretary in practice does not comply with the provisions of sub-section (12)	He shall: (a) in case of a listed company, be liable to a penalty of Rs.5 lakh; and (b) in case of any other company, be liable to a penalty of Rs. 1 Lakh.
37.	Section 157(2)- Company to Inform Director Identification Number to Registrar	If a company fails to furnish Director Identification Number	Company shall be liable to a penalty of Rs.25,000 and in case of continuing failure, with further penalty of Rs. 100 for each day after the first during which such failure continues, subject to a maximum of Rs. 1 Lakh, and Every officer of the company who is in default shall be liable to a penalty of not less than Rs. 25,000 and in case of continuing failure, with further penalty of Rs. 100 for each

			day after the first during which such failure continues, subject to a maximum of Rs. 1 Lakh.
38.	Section 159-Penalty for Default of Certain Provisions	If any individual or director of a company makes any default in complying with any of the provisions of section 152, section 155 and section 156	Such individual or director of the company shall be liable to a penalty which may extend to Rs. 50,000 and where the default is a continuing one, with a further penalty which may extend to Rs. 500 for each day after the first during which such default continues.
39.	Section 165- Number of Directorships	If a person accepts an appointment as a director in violation of this section	he shall be liable to a penalty of Rs. 2000 for each day after the first during which such violation continues, subject to a maximum of Rs. 2 Lakhs.
40	Section 172- Penalty	If a company is in default in complying with any of the	Company and every officer of the company who is in

		provisions of Chapter X-Appointment and Qualifications of Directors and for which no specific penalty or punishment is provided therein	default shall be liable to a penalty of Rs. 50,000, and in case of continuing failure, with a further penalty of Rs. 500 for each day during which such failure continues, subject to a maximum of Rs. 3 Lakhs in case of a company and Rs. 1 Lakh in case of an officer who is in default
41	Section 173(4)- Meetings of Board	Every officer of the company whose duty is to give notice under this section and who fails to do so	Liable to penalty of Rs. 25,000
42	Section 178(8)- Nomination and Remuneration Committee and Stakeholders Relationship Committee	In case of any contravention of the provisions of section 177 and 178	Company shall be liable to a penalty of Rs. 5 Lakhs; and Every officer of the company who is in default shall be liable to a penalty of Rs. 1 Lakh
43	Section 184(4)- Disclosure of Interest by Director	If a director of the company contravenes the provisions of	such director shall be liable to a penalty of Rs. 1 Lakh.



		subsection (1) or subsection (2) of Section 184	
44	Section 187(4)- Investments of Company to be Held in its Own Name	If a company is in default in complying with the provisions of this section	Company shall be liable to a penalty of Rs. 5 Lakhs; and Every officer of the company who is in default shall be liable to a penalty of Rs. 50,000.
45	Section 188(5)- Related Party Transactions	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,	In case of listed company, be liable to a penalty of Rs. 25 Lakhs; and In case of any other company, be liable to a penalty of Rs. 5 Lakhs.
46	Section 189(6)- Register of Contracts or Arrangements in Which Directors are Interested	Every director who fails to comply with the provisions of this section and the rules made thereunder shall be	Liable to a penalty of Rs. 25,000.
47	Section 190(3)- Contract of Employment with Managing or WholeTime Directors	If any default is made in complying with the provisions of subsection (1) or sub-	Company shall be liable to a penalty of Rs. 25,000; and Every officer of the

		section (2) of this section	company who is in default shall be liable to a penalty of Rs. 5000 for each default
48	Section 191(5)- Payment to Director for Loss of Office, etc., in Connection with Transfer of Undertaking, Property or Shares	If a director of the company makes any default in complying with the provisions of this section	Such director shall be liable to a penalty of Rs. 1 Lakh
49	Section 197(15)- Overall Maximum Managerial Remuneration and Managerial Remuneration in Case of Absence or Inadequacy of Profits	If any person makes any default in complying with the provisions of this section	He shall be liable to a penalty of Rs. 1 Lakh; and where any default has been made by a company, the company shall be liable to a penalty of Rs. 5 Lakhs
50	Section 203(5)- Appointment of Key Managerial Personnel	If any company makes any default in complying with the provisions of this section	Company shall be liable to a penalty of Rs. 5 Lakh; and Every director and key managerial personnel of the company who is in default shall be liable to a penalty of Rs. 50,000 and where the default is a continuing one, with a further penalty of Rs. 1000 for each day after the first during

			which such default continues but not exceeding Rs. 5 Lakhs
51	Section 204- Secretarial Audit for Bigger Companies	If a company or any officer of the company or the company secretary in practice, contravenes the provisions of this section	the company, every officer of the company or the company secretary in practice, who is in default, shall be liable to a penalty of Rs. 2 Lakhs.
52	Section 232(8)- Merger and Amalgamation of Companies.	If a company fails to file a certified copy of the order with the Registrar under sub-section (5),	the company and every officer of the company who is in default shall be liable to a penalty of Rs. 20,000 and where the failure is a continuing one, with a further penalty of Rs.1000 for each day after the first during which such failure continues, subject to a maximum of Rs. 3 lakhs.
53	Section 238- Registration of Offer of Schemes Involving Transfer of Shares	The director who issues a circular which has not been presented for registration and	liable to a penalty of Rs. 1 Lakh

		registered under clause (c) of sub-section (1)	
54	Section 247(3)-Valuation by Registered Valuers.	If a valuer contravenes the provisions of this section or the rules made thereunder	The valuer shall be liable to a penalty of Rs. 50,000.
55	Section 378V-Meetings of Board and quorum of Producer Company	The Chief Executive shall give notice as aforesaid not less than seven days prior to the date of the meeting of the Board and if he fails to do so, he shall be	liable to a penalty of Rs.5000
56	Section 378X Secretary of Producer Company	If a Producer Company fails to comply with the provisions of appointment of whole-time secretary	the Company and every officer of the Company who is in default, shall be liable to a penalty of Rs. 100 for every day during which the default continues subject to a maximum of Rs. 1 Lakh.
57	Section 403- Fee for Filing, etc.	Where a company fails or commits any default to submit, file, register or record any document, fact or	the company and the officers of the company who are in default, shall, without prejudice to the

		information under sub-section (1) before the expiry of the period specified in the relevant section	liability for the payment of fee and additional fee, be liable for the penalty or punishment provided under this Act for such failure or default.
58	Section 405(4)-Power of Central Government to Direct Companies to Furnish Information or Statistics.	If any company fails to comply with an order made under sub-section (1) or sub-section (3), or furnishes any information or statistics which is incorrect or incomplete in any material respect	the company and every officer of the company who is in default shall be liable to a penalty of Rs. 20,000 and in case of continuing failure, with a further penalty of Rs. 1000 for each day after the first during which such failure continues, subject to a maximum of Rs. 3 Lakhs.
59	Section 446B-Penalty for small company and OPC	if penalty is payable for noncompliance of any of the provisions of this Act by a One Person Company, small company, start-up company or Producer Company, or	such company, its officer in default or any other person, as the case may be, shall be liable to a penalty which shall not be more than one-half of the

		by any of its officer in default, or any other person in respect of such company, then	penalty specified in such provisions subject to a maximum of Rs. 2 Lakhs in case of a company and Rs. 1 Lakh in case of an officer who is in default or any other person, as the case may be
60	Section 450-Punishment Where No Specific Penalty or Punishment is Provided.	If a company or any officer of a company or any other person contravenes any of the provisions of this Act or the rules made thereunder, or any condition, limitation or restriction subject to which any approval, sanction, consent, confirmation, recognition, direction or exemption in relation to any matter has been accorded, given or granted, and for which no penalty or punishment is	the company and every officer of the company who is in default or such other person shall be liable to a penalty of Rs. 10,000, and in case of continuing contravention, with a further penalty of Rs. 1000 for each day after the first during which the contravention continues, subject to a maximum of Rs. 2 Lakhs in case of a company and Rs. 50,000 in case of an officer who is in

		provided elsewhere in this Act,	default or any other person
61	Section 454A-Penalty for repeated default.	Where a company or an officer of a company or any other person having already been subjected to penalty for default under any provisions of this Act, again commits such default within a period of three years from the date of order imposing such penalty passed by the adjudicating officer or the Regional Director, as the case may be,	it or he shall be liable for the second or subsequent defaults for an amount equal to twice the amount of penalty provided for such default under the relevant provisions of this Act.



SUMMARISED VERSION (MIND MAP)



### I. INTRODUCTION

#### What is Compounding?

- i. The term "Compounding" refers to the exercise of voluntarily admitting the contravention, pleading guilty and seeking redressal for the same. Whereas, the term "Offence" mean any act or omission made punishable by any law for the time being in force.
- ii. Compounding of an offence is a settlement mechanism, by which, the offender is given an option to pay money in lieu of his prosecution, thereby avoiding a prolonged litigation.
- iii. There is no definition of the word "compounding" in the Companies Act 2013, however, the legal meaning of compounding is "doing good the default/non-compliance".
- iv. A compounding of offense has three basic constituents i.e.
  - Consciousness of offence
  - The agreement not to prosecute
  - The receipt of penalty.
- v. The compounding authority (RD/NCLT) in case of the Companies Act, 2013 (the Act) may compound the offence and ask the defaulter to deposit compounding fee.
- vi. Once the offence has been compounded, the defaulter will no more be treated for the offence which has been compounded.

#### What is an Offence?

Offence means any act or omission made punishable by any law for the time being in force. Corporate offences are classified into civil and criminal offences. An offence may be "Compoundable" or "Non-Compoundable"

### 2. COMPOUNDING OF OFFENCES PROVISIONS UNDER THE COMPANIES ACT, 2013

- i. Section 441 of Companies Act, 2013 deals with Compounding of offences.
- ii. The Companies Act, 2013 does not define compounding of offences. However, it provides enabling provisions by which, the Company or its director or officers can apply for compounding thereby avoiding the prolonged litigation.

## PERSONS ELIGIBLE TO MAKE A COMPOUNDING APPLICATION

*Company – any director authorized by the  
BOD*

*Officers in default of the company who are  
liable for prosecution under the respective  
provisions for non-compliances*

### Thoda Extra gyaaannnn..... Swaad Anusaaar

#### Who is considered as officer in default?

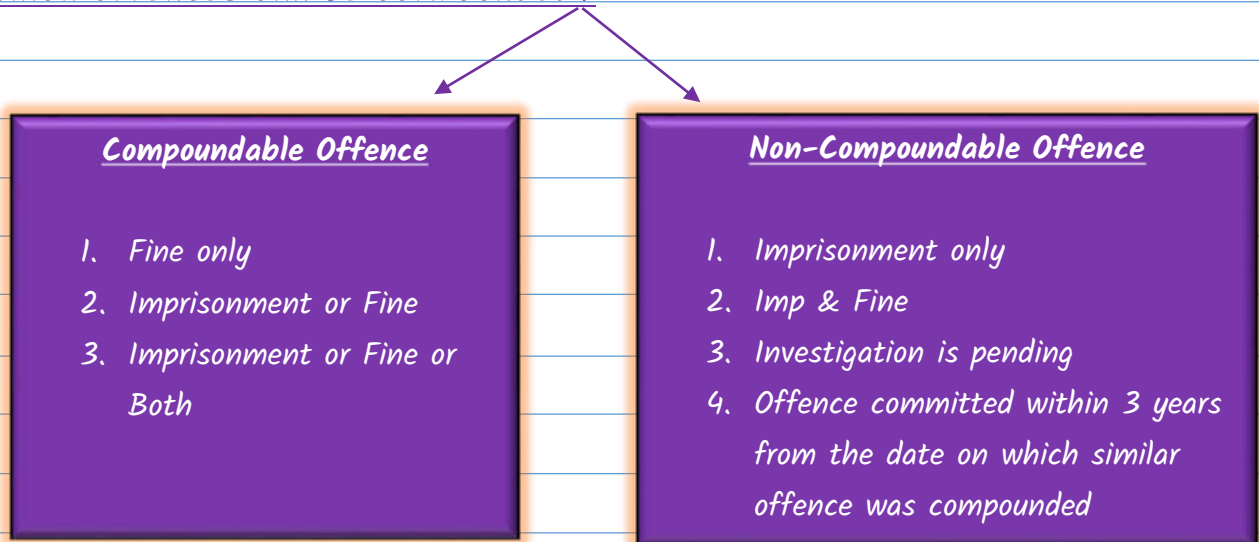
- i. whole-time director
- ii. key managerial personnel
- iii. where there is no key managerial personnel, director or directors specified by the Board and has given his consent in writing to the Board
- iv. any person who, under the immediate authority of the Board or any key managerial personnel, is charged with any responsibility including maintenance, filing or distribution of accounts or records, authorises, actively participates in, knowingly permits, or knowingly fails to take active steps to prevent, any default
- v. any person in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act, other than a person who gives advice to the Board in a professional capacity
- vi. every director, who is aware of contravention because of participation in proceedings without objecting to the same, or where such contravention had taken place with his consent or connivance.
- vii. in respect of the issue or transfer of any shares of a company, the share transfer agents, registrars and merchant bankers to the issue or transfer.



### 3. BENEFITS OF COMPOUNDING OF OFFENCES

- i. Acts as a deterrent and prevents commission of offence
- ii. Avoid heavy fines and penalty
- iii. Keep the flow of business activity unhindered
- iv. Help to maintain dignity
- v. Does not burden court with cases
- vi. Less time consuming and summary proceedings
- vii. No disqualification for Directors, since fees payable on compounding are not treated as penalty.

### 4. WHICH OFFENCES CAN BE COMPOUNDED?



### CASE STUDY

#### Cybersites India (Pvt) Ltd

In the instant case when applicant filed an application for compounding it was held since nature of violations committed were not criminal in nature and same were committed unintentionally, lenient view was to be taken and ad valorem fine for all offences/violations was to be imposed

## CASE STUDY

### Capital Small Finance Bank Ltd Vs. Registrar of Companies

In the instant case when applicant filed an application for compounding it was held that since company had inadvertently and under bona-fide mistake breached thresholds and there were no complaints or investigation pending against the company, authority should compound the suo moto application filed by the applicant.

#### 5. WHEN COMPOUNDING CAN BE DONE?

- i. Offenses committed by a company or its officers that are punishable with a fine may be compounded.
- ii. Example failure to file certain documents with the Registrar of Companies, failure to hold an Annual General Meeting, or failure to maintain statutory registers.
- iii. Compounding can be done either before (or) after the institution of any prosecution.

#### 6. WHO ARE THE COMPOUNDING AUTHORITIES/WHO CAN COMPOUND THE OFFENCE?

1. Regional Director (Upto 25 lakhs)
2. Tribunal (Beyond 25 Lakhs)

## CASE STUDY

### UW International Training & Education Centre for Health Private Limited

The instant case demonstrates that when compounding an offense, the minimum amount of fine specified in the penal clause of the relevant section may not be strictly applicable. Compounding authorities have the flexibility to consider various actions beyond imposing fines, such as admonishing the defaulter or issuing warnings.

## 7. LIST OF OFFENCES COMPOUNDABLE IN NATURE (POWERS VESTED WITH REGIONAL DIRECTOR)

- i. Contravention of provisions relating to issue of a prospectus.
- ii. Committing default in complying with the provisions regarding to variation of shareholders' rights.
- iii. Committing default in complying with the order of Tribunal relating to rectification of register of members.
- iv. Failure to publish the order of confirmation of the reduction of share capital by the Tribunal.
- v. Contravening provisions relating to purchase by company or loans by company for purchase of its own shares.
- vi. Committing default in complying with the order of Tribunal relating to redemption of debentures.
- vii. Failure to maintain register of members or debenture-holders or other security holders as prescribed.
- viii. If a company secretary in practice certifies the annual return otherwise than in conformity with the requirements of this section or the rules made thereunder.
- ix. Failure to keep proper books of account.
- x. Failure to keep proper financial statement.
- xi. Default in complying with the provisions regarding financial statement and Board's report.
- xii. Failure of auditor to intimate to Central Government regarding fraud against the company by officers or employees.
- xiii. Functioning as a director after vacation of office.
- xiv. Contravention of the provisions of sub-section 1 relating to loans, guarantee or security.
- xv. Related party transaction in case of other company and listed company.
- xvi. Forward dealing in securities of the company by Key Managerial personnel or director.

## 8. LIST OF OFFENCES COMPOUNDABLE IN NATURE (POWERS VESTED WITH THE TRIBUNAL)

- i. Committing default in complying with the requirements relating to formation of companies with charitable objects, etc.



- ii. Committing default in complying with the provisions relating to securities to be dealt with in stock exchanges.
- iii. Fraudulently issuing of duplicate share certificates by a company.
- iv. If a company fails to repay the deposit or part thereof or any interest thereon within the time specified or such further time as may be allowed by the Tribunal.
- v. Punishment for fraud involves an amount less than ten lakh rupees or one per cent. of the turnover of the company, whichever is less and does not involve public interest.

#### 9. LIST OF OFFENCES NON-COMPOUNDABLE IN NATURE

- i. Deceitfully personating as an owner of any shares or interest in a company
- ii. Contravention of an order of the Tribunal regarding the refusal of registration and appeal against refusal.
- iii. Contravening provisions relating to purchase by company or loans by company for purchase of its own shares.
- iv. Tampering with the minutes of the proceedings of meeting.
- v. Failure to distribute dividend within thirty days.
- vi. Failure of auditor to comply with the provisions of sections 139, 143, 144 and 145
- vii. Political contribution made in contravention of the provision
- viii. Contravention of the provisions relating to loans and investment
- ix. Disobeys the direction issued by the Registrar or inspector
- x. Disobeys the direction issued by the Registrar or inspector in relation to investigation
- xi. Failure to provide information, books or papers, etc. to inspector during investigation
- xii. Committing default in complying with the order of Tribunal
- xiii. Contravention of the provisions by the valuer
- xiv. Offences by officers of companies in liquidation
- xv. Frauds by officers
- xvi. Failure to keep proper books of account before winding up
- xvii. Punishment for fraud If the fraud involves public interest
- xviii. Intentionally gives false evidence
- xix. Wrongful withholding of property

### Pahuja Takii Seed Ltd. and Ors. Vs ROC

In the instant case an application was made for compounding on the grounds that they had already taken corrective measures to rectify their offenses. However, the National Company Law Tribunal (NCLT), New Delhi Bench-III, dismissed these applications in a common order.

Questions for Determination in Court of Law:

- i. Whether the Companies Act, 2013 bars filing of a joint application for compounding of offence by a defaulting company along with its officers in default?

The NCLAT observed that there was no specific bar against the "joinder of parties" or the joining of separate causes of action in filing a compounding application. In the absence of any such prohibition, the joinder of parties for the same offense is allowed.

- ii. Whether the Companies Act, 2013 bars filing of a joint application for compounding of the same offence committed in different years?

The NCLAT stated that there is no prohibition against filing a single application for compounding the same offense committed in different financial years by the company and its officers. Similarly, there is no bar on a joint application being preferred by a company along with its officers in default. The NCLAT emphasized that procedures are considered permissible unless expressly prohibited.

- iii. Whether the Tribunal has jurisdiction to compound offences where the fine prescribed for such offence are less than its monetary jurisdiction?

The NCLAT clarified that Section 441 of the Companies Act only restricts the power of the Regional Director and authorized officers of the Central Government to compound offenses where the maximum fine does not exceed a specified amount. However, no such restriction has been imposed on the powers of the Tribunal, which is the primary forum for compounding offenses. The Regional Director and officers of the Central Government represent alternative forums with restrictions based on the quantum of punishment. The NCLAT affirmed that the Tribunal has the authority to compound all offenses, irrespective of any pecuniary limit.

- iv. How to quantify the limit of Rs. 25 lacs in order determine the jurisdiction of RD?

The NCLAT did not explicitly answer this question but reaffirmed the NCLT's observation that the quantum of Rs. 25 lakhs should be determined based on each applicant and is not required to be aggregated when joint applications are filed. In other words, for calculating the monetary jurisdiction, the fine should be assessed separately for each applicant, and aggregation is not necessary. If the fine on the company is less than Rs. 25 lakhs but the officer in default faces a higher fine, either a joint application can be filed with the Tribunal, or the company can file an application with the Regional Director while the officer in default files with the Tribunal.

## 10. COMPOUNDING OF REPEATED OFFENCES

- i. Section 441 provides that if a company or officer in default compounds a contravention within 3 years from the date on which the similar offence was committed and compounded, cannot be compounded.
- ii. This means:
  - a. on which the offence was previously compounded, shall be deemed to be a first offence;
  - b. "Regional Director" means a person appointed by the Central Government as a Regional Director for the purposes of this Act



### CAN YOU SOLVE THIS?

Whether an offence punishable under the relevant provisions of the Companies Act, 2013 with 'fine only' or with 'imprisonment or fine', if repeated within a period of three years results into a mandatory imprisonment for the defaulters and whether the same can be compounded or not?

#### **Solution:**

An offence committed by a company or its officer within a period of 3 years from the date on which a similar offence committed by it or him was compounded under this section cannot be compounded and the provisions of Section 451 also becomes applicable. Section 451 prescribes that if the same offence is committed for the second or subsequent occasions within a period of three years, then, that company and every officer thereof who is in default shall be

punishable with twice the amount of fine for such offence in addition to any imprisonment provided for that offence.



### CAN YOU SOLVE THIS?

Whether an offence punishable under the relevant provisions of the Companies Act, 2013 with 'fine only' or with 'imprisonment or fine', if repeated within a period of three years results into a mandatory imprisonment for the defaulters and whether the same can be compounded or not?

#### **Solution:**

Yes, all three years offence can be compounded as these offences were committed prior to compounding order. If same offence is repeated during 2019-20 that cannot be compounded.

## II. APPLICATION TO REGISTRAR OF COMPANIES

- i. Application under section 491 is forwarded to the ROC. ROC after adding comments forward it to RD or NCLT.
- ii. Where any offence is compounded under this section, whether before or after the institution of any prosecution, an intimation thereof shall be given by the company to the Registrar within seven days from the date on which the offence is so compounded.
- iii. Where any offence is compounded before the institution of any prosecution, no prosecution shall be instituted in relation to such offence, either by the Registrar or by any shareholder of the company against the offender in relation to whom the offence is so compounded.
- iv. Where the compounding of any offence is made after the institution of any prosecution, such compounding shall be brought by the Registrar in writing, to the notice of the court in which the prosecution is pending and on such notice of the compounding of the offence being given, the company or its officer in relation to whom the offence is so compounded shall be discharged.

## CASE STUDY

### Schneider Electric IT Business India Private Limited & Ors

In this case the central question revolves around whether an offense can be compounded even when a prosecution is already underway against the involved parties.

The case establishes that if an offense is compounded after the initiation of a prosecution, the Registrar is obligated to inform the Court where the prosecution is currently being pursued in writing. Upon receiving notice of the composition, the Court is then mandated to release the company or its officers against whom the prosecution is pending

### Thoda Extra gyaaannnn..... Swaad Anusaaar

Are the following offences compoundable and if yes, by whom ?

i. Fraudulently issuing duplicate share certificates

The offence is punishable under section 46(5) of the Companies Act, 2013 with fine only.  
Compoundable by RD/NCLT.

ii. Failure to keep proper books of accounts

Compoundable by RD

iii. Tampering with minutes of meetings.

This offence is punishable under section 118(12) of the Companies Act, 2013 with Imp & Fine



### CAN YOU SOLVE THIS?

PQR Ltd. failed to file return of allotment against the 16 lakh shares allotted by the Board of directors at its meeting held on 20th April, 2019 and got order for compounding of offence on 10th June, 2020. The company again failed to file return of allotment against the 11 lakh shares allotted by the Board of directors at its meeting held on 4th March, 2022. What options are available to the company in respect of this default ?

**Solution:**

According to section 441 of Companies Act, 2013, Similar offence cannot be compounded if the offence is committed within 3 years from the date it was compounded. Hence, in the given case, the company cannot go for compounding for non-filing of return of allotment.

However, there is no such restriction imposed under section 454 on adjudicating a penalty by the adjudicating officer. AO may impose the penalty on company or direct the company or officer in default to rectify the default.

Secondly, section 460(b) of Companies Act, 2013, provides an option for condonation of delay by the CG if there is a delay in filing of document with ROC.

Hence, PQR doesn't have an option for compounding but they can go for adjudication or condonation of delay.

Procedure for Compounding (Chart)



## 12. PROCEDURE FOR COMPOUNDING OF OFFENCE UNDER THE COMPANIES ACT, 2013

Step 1

Check if the offence is compoundable

Step 2

Hold a BM to decide the offence that has been committed and calculate the fine that is payable

Form MGT-14  
is filed with  
ROC for Board  
Resolution

Following would be decided in BM:

1. Application for Compounding
2. Authorize the Director or Officer in Default to sign and submit the application.
3. To appoint CA/CS/Lawyer to appear before authority.

Step 3

Filing Application for Compounding of Offence with ROC:

- Application is filed in Triplicate.
- Board resolution passed for the purpose of making an application
- Affidavit verifying the application/petition
- Memorandum of appearance or power of attorney
- General profile and history of the company
- Copy of notice received from ROC
- Other documents if required.

Form GNL-1

Step 4

ROC will forward the complaint to NCLT/ RD

Step 5

RD/NCLT will send a notice a notice to the company for personal hearing & authorized representative of the company will make representation and admit the contravention committed



Step 6

Payment of fees for compounding within the time period specified.

Step 7

RD/NCLT will pass an order of Compounding.

Step 8

Order of RD/NCLT will be intimated to ROC.

Form INC-28



**CAN YOU SOLVE THIS?**

*Is there any discretionary power to reject the Application of Compounding?*

**Solution:**

No, neither of the NCLT or the RD has been authorized with discretionary power to reject a compounding application without due consideration.



**CAN YOU SOLVE THIS?**

*Whether NCLT has powers to review its own decision?*

**Solution:**

Section 420 of Companies Act, 2013 gives power to tribunal to rectify any error apparent on record and to amend the order accordingly ("APC Credit Rating Private Limited Vs. Registrar of Companies")

#### 14. OTHER PROVISIONS OF COMPOUNDING OF OFFENCES UNDER SECTION 441 OF THE COMPANIES ACT, 2013

- i. Compounding authority may ask the applicant to submit the amount before compounding to the credit of Central Government.
- ii. Offence will be compounded only after the sum has been paid and an evidence has been given proving the payment of the compounding fee.
- iii. The amount asked by the compounding authorities should not exceed the maximum amount of fine that could have been imposed for the respective offence.
- iv. The sum will be determined after duly taking into account any additional fee that the company would have paid.
- v. Prior to making the application for the compounding of offence arising from any failure or default in relation to which a fee and additional fee is payable it is essential to ensure to put an end to the failure or for removal of the default so that the compounding authority could take the additional fee paid into consideration.

#### 15. PENALTY FOR NON - COMPLIANCE OF ORDER OF COMPOUNDING AUTHORITIES

In case any officer fails to comply with the compounding order the maximum amount of fine for the offence proposed to be compounded under section 441 **shall be twice the amount provided in the corresponding section.**

#### 16. COMPOUNDING PROVISIONS UNDER THE SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992 ("SEBI ACT"), SECURITIES CONTRACTS (REGULATION) ACT, 1956 (SCRA) & DEPOSITORIES ACT, 1996

##### Composition Of Certain Offences

SEBI Act, provides that any offence punishable under this Act, not being an offence punishable with imprisonment only, or with imprisonment and also with fine, may either before or after the institution of any proceeding, be compounded by a Securities Appellate Tribunal or a court before which such proceedings are pending.

## Prakash Gupta v. Securities and Exchange Board of India

### Issue:

In this case, the appellant was being prosecuted for an offence under Section 24(1) of the Securities and Exchange Board of India Act, 1992 (SEBI Act). The appellant sought to compound the offence under Section 24A. However, the Trial Court rejected the application, upholding SEBI's objection that the offence could not be compounded without its consent.

### Facts:

- i. Mr. Prakash Gupta, director of Ideal Hotels & Industries Limited, was accused of price rigging and insider trading during the Company's IPO, violating SEBI regulations. SEBI's investigation revealed irregularities in share trading by certain entities during the IPO, suggesting their involvement in upward price movement.
- ii. A compounding application under Section 24A was filed by Mr. Gupta after an Adjudicating Officer imposed a fine on him for the violations. However, SEBI's High Powered Advisory Committee objected to compounding.
- iii. The Trial Court rejected the application, stating that SEBI's consent was necessary for compounding. The High Court of Delhi upheld this decision.

### Key Issue:

The key issue was whether SEBI's consent was required for compounding offences under Section 24A. The Supreme Court observed that Section 24A doesn't explicitly demand SEBI's consent and that Parliament had intentionally specified SEBI's role in other sections. The Court held that SEBI's consent was not mandatory for compounding before the Securities Appellate Tribunal (SAT) or the court where proceedings were pending.

### Judgement:

**In the present case, the nature of the allegations against the appellant are such so as to preclude a decision to compound the offences:**

- i. The opinion of SEBI and its HPAC must be given due deference as the same indicates their position on the effect that non-prosecution of the offence may have on market structures. The Securities Appellate Tribunal or the courts should only differ from the opinion of SEBI/ the HPAC, if it has reasons to believe that the said opinion is mala fide or manifestly arbitrary.

- ii. *The principle behind the compounding proceeding should be that the aggrieved party has been restituted and that it has consented to end the dispute. Since the aggrieved party may not be before the court, and that the offences are usually of public nature, it becomes even more essential to rely on SEBI's opinion to understand if restitution has taken place.*
- iii. *Even if restitution has taken place, but the offence is of public character and non-prosecution of the same would affect the public at large, such offence should not be compounded.*

## **17. SETTLEMENT PROCEEDINGS / CONSENT ORDERS UNDER SEBI LAWS-APPLICABLE FOR COMPOSITION OF OFFENCE**

- i. *Consent order may be passed at any stage after probable cause of violation has been found under SEBI Laws. However, in the event of a serious and intentional violation, the process should not be completed till the factfinding process is completed whether by way of investigation or otherwise*
- ii. *Consent orders provide flexibility of a wider array of enforcement actions which will achieve the twin goals of an appropriate sanction and deterrence without resorting to long drawn litigation before SEBI, SAT, and Courts. Passing of consent orders also reduce regulatory costs and save time and efforts in pursuing enforcement actions*
- iii. *It is an order settling administrative or civil proceedings between the regulator and a person (Party) who may prima facie be found to have violated securities laws.*
- iv. *Under the Securities and Exchange Board of India Act, 1992, Securities Contracts (Regulation) Act, 1956 (SCRA) and the Depositories Act, 1996 (collectively also known as securities laws), SEBI pursues two streams of enforcement actions i.e., Administrative /Civil (or) Criminal.*
- v. *Administrative/civil actions include issuing directions such as remedial orders, cease and desist orders, suspension or cancellation of certificate of registration and imposition of monetary penalty under the respective statutes and action pursued or defended in a court of law/tribunal. Criminal action involves initiating prosecution proceedings against violators by filing complaint before a criminal court*

## 18. SETTLEMENT OF ADMINISTRATIVE AND CIVIL PROCEEDINGS (Same as Chap 6)

- i. Any person, against whom any proceedings have been initiated or may be initiated under section 11, section 11B, section 11D, sub-section (3) of section 12 or section 15-1, may file an application in writing to the Board proposing for settlement of the proceedings initiated or to be initiated for the alleged defaults.
- ii. The Board may, after taking into consideration the nature, gravity and impact of defaults, agree to the proposal for settlement, on payment of such sum by the defaulter or on such other terms as may be determined by the Board.
- iii. The settlement proceedings under this section shall be conducted in accordance with the procedure specified in the regulations made under this Act.
- iv. All settlement amounts, excluding the disgorgement amount and legal costs, realised under this Act shall be credited to the Consolidated Fund of India.
- v. No appeal should lie against the order of settlement.

### CASE STUDY

#### Kapashi Commercials Ltd.

On July 10, 2020, shareholders of Kapashi Commercials Ltd., a BSE-listed company, reached a settlement with the Securities and Exchange Board of India (SEBI) to resolve an alleged violation of takeover norms. The shareholders paid an amount exceeding Rs. 34 lakh as part of the settlement terms.

The case revolved around the alleged breach of SAST (Substantial Acquisition of Shares and Takeovers) Regulations. These regulations govern the acquisition of substantial shares in a company and the obligations that arise due to such acquisitions. It was claimed that four individuals had failed to promptly disclose changes in their shareholding within the stipulated timeframe, both to Kapashi Commercials and the Bombay Stock Exchange (BSE).

To address the alleged violation, the shareholders submitted an application to SEBI, proposing a settlement for the breach of SAST Regulations related to the change in their shareholding in Kapashi Commercials. The settlement involved the payment of a sum of more than Rs. 34 lakh as part of the resolution.

In summary, shareholders of Kapashi Commercials Ltd. settled with SEBI by paying a settlement amount of over Rs. 34 lakh to address allegations of violating takeover norms. The allegations were linked to the delayed disclosure of changes in their shareholding within the company and the stock exchange.

## 19. SECURITIES AND EXCHANGE BOARD OF INDIA (SETTLEMENT PROCEEDINGS) REGULATIONS, 2018

### Application for Settlement

1. Application for settlement will be filed in form specified in Part A in Schedule I.
2. It will be accompanied by non-refundable fee.
3. The applicant shall make full and true disclosures in the application in respect of the alleged default.
4. The applicant shall make one application for settlement of all the proceedings that have been initiated or may be initiated in respect of the same cause of action.
5. The applicant whose application has been returned may, within fifteen days from the date of communication from the Board, submit the complete and revised application that conforms to the requirements of these regulations. No further opportunity will be given to the applicant for default.
6. An application for settlement of defaults related to disclosures, shall as possible, be made after making the required disclosure.

### Limitation

Any application for settlement will not be accepted after expiry of 60 days from the date on which the show cause notice is issued.

### Scope of Settlement Proceedings

- i. No application for settlement of any proceedings may be accepted if-
  - An earlier application regarding same default has been rejected.
  - Audit, investigation or inquiry is pending regarding the said offence.
  - Monies due under an order issued under securities laws are liable for recovery under securities laws.
- ii. Board may not settle any matter if it is of the opinion that the default:
  - has market wide impact
  - caused losses to a large number of investors, or
  - affected the integrity of the market

- iii. Apart from provisions laid down above, Board will take into consideration following factors for acceptance of any application:
- whether the applicant has refunded or disgorged the monies due, to the satisfaction of the Board;
  - whether the applicant has provided an exit or purchase option to investors in compliance with securities laws, to the satisfaction of the Board;
  - whether the applicant is in compliance with securities laws or any order or direction passed under securities laws, to the satisfaction of the Board;
  - any other factor as may be deemed appropriate by the Board.

### **Rejection of Application**

An application made to the Board can anytime be rejected on the following grounds:

- i. The applicant refuses to receive or respond to the communications sent by the Board;
- ii. The applicant does not submit or delays the submission of information, document, etc., as called for by the Board
- iii. The applicant who is required to appear, does not appear before the Internal Committee on more than one occasion
- iv. Where the applicant violates in any manner the undertaking and waivers
- v. The applicant does not remit the settlement amount within the period specified and/or does not abide by the undertaking and waivers.
- vi. When the applicant fails to comply with the condition precedent for settlement in the time required by Internal Committee.

### **Withdrawal of Application**

- i. An application can be withdrawn before the decision is communicated by the panel of whole time members. However, once the application is withdrawn no application can be made for a similar default unless a recommendation has been made by the High-Powered Advisory Committee.
- ii. Such an application may be considered subject to an increase of at least fifty percent over the settlement amount determined.



### **Effect of pending application on specified proceedings**

- i. The filing of an application for settlement of any specified proceedings shall not affect the continuance of the proceedings save that the passing of the final order shall be kept in abeyance till the application is disposed of.
- ii. Where the application is filed in case of proceedings that may be initiated against the applicant, such proceedings shall not be initiated till the application is rejected or withdrawn.

### **Settlement terms**

Settlement terms includes a settlement amount and non-monetary terms which includes the following:

- a) Suspension or cessation of business activities for a specified period;
- b) Exit from Management;
- c) Disgorgement on account of the action or inaction of the applicant;
- d) Refraining from acting as a partner or officer or director of an intermediary or as an officer or director of a company that has a class of securities regulated by the Board, for specified periods;
- e) Cancel securities and reduce holdings where the securities are issued fraudulently, including bonus shares received on such securities, if any, and reimburse any dividends received, etc.;
- f) Lock-in of securities;
- g) Implementation of enhanced policies and procedures to prevent future securities laws violations and agreeing to appoint an independent consultant to review internal policies, processes and procedures.
- h) Provide training and education to employees of intermediaries and securities market infrastructure institutions.

Money received **through application** has to be **credited to SEBI General Fund, Settlement amount**, excluding the cost, shall be **credited to consolidated fund of India** and the **amount of profits made by the applicant** may be disgorged as part of the settlement terms and shall be **credited to the Investor Protection and Education Fund**.

### **Factors to be considered to arrive at the settlement terms**

- i. Nature, gravity and impact of alleged default

- ii. The extent of harm and/or loss to the investors' and/or gains made by the applicant;
- iii. The role played by the applicant in case the alleged default is committed by a group of persons
- iv. Processes that have been introduced since the alleged default to minimize future defaults or lapses;
- v. Economic benefits accruing to any person from the non-compliance or delayed compliance;
- vi. Whether any other proceeding against the applicant for non-compliance of securities laws is pending or concluded
- vii. Any other enforcement action that has been taken against the applicant for the same violation
- viii. Any other factors necessary taking into consideration the facts and circumstances of the case.

### Internal Committee

- i. An officer of the Board not below the rank of Chief General Manager.
- ii. Such other officers as specified by the Board.

### High Powered Advisory Committee

- i. The Board shall constitute a High-Powered Advisory Committee for consideration and recommendation of the terms of settlement.

ii. **Composition:**



- iii. High Powered Committee shall conduct its meetings in the manner specified by the Board however, if no consensus could be reached between the members, decision of judicial member will be considered as the final decision.

Provided that:

- (i) where any member of the High-Powered Advisory Committee seeks recusal, the remaining two or more members may submit their recommendation on the terms of settlement;
- (ii) where no consensus or majority may be reached, the recommendation made by the Judicial member shall be considered to be the recommendation of the High-Powered Advisory

Committee and in case of recusal of the Judicial member, the recommendations of the remaining two or more members shall be submitted for consideration to the Panel of Whole Time Members; and

- (iii) where all or all but one of the members of the High-Powered Advisory Committee recuse themselves in respect of an application, the Board may constitute another High-Powered Advisory Committee.

## **20. PROCEDURE OF SETTLEMENT**

### Proceedings before the Internal Committee

- i. Application is referred to Internal Committee to determine whether the proceedings may be settled and the settlement terms as per the regulations.
- ii. The Internal Committee may:
  - a. call for relevant information, documents, etc., pertaining to the alleged default(s) in possession of the applicant or obtainable by the applicant.
  - b. call for the personal appearance of the applicant before it. Personal appearance under this clause includes appearance through audio-video electronic means or through the medium of electronic video linkage as may be permitted by the Internal Committee
  - c. permit the applicant to submit revised settlement terms within a period not exceeding 15 working days from the date of the Internal Committee meeting.
- iii. The proposed settlement terms, if any, shall be placed before the High-Powered Advisory Committee.

### Proceedings before the High Powered Advisory Committee

- i. Internal committee will place settlement terms before the High-powered committee and the committee would take into consideration
  - a. the application,
  - b. settlement terms or revised settlement terms proposed by the applicant,
  - c. factors specified,
  - d. any material available on record.
- ii. Committee has the power to seek revision of terms and refer application back to Internal Committee.

iii. The recommendations of the High-Powered Advisory Committee shall be placed before the Panel of Whole Time Members.

## 21. ACTION ON THE RECOMMENDATION OF HIGH POWERED ADVISORY COMMITTEE

- i. The Panel of Whole Time Members shall consider the recommendations of the High Powered Advisory Committee and may accept or reject the same
- ii. where the recommendations of the High Powered Advisory Committee to settle the specified proceedings are rejected, the panel of Whole Time Members shall record reasons for rejection of the recommendations and communicate the same to the applicant.
- iii. Where the recommendation of the High-Powered Advisory Committee have been rejected, the panel may return the application for re-examination of the settlement terms and thereafter the procedure as applicable in the case of an original application shall be followed by the Internal Committee and the High Powered Advisory Committee.
- iv. Where the Panel of Whole Time Members accepts the recommendation of the High-Powered Advisory Committee to settle the specified proceedings, the applicant shall be issued a notice of demand within seven working days of the decision of the panel and the applicant shall-
  - a) remit the settlement amount forming part of the settlement terms, not later than Thirty calendar days from the date of receipt of the notice of demand.
  - b) fulfill/undertake in writing to abide by, the other settlement terms, if any, within the time provided to the applicant.

## 22. SUMMARY SETTLEMENT PROCEDURE

- i. Before initiating any specified proceedings, Board may issue a notice of summary settlement, calling upon the person to whom the notice is served to file an application and submit a settlement amount or submit any undertaking in non-monetary terms for following defaults:
  - a) Delayed disclosures
  - b) Non-disclosure in relation to companies already listed on stock exchange
  - c) Disclosures not made in specified formats
  - d) Delayed compliance of any requirement laid down by the board
  - e) Such other defaults as may be determined by the Board.

Provided that, the specified proceeding(s) shall not be settled under this Chapter, if in the opinion of the Board, the applicant has failed to make a full and true disclosure of facts or failed to co-operate in the required manner.

- ii. The noticee may, within thirty calendar days from the date of receipt of the notice of settlement-
  - a) File a settlement application
  - b) remit the settlement amount as specified in the notice of settlement
  - c) comply or undertake to comply with other non-monetary terms as specified in the notice of settlement
  - d) ask for rectification of the calculation of the settlement amount, as communicated in the notice of settlement.
- iii. Noticee has to remit the amount within 30 days from the date of receiving the notice. However, if the Board deems fit, in a case of delay, it can grant an extension of not more than 15 days.
- iv. After receiving the settlement amount and being sure that noticee will comply with the terms of the settlement agreement, Board may pass an order of settlement.

### **23. SETTLEMENT WITH CONFIDENTIALITY**

- i. An applicant can seek the benefit of confidentiality subject to conditions imposed under this chapter which includes:
  - a) Providing and continuing to provide true and complete disclosures of informations, documents or evidences which are in his possession or he is capable to obtain.
  - b) Co-operating fully, continuously and expeditiously throughout the investigation, inspection, inquiry or audit and related proceedings before the Board
  - c) Not concealing, destroying, manipulating or removing the relevant documents in any manner that may contribute to the establishment of the alleged violation.
  - d) cease to participate in the violation of securities laws from the time of the disclosure of information.
- ii. To ensure confidentiality, the applicant or its authorized representative may make an application containing all the relevant disclosures and evidence relating to the commission of any violation of securities laws.

- iii. Upon being satisfied, the Board may assure the benefit of confidentiality and shall thereupon mark the status of the application depending upon its priority.
- iv. The Board may, at any stage, reject the application if the information, documents or evidence is found to be incomplete or false to the knowledge of the applicant.
- v. An application made shall be made prior to any order of investigation, inspection, inquiry or audit.

## **24. CONFIDENTIALITY**

- i. The following shall be treated as confidential,
  - a. the identity of the applicant seeking confidentiality; and
  - b. the information, documents and evidence furnished by the applicant
- ii. However, the identity of the applicant or such information or documents or evidence may not be treated as confidential if-
  - a. the disclosure is required by law
  - b. the applicant has agreed to such disclosure in writing
  - c. there has been a public disclosure by the applicant

## **25. SETTLEMENT ORDERS**

### **Settlement of proceedings before the Adjudicating Officer and the Board**

The Whole Time Member, Adjudicating Officer or the competent officer of the Board before whom the proceedings are pending, shall dispose of the respective proceedings, by an appropriate order, on the basis of the approved settlement terms.

### **Settlement of the proceedings pending before the Tribunal or any Court**

The proposal of settlement along with the settlement terms or rejection thereof shall be placed before such Tribunal or court for appropriate orders.

### **Service and publication of settlement order**

Settlement orders shall be served on the applicant and shall also be published on the website of the Board, however settlement orders with confidentiality should not directly or indirectly disclose the identity of the applicant.

### Settlement Schemes

The Board may specify a settlement scheme for any class of persons involved in respect of any similar specified defaults.

### Effect of settlement order on third party rights or other proceedings

- i. A settlement order under these regulations shall not be admissible as evidence in any other proceeding relating to an alleged default not covered under the settlement order
- ii. It will not affect the right of third parties arising out of the alleged default.
- iii. Where any person has obtained a settlement order, which contains observations in respect of any other person for the commission of an alleged default, such an order shall not in itself be admissible as evidence against such other person.

### Revocation of the settlement order

- i. If the applicant does not comply with the settlement order or Board has the knowledge that information given during settlement is false, the settlement order will stand revoked and Board will initiate or restore the proceedings.
- ii. Whenever any settlement order is revoked, no amount paid under these regulations shall be refunded.

### Confidentiality of information

All information submitted and discussions held in settlement proceedings will not be disclosed to the public.

Any documents submitted or proposals made during the settlement proceeding will not be submitted as an evidence in the court or Tribunal.

## **26. INTRODUCTION OF COMPOUNDING PROVISIONS UNDER COMPETITION ACT, 2002**

The Competition (Amendment) Act, 2023 provides for compounding of compoundable offences by National Company Law Tribunal.



## 27. COMPOUNDING PROVISIONS UNDER THE FOREIGN EXCHANGE MANAGEMENT ACT, 1999 (FEMA)

### PENAL PROVISIONS UNDER FEMA

Section 13 of FEMA contains the penalties for contravention of any provision of FEMA. The penalties are quite substantial and **can extend up to three times of the sum involved** in such contravention where the amount is quantifiable or **up to Rs.2 lakhs**, where the amount is not directly quantifiable and where the contravention is a continuing one, further penalty which may extend to Rs.5000 for every day after the first day during which the contravention continues.

## 28. POWER TO COMPOUND CONTRAVENTION

Any contravention under section 13 may, on an application made by the person committing such contravention, be compounded within 180 days from the date of receipt of application by the Director of Enforcement or such other officers of the Directorate of Enforcement and officers of the Reserve Bank as may be authorised in this behalf by the Central Government.

## 29. WHO ARE THE COMPOUNDING AUTHORITIES/WHO CAN COMPOUND THE OFFENCE?

Officers from RBI not below the rank of Assistant General Manager and officers from Directorate of Enforcement not below the rank of Deputy Director or Deputy Legal Adviser are authorized to compound the offences.

## 30. POWER OF RESERVE BANK TO COMPOUND CONTRAVENTION

When a person contravenes provisions of section 3 except section 3 (a) of the act, compounding can be done:

- i. where the sum involved is ten lakhs rupees or below, by the Assistant General Manager of the Reserve Bank of India;
- ii. where the sum involved is more than rupees ten lakhs but less than rupees forty lakhs, by the Deputy General Manager of Reserve Bank of India;
- iii. where the sum involved is rupees forty lakhs or more but less than rupees one hundred lakhs by the General Manager of Reserve Bank of India;

- iv. where the sum involved is rupees one hundred lakhs or more, by the Chief General Manager of the Reserve Bank of India;

### **31. POWER OF ENFORCEMENT DIRECTORATE TO COMPOUND CONTRAVENTIONS**

- i. If a person contravenes provisions of section 3(a) of the Act then following have the authority to compound the offences:
- ii. where the sum involved is five lakhs rupees or below, by the Deputy Director of the Directorate of Enforcement;
- iii. where the sum involved is more than rupees five lakhs but less than rupees ten lakhs, by the Additional Director of the Directorate of Enforcement
- iv. where the sum involved is rupees ten lakhs or more but less than fifty lakhs rupees by the Special Director of the Directorate of Enforcement;
- v. where the sum involved is rupees fifty lakhs or more but less than one crore rupees by Special Director with Deputy Legal Adviser of the Directorate of Enforcement;
- vi. where the sum involved in such contravention is one crore rupees or more, by the Director of Enforcement with Special Director of the Enforcement Directorate.
- vii. No contravention shall be compounded unless the amount involved in such contravention is quantifiable.

### **32. LIMIT FOR COMPOUNDING**

Any contravention committed by a person within a period of three years from the date on which a similar contravention was committed, cannot be compounded.

If any appeal is made, the offence cannot be compounded.

### **33. PROCEDURE FOR COMPOUNDING**

- i. Every application for compounding any contravention under this rule shall be made in Form to the along with a fee of Rs, 5,000 by Demand Draft in favour of compounding authority.
- ii. The Compounding Authority may call for any information, record or any other documents relevant to the compounding proceedings and pass an order after providing opportunity of being heard to both the parties within 180 days from the date of receiving the application.

- iii. Where contravention is compounded before adjudication no inquiry can be made against such person.
- iv. Where contravention is compounded after making a complaint such compounding shall be brought in the notice of adjudicating authority and on such notice the person will be discharged.
- v. If the Enforcement Directorate is of the view that the proceeding initiated before it relates to a serious contravention suspected of money laundering, terror financing or affecting sovereignty and integrity of the nation, the compounding authority will not proceed with compounding and transfer the matter for adjudication.

### **34. FACTORS CONSIDERED WHILE CONSIDERING COMPOUNDING APPLICATION**

- i. The amount of gain of unfair advantage.
- ii. The amount of loss caused to any authority/ agency/ exchequer.
- iii. Economic benefits accruing to the contravener from delayed compliance or compliance avoided.
- iv. The repetitive nature of the contravention, the track record and/or history of non-compliance of the contravene.
- v. Contravener's conduct in undertaking the transaction, in disclosure of full facts in the application and submissions made during the personal hearing.

### **35. PAYMENT OF AMOUNT COMPOUNDED AND CERTIFICATE OF COMPOUNDING**

The sum for which the contravention is compounded as specified in the order of compounding shall be paid by demand draft in favour of the Compounding Authority **within fifteen days** from the date of the order of compounding of such contravention. In case a person fails to pay the sum compounded within the time specified he shall be deemed to have never made an application for compounding.

### **36. CONTENTS OF THE ORDER OF THE COMPOUNDING AUTHORITY**

- i. Should specify the provisions of act, rules s, directions, requisitions or orders made in respect of the contravention that has taken place along with the details of alleged contravention.
- ii. Should be dated and signed by the Compounding Authority.
- iii. Copy of order will be given to the applicant and AO.

## CASE STUDY



### **M/s Candor View India Private Limited**

*The applicant, M/s Candor View India Private Limited (applicant), was incorporated on December 01, 2015, under the Companies Act, 2013, as per the Certificate of Incorporation issued by the Registrar of Companies, Karnataka. The company is engaged in the business of aluminium metal & metal alloys as cash and carry wholesale trading*

*Applicant made an application for compounding for delay in allotment of shares to the foreign investors, persons resident outside India, beyond 180 days of receipt of the inward remittances. The application was considered and the contraventions were compounded.*



**Mrs. Joyce Lynn Peters v. Reserve Bank of India**

- i. SCN was issued to the applicant for non compliance with capital account transactions.
- ii. Applicant applied for compounding before RBI and ED.
- iii. Application was rejected on the grounds that compounding was not permissible when adjudicatory proceedings for contravention were being initiated.
- iv. Applicant submitted that pendency of adjudicatory proceedings cannot be a ground for declining the request for compounding.
- v. since no decision was taken by the Respondents thereon, the Petitioner filed a writ petition before the co-ordinate bench of the Karnataka High Court, which ordered to file another application for compounding within 2 weeks and direct the respondent to consider the same.
- vi. Accordingly, after some period of delay, the Petitioner filed another application before the Respondents ("Application"). The Application was also rejected by the Respondents stating that since the Petitioner had filed appeal against the adjudicatory order, Rule 11 of the Compounding Rules would come in the way of the Application being treated favourably

**Further issues:**

- a. Whether petitioner had made the application for compounding beyond the period prescribed by the Coordinate Bench of this Court?
- b. Whether the pendency of appeal preferred by the contravener bars the compounding of contravention,
- c. Whether the Respondent Nos. 1 & 2 could have banked upon Rule 11 of the Compounding Rules for rejecting petitioner's application for compounding...?

**Judgement:**

The writ petition succeeded and a writ of certiorari was issued quashing the Impugned Reply to Application. The matter was remitted back to the Respondents for consideration afresh, in accordance with law and within a period of eight weeks.

**37. MEDIATION & CONCILIATION**

Alternative dispute resolution (ADR) mechanisms like arbitration, conciliation and mediation plays a significant role in reducing the number of cases that enter the formal justice delivery system by providing redress outside it.

### Mediation

- i. Mediation is a **voluntary, party-centered and structured negotiation** process where a neutral third party assists the parties in amicably resolving their dispute by using specialized communication and negotiation techniques.
- ii. In mediation, the **parties retain the right to decide for themselves** whether to settle a dispute and the terms of any settlement.

“A method of non-binding dispute resolution involving a neutral third party who tries to help the disputing parties to reach a mutually agreeable solution”

### Conciliation

It is a process in which independent person or persons are appointed by the parties with mutual consent by agreement to bring about a settlement of their dispute through consensus or by using of the similar techniques which is persuasive.

““The process of adjusting or settling disputes in a friendly manner through extra judicial mean”

### 38. DIFFERENCE BETWEEN MEDIATION AND CONCILIATION

<u>Points of Difference</u>	<u>Mediation</u>	<u>Conciliation</u>
<u>Meaning</u>	The Mediator assists the disputants to reach a negotiable settlement.	Conciliator brings the disputants to the agreement through negotiation
<u>Third Party</u>	Has less involvement	More participation
<u>Terms of Settlement</u>	The mediator does not suggest the manner of settlement to the parties.	Conciliator suggests terms for settlement to the parties
<u>Decision</u>	Is called settlement	Is called Award

### 39. ADVANTAGES OF MEDIATION AND CONCILIATION

- i. **Informal:** The process is informal as there are no proper rules and regulations to be followed.
- ii. **Confidential:** Mediators and Conciliators do not disclose any information revealed during mediation. It is a closed door discussion.
- iii. **Quick and Inexpensive:** It takes less time to complete the process.
- iv. **Mediator:** Unlike formal adjudicatory processes, the mediation need not be confined to the issues raised in the case, but can go beyond to other matters the parties want resolved. The mediator helps the parties to address each others issues.

### 40. MEDIATION & CONCILIATION UNDER THE COMPANIES ACT, 2013

#### Panel of Mediators and Conciliators

- i. Regional Director shall prepare a panel of experts willing and eligible to be appointed as mediators or conciliators in the respective regions and such panel shall be placed on the website of the Ministry of Corporate Affairs or on any other website as may be notified by the Central Government.
- ii. RD may invite applications of persons possessing relevant qualifications and who is willing to get empaneled as mediator or conciliator.
- iii. RD may scrutinize the application and if the application is rejected, provide reasons for the same.
- iv. Interested person will make an application in **form MDC-1**.
- v. The Regional Director shall invite applications from persons interested in getting empanelled as mediator or conciliator every year during the month of February and update the Panel which shall be effective from 1st of April of every year.



### Qualifications

- i. has been a Judge of the **Supreme Court** of India; or
- ii. has been a Judge of a **High Court**; or
- iii. has been a **District and Sessions Judge**; or
- iv. has been a **Member or Registrar of a Tribunal constituted at the National level** under any law for the time being in force; or
- v. has been an officer in the **Indian Corporate Law Service or Indian Legal Service** with fifteen years' experience; or
- vi. is a qualified **legal practitioner** for not less than ten years; or
- vii. is or has been a professional for at least fifteen years of continuous practice as **Chartered Accountant or Cost Accountant or Company Secretary**; or
- viii. has been a **Member or President of any State Consumer Forum**; or
- ix. is an **expert in mediation or conciliation** who has successfully undergone training in mediation or conciliation.

### Disqualification

- i. is an **undischarged insolvent** or has applied to be adjudicated as an insolvent and his application is pending or
- ii. has been **convicted for an offence** which, in the opinion of the Central Government, involves **moral turpitude** or
- iii. has been **removed or dismissed from the service of the Government** or the Corporation owned or controlled by the Government or
- iv. has been **punished in any disciplinary proceeding**, by the appropriate disciplinary authority.

### Conditions for application for appointment of Mediator or Conciliator

1. Parties may agree to appoint a sole mediator or sole conciliator.
2. Where parties are unable to agree upon a sole mediator or sole conciliator, Central Government may ask each party to nominate a mediator or conciliator or the Central Government or Tribunal may themselves appoint the mediator or conciliator.
3. The application to the Central Government or the Tribunal or the Appellate Tribunal, for referring the matter pertaining to any proceeding pending before it for mediation or conciliation shall be in **Form MDC-2** and shall be accompanied with **a fee of one thousand rupees**.

4. On receipt of application, Tribunal or Central Government may appoint a mediator or conciliator from the panel of experts.
5. Central Government or Tribunal may suo moto refer a matter before the panel, in public interest.

#### Deletion from the Panel

- The Regional Director may by recording reasons in writing and after giving him an opportunity of being heard, remove any person from the Panel.

#### Withdrawing Name from Panel

Any person who intends to withdraw his name from the Mediation and Conciliation Panel may make an application to the Regional Director indicating the reasons for such withdrawal and the Regional Director shall take a decision on such application **within fifteen days of receipt of such application** and update the Panel accordingly.

#### Duty of mediator or conciliator to disclose certain facts

- i. It shall be the duty of a mediator or conciliator to disclose to the Central Government or the Tribunal or the Appellate Tribunal, as the case may be, about any circumstances which may give rise to a reasonable doubt as to his independence or impartiality in carrying out his functions.
- ii. Every mediator or conciliator shall from the time of his appointment and throughout continuance of the mediation or conciliation proceedings, without any delay, disclose to the parties about existence of any circumstance referred in clause 1.

#### Withdrawal of appointment

Where the Central Government or the Tribunal receive any information about impartiality of the mediator or conciliator, it may withdraw the appointment and appoint any other mediator or conciliator in that proceeding. The mediator or conciliator may, offer to withdraw himself from such proceeding and request the Central Government or the Tribunal or the Appellate Tribunal as the case may be to appoint any other mediator or conciliator.

### Procedure for disposal of matters

- i. He will fix, the dates and the time of each mediation or conciliation session, where all parties have to be present, in consultation with the parties.
- ii. He shall hold the mediation or conciliation at the place decided by the Central Government or the Tribunal or the Appellate Tribunal, as the case may be, or such other place where the parties and the mediator or conciliator jointly agree;
- iii. He may conduct joint or separate meetings with the parties;
- iv. Each party shall, ten days before a session, provide to the mediator or conciliator a brief memorandum providing issues which needs to be resolved;
- v. Each party shall provide all the information as may be required by the mediator or conciliator.

### Representation of parties

- i. The parties shall be present personally or through an authorised attorney at the sessions or meetings.
- ii. The parties may be represented by an authorised person or counsel with the permission of the mediator or conciliator in such sessions or meetings and the mediator or conciliator or the Central Government or the Tribunal or the Appellate Tribunal as the case may be, shall be entitled to direct or ensure the presence of any party to appear in person.
- iii. The party not residing in India may, with the permission of the mediator or conciliator, be represented by his or her authorised representative at the sessions or meetings

### Consequences of non-attendance of parties at sessions or meetings on due dates

If a party fails to attend a session or a meeting fixed by the mediator or conciliator deliberately or wilfully for two consecutive times, the mediation or conciliation shall be deemed to have failed and mediator or conciliator shall report the matter to the Central Government or the Tribunal or the Appellate Tribunal, as the case may be.

### Administrative assistance

In order to facilitate the conduct of mediation or conciliation proceedings, the mediator or conciliator with the consent of the parties, may arrange for administrative assistance by a suitable institution or person.

### Role of Mediator or Conciliator

The mediator or conciliator shall attempt to voluntarily resolve dispute between the parties, communicate the view of each party to the other, assist them in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise. He shall not impose any terms of compromise on the parties. Parties will consent amongst themselves and mediator/conciliator may then impose such terms on which the consent is reached.

### Parties alone responsible for taking decision

- i. The mediator or conciliator facilitates in arriving a decision to resolve the dispute. They cannot impose any settlement nor the mediator or conciliator give any assurance that the mediation or conciliation shall result in a settlement.
- ii. The mediator or conciliator shall not impose any decision on the parties

### Time limit for completion of mediation or conciliation

- i. The process for any mediation or conciliation shall be completed within a period of three months from the date of appointment of expert or experts from the Panel.
- ii. However, if same cannot be completed within the said period, an application may be made to Tribunal or Central Government by the mediator or conciliator and if the Government or Tribunal deems fit, they can grant an extension of not more than three months.

### Confidentiality, disclosure and inadmissibility of information

- i. When a mediator or conciliator receives any information, regarding the dispute between the parties, they may disclose the same to the other parties, in order to provide them an opportunity of explanation. However, when a party gives an information to the mediator or conciliator subject to a specific condition that the information may be kept confidential, the mediator or conciliator shall not disclose that information to the other party.
- ii. The receipt or preparation of records, reports or other documents by the mediator or conciliator, should also be confidential and the mediator or conciliator shall not be compelled to provide information regarding the same.
- iii. There shall be no audio or video recording of the mediation or conciliation proceedings and no statement of parties or witnesses should be recorded by the mediator or conciliator.

- iv. The parties shall maintain confidentiality in respect of events that occurred during the mediation and conciliation and shall not rely on or introduce the said information in other proceedings as to:
- a. views expressed by a party in the course of the mediation or conciliation proceedings
  - b. documents obtained during the mediation or conciliation which were expressly required to be treated as confidential or other notes, drafts or information given by the parties or the mediator or conciliator.
  - c. proposals made or views expressed by the mediator or conciliator
  - d. admission made by a party in the course of mediation or conciliation proceedings

*No statement of parties or the witnesses shall be recorded by the mediator or conciliator.*

#### Communication between mediator or conciliator and the Central Government or the Tribunal or the Appellate Tribunal

In order to ensure neutrality, there is no communication between Central Government or Tribunal and Mediator or Conciliator. If at all any communication is required same shall be done in writing and copies of it will be distributed amongst the parties and their representatives.

Communication between the mediator or conciliator and the Central Government or the Tribunal or the Appellate Tribunal, shall be limited to communication by the mediator or conciliator:

- i. About the failure of the party to attend the sessions;
- ii. About the consent of the parties;
- iii. About his assessment that the case is not suited for settlement through the mediation or conciliation;
- iv. About settlement of dispute between the parties.

#### Settlement agreement

- i. Where an agreement is reached between the parties, the same shall be reduced in a written format and shall be submitted to the mediator or conciliator, who then forwards it to the Central Government or the Tribunal.
- ii. Where no agreement is reached between the parties or no settlement is possible, mediator or conciliator will inform the same to the Central Government or the Tribunal.

- iii. *The Central Government, Tribunal or Appellate Tribunal, shall fix a date of hearing normally within 14 days from the date of receipt of report of mediator or conciliator and on the said date if the Government or Tribunal is satisfied that the parties have settled their dispute, it shall pass a necessary order.*
- iv. *If the settlement has dealt with only few issues then Tribunal may proceed with the rest.*

#### Fixing date for recording settlement and passing order

*The Central Government or the Tribunal or the Appellate Tribunal shall fix a date of hearing normally within fourteen days from the date of receipt of the report of the mediator or conciliator and on such date of hearing if the authority comes to the conclusion that the parties have settled their dispute, it shall pass an order in accordance with terms thereof. If the settlement disposes of only certain issues arising in the proceeding, the Central Government or the Tribunal or the Appellate Tribunal, as the case may be, shall proceed further to decide the remaining issues.*

#### Expenses of the mediation and conciliation

- i. *At the time of referring the matter to the mediation or conciliation, the Central Government or the Tribunal or the Appellate Tribunal may fix the fee of the mediator or conciliator and as far as possible, a consolidated sum may be fixed rather than for each session or meeting.*
- ii. *Expenses of Mediation and Conciliation including the fee of the mediator or conciliator, costs of administrative assistance and other ancillary expenses are borne equally by the parties.*
- iii. *Each party shall bear the costs for production of witnesses on his side.*
- iv. *The mediator or conciliator may, before the commencement of the mediation or conciliation, direct the parties to deposit equal share of the probable costs of the mediation or conciliation including the fees to be paid to the mediator or conciliator.*
- v. *If any party or parties do not pay the amount as specified above, the Central Government or the Tribunal or the Appellate Tribunal, shall on the application of the mediator or conciliator, issue appropriate directions to the concerned parties.*
- vi. *The mediation or conciliation shall commence only on the deposit of amount and in case amount is not paid before such commencement, the mediation or conciliation shall be deemed to have terminated.*



### Ethics to be followed by Mediator or Conciliator

- i. Follow and observe the rules strictly and with due diligence.
- ii. Not carry on any activity or conduct which shall reasonably be considered as unacceptable conduct of a mediator or conciliator.
- iii. Uphold the integrity and fairness of the mediation or conciliation process.
- iv. Ensure that the parties involved in the mediation or conciliation are fairly informed and have an adequate understanding of the procedural aspects of the process.
- v. Satisfy himself or herself that he or she is qualified to undertake and complete the assignment in a professional manner.
- vi. Disclose any interest or relationship likely to affect impartiality.
- vii. Be faithful to the relationship of trust and confidentiality imposed in the office of mediator or conciliator.
- viii. Conduct all proceedings related to the resolutions of a dispute, in accordance with the relevant applicable law.

### Resort to arbitral or judicial proceedings

The parties shall not initiate, during the mediation or conciliation under these rules, any arbitral or judicial proceedings in respect of a matter that is the subject-matter of the mediation or conciliation, except that a party may initiate arbitral or Judicial proceedings, where, in his, opinion, such proceedings are necessary for protecting his rights.

### Matters not to be referred to the mediation or conciliation

- i. Cases involving serious and specific allegations of fraud, fabrication of documents forgery, impersonation, coercion etc.
- ii. Cases involving prosecution for criminal and non-compoundable offences.
- iii. Cases which involve public interest or interest of numerous persons.
- iv. The matters relating to proceedings in respect of inspection or investigation or the matters which for which applications for compounding have been made.

### QUESTIONS FOR PRACTICE?

- i. Whether the order of the panel will be binding upon the parties?



- ii. *Can crimes of fraud be referred to mediation or conciliation?*
- iii. *A Practicing Company Secretary wants to establish his practice in the field of Mediation and Conciliation. He wants to know whether he would not be eligible to be appointed as a Mediator or Conciliator as per Rule 5 of Companies (Mediation and Conciliation) Rules, 2016. Advise him.*
- iv. *What is a Settlement agreement as per Companies Act, 2013 and the Companies (Mediation and Conciliation) Rules?*