RAGHAV ACADEMY

CMA FINAL GR-III

COMPANY LAW

CONCEPTS AND CASES

BY

CA RAGHAV GOEL

Dedicated to My Father

Late Shri JagMohanGoel

His eternal soul
is always with me.

ALL ENERGY IS WITHIN.

ALL POWERS IS INSIDE.

TAKE IT OUT.

DON'T LET OTHERS WRITE YOUR DESTINY.

COME AND CREATE THE DIFFERENCE.

BE YOURSELF.

BEHAVE YOURSELF.*Raghav Goel*

Lehron se Darkar nauka par nahin hoti,
koshish karne walon ki haar nahin hoti

Nanhi cheenti jab daana lekar chalti hai,
chadhti deewaron par, sau bar phisalti hai.
Man ka vishwas ragon mein saahas bharta hai,
chadhkar girna, girkar chadhna na akharta hai.
Akhir uski mehnat bekar nahin hoti,
koshish karne walon ki haar nahin hoti.

Dubkiyan sindhu mein gotakhor lagata hai,
ja ja kar khali haath lautkar aata hai
Milte nahi sahaj hi moti gehre paani mein,
badhta dugna utsah isi hairani mein.
Muthi uski khali har bar nahin hoti,
koshish karne walon ki haar nahi hoti.

Asaflta ek chunauti hai, ise sweekar karo,
kya kami reh gayi, dekho aur sudhar karo.

Jab tak na safal ho, neend chain ko tyago tum,
Sangharsh ka maidan chhodkar mat bhago tum.
Kuch kiye bina hi jai jaikar nahin hoti,
koshish karne walon ki haar nahin hoti.

– Harivansh Rai Bacchan

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BASICS UNDER COMPANY LAW

Q.1. Comment on the following:
Common seal can be used by any employee of the company irrespective of his designation.
(5 marks; 2014 - June)

Answer:
Please refer 2008 - Dec

Q.2. Write short note on the following:
(i) The separate personality of a company is a statutory privilege and it must be used for legitimate business purposes only. (4 marks; 2008 - Dec)[CSEM - II]

Answer:

Sr. No.	Heading	Description
1.	**Authenticity of the statement**	Statement is correct.
2.	**Statutory Privilege for legitimate purpose**	As separate personality of the company is a statutory privilege and it must be used for ^legitimate business purpose only.
3.	**"Lifting of or piercing the corporate veil"**	, Where a fraudulent and dishonest use is made of the legal entity, the individuals concerns will not be allowed to take shelter behind the corporate personality. The Tribunal will break through the corporate veil.

Q.3. Write a note on the following:
(i) Disadvantages of corporate form of enterprise (4 marks; 2010 - June) [CSEM - II]

Answer:
Disadvantages of corporate form of enterprises:
There are certain disadvantages of a corporate form of enterprise. Some of these disadvantages are:

(a)	**Formalities and expenses**	Formation of a company is coupled with difficult and detailed legal formalities and procedure involving considerable amount of time and money.
(b)	**Greater tax burden**	In few circumstances, the tax burden on a company is more than that in comparison to other form of business organization.
(c)	**Greater social responsibility**	Having regard to the enormous powers wielded by the companies and the impact they have on the society, the companies are called upon to show greater social responsibility in their working.
(d)	**Detailed winding up procedure**	Detained procedure for winding - up of companies which is more expensive and more time consuming.

Q.4. Distinguish between the following:
(i) 'Company' and 'corporation'. (4 marks; 2010 - June) [CSEM - II]

Answer:

Distinction between Company and Corporation.

1.	Wider Concept of the Word "Corporation"	The term body corporate is much wider in concept than the word company because it includes:	
		(a) Companies	Formed and registered under the **Companies Act, 2013** that is all Indian Companies.
		(b) Foreign Companies	Companies incorporated outside India that is foreign companies.

		(c) Public Financial Institution	
		(d) Nationalized Bank	
		(e) Corporationsformed underacts of Parliaments	
		(f) Limited Liabilities Partnerships	Registered under the Limited Liability **Partnership Act, 2008.**
		As per **Section 2 (11) of Companies Act, 2013,**the term body corporate does not include :	
		(a) Co-operative Society	Registered under any law relating to Co-operative Societies.
		(b) Any other body corporate, notified by Central Government in its official gazette	But not being a company as defined in this Act.

Q.5. Distinguish between the following:
(i) 'Company' and 'corporation'. **(4 marks; 2011 - June) [CSEM- II]**

Answer:
Please refer 2010 -June

Q.6. Distinguish between the following:
(a) 'Company' and 'partnership firm'. **(4 marks; 2013 - Dec)**

Answer:

S.No.	Topic	Company	Partnership Firm
1	**Regulating Act**	A Company is regulated by the **Companies Act, 2013.**	While a partnership is governed by the **Indian Partnership Act, 1932.**
2	**Mode of Creation**	Registration is compulsory in case of company.	Whereas registration is optional in Partnership.
3	**Minimum Membership**	Whereas the minimum number of members in a private company are two and that in case of public company are seven members.	In partnership, the minimum number of partners are two.
4	**Maximum Membership**	Maximum number of member are: •For private company: **200** •For Public company: Unlimited	A partnership with objects of acquisition for gains cannot be formed beyond 50 numbers of partners. **[Section 464 read with Rule 10 of Companies (Miscellaneous) Rules, 2014]**
5	**Legal Status**	A company has a separate legal personality distinct from that of its members.	Whereas partnership is not a distinct person, it comprises of several persons who compose it.
6	**Liability of Members**	In case of company the liability of shareholders is limited to the extent of their share capital or upto the amount of guarantee given by them.	But in case of partnership the liability of partner is unlimited. Each partner is liable to an unlimited extent for the debt incurred in the ordinary course of business.
7	**Transfer of Share**	Shares of a Public Co. are freely transferable	But in case of partnership, no partner can transfer his share without the consent of other partner.

Q.7. Distinguish between the following:
'Limited liability partnership' and 'body corporate'. **(4 marks; 2015 - June)**

Answer:

Limited Liability Partnership (LLP) and Body Corporate

Sr. No.	Basis	Limited Liability Partnership (LLP)	Body Corporate
1.	**Regulation**	LLP is an alternative form of corporate business, not being a company, which gives the benefits of limited liability of a company and the flexibility of a partnership. LLP is covered under the **Limited Liability Partnership Act, 2008.**	While term "Body Corporate" as defined under **section 2(11) of Companies Act, 2013** includes a Company incorporated outsideIndia but does not include: (i) a co-operative society registered under any law relating to cooperative societies; and - (ii) any other body corporate (not being a company as defined in this Act), which the Central Government may, by notification, specify in this behalf.
2.	**Incorporation as one person Company**	LLP can't be incorporated by One Person.	A body corporate may be a company incorporated by one person as One Person Company.
3.	**LLP as body corporate and Vice-Versa**	A LLP may be a body corporate.	But the vice-versa may not be true.
4.	**Compliance Requirements**	LLP will have lesser compliance requirements.	A body corporate will have more compliance requirements.

Q.8. Distinguish between 'Company' and 'limited liability partnership'.
(4 marks; 2015 - Dec)

Answer:

S.No.	Heading	Description	
1.	**Regulation**	**A** basic difference between an LLP and a joint stock company lies in that the internal **governance structure** of a company isregulated by statute (i.e. **Companies Act, 2013)** whereas for an LLP it would be by a contractual agreement between partners.	
2.	**Management**	The **management-ownership divide** inherent in a company is not there in a limited liability partnership.	
3.	**Compliance requirements**	LLP will have lesser compliance requirements as compared to a company.	
4.	**Benefit of limited liability and Flexibility**	(a) **Limited Liability**	•LLP is an alternative corporate business form that gives the benefits of limited liability of a company and the flexibility of a partnership. •LLP can continue its existence irrespective of changes in partners. •It is capable of entering into contracts and holding property in its own name. •LLP is a separate legal entity, is liable to the full extent of its assets but liability of the partnersis limited totheir agreed contribution in the LLP.
		(b) **Flexibility**	LLP will have more flexibility as compared to a company.

5.	**Enforcement of contracts**	LLP is a body corporate and a legal entity separate from its partners, having perpetual succession.
6.	**LLP as a business model**	LLP form is a form of business model which. (i) is organized and operates on the basis of an agreement in between partners; (ii) provides flexibility without imposing detailed legal and procedural requirements; (iii) Enables professional/technical expertise and initiative to combine with financial risk taking capacity in an innovative and efficient manner.

Q.9. Two companies are incorporated with the same set of shareholders. Are they same or distinct under the Companies Act, 2013? Discuss. (4 marks; 2008 - June) [CSIG - II]

Answer:

1.	**Separate Legal Entity**	**(i) Separate Corporate Personality**	On incorporation, a companybecomes a separate legal person inthe eyes of law. The company isvested with a corporate personalitydistinct from individuals who are itsmembers.
		(ii) Own Name and acts	Being a separate legal entity, it bears its own name and acts under a distinct corporate name.
		(iii) Owned assets	Its assets are separate and distinct from those of its members.
		(iv) Different person from promoters	It is also different 'person' from the members who compose it.
		(v) Owned properties, borrowing money etc	As such, it is capable of owning property, incurring debts, borrowing money, having a bank account, employing people, entering into contracts and suing or being sued in the same manner as an individual.
2.	**Conclusion**	Thus, the two companies which are incorporated with the same set of shareholders are nevertheless distinct and separate entities **[Patinson v. Bindya Debt AIR 1933 Pat 196]. [Theory of Corporate veil; Saloman v. Saloman & Co. Ltd.]**	

Q.10. Comment on the following:
Common seal of a company will have to be affixed on all the letters and documents of the company. (5 marks; 2008 - Dec) [CSEM - II]

Answer:

(A)	**Authenticity of the statement**	Statement is not correct.
(B)	**Provisions of Companies Act**	1. Resolution of Board is required for affixing common seal (if any) of the company on deed and contracts.
		2. Common seal is affixed only in presence of two directors and Company Secretary or such other person as the Board may appoint for the purpose in accordance with the articles of association.

Amendment Made by Companies (Amendment) Act, 2015

Sr. No.	Section in which Amend-ment is made	Words to be omitted	Words to be substituted with	New Provisions to be inserted in the section
1.	Section 9	The words "and a -common seal" shall be omitted		
2.	Section 22	-	(a) for thewords "underits	(b) The followingproviso shall

	sub section (2)		common seal", the words "under its common seal, if any," shall be substituted;	beinserted, namely: — "Provided that in case a company does not have a common seal, the authorisation under this sub-section shall be made bytwo directors or by a director and the Company Secretary, wherever the company has appointed a Company Secretary."
3.	Section 22 Subsection (3)	The words "and have the effect as if it were made under its common seal" shall be omitted		-
4.	Section 46, sub section (1)	-	For the words "issued under the common seal of the company", the words "issued under the common seal, if any, of the company or signed by two directors or by a director and the Company Secretary, wherever the company has appointed a Co m pan y Secretary" shall be substituted.	-
(C)	Seal when to be used	The article of association of a company provide for affixing the seal of the company on documents. The company seal may be affixed on the following documents after authorisation from AOA & Boardresolution: (i) Power of attorney. (ii) Deed of lease (iii) Share certificate (iv) Deed of mortgage (v) Promissory notes (vi) Share Warrant etc.		

Q.11. "Common seal of a company will have to be affixed on ail the letters and documents of the company." Discuss. **(5 marks; 2009 - Dec) [CSIM - II]**

Answer:
Please refer2008 -Dec

Q.12. Comment on the following:
(i) The managing director and other directors of a company are not liable to be sued for dues against a company. **(5 marks; 2011 - June) [CSEM - II]**
(ii) The competent Tribunal of law can entertain a petition for winding-up of an illegal association under company law. **(5 marks; 2011 - June) [CSEM - II]**
(iii) A company can be regarded as having enemy character under certain circumstances. **(5 marks; 2011 - June) [CSEM - II]**

Answer:

(i)

1.	**Authenticity of thestatement**	A company being a juristic person, it can sue and canbe sued by others in it own name.	
2.	**Case Law**	**Abdul Haq Vs. Das Mai**	If an employee was not paid his salary for several months. He may file a suit against the director of the company for the recovery of the amount of salary due to him. It is held that he will not succeed because the remedy lies against the company and not against the directors-or members of the company.

(ii)

1.	**No recognition to illegal association by Law**	The law does not recognize illegal association and therefore cannot be wound up by order of Tribunal.
2.	**Conclusion**	The Tribunal cannot entertain a petition for the winding up of a company formed m contravention of **Companies Act, 2013.**

(iii)

1.	**Authenticity of the Statement**	The statement is correct based on a case Law -**Daimler Co. Ltd. vs. Continental Tyre and Rubber Co. Ltd.**
2.	**Analysis of the case law**	➢ The facts in question are similar to the facts in **Daimler Co. Ltd. Vs. Continental Tyre and Rubber Co. Ltd.** a company was incorporated in England to sell tyres manufactured by a German Company. ➢ The bulk of the shares of the English Company were held by Germans and all the directors were Germans. ➢ During world war, the English Company filed a suit to recover a trade debt. ➢ It was held that the company though incorporated in England was an enemy company; and the company was not allowed to proceed with the action to recover its debts. ➢ It was laid down that a company may assume an enemy character when persons in defacto control of its affairs are residents of an enemy country or, wherever resident, are acting under the control of enemies.

Q.13. Comment on the following:

A shareholder who holds 99% of the share capital of a company can be held liable for the acts of the company. **(5 marks; 2012-June) [CSEM - II]**

Answer:

1.	**Authenticity of the statement**	The statement is not true.
2.	**Separate Legal Entity**	➢ A company is an artificial person. It is formed and registered under the Companies Act. It has distinct legal entity. Its personality is separate and distinct from its members. ➢ The company's money and property belong to the company and not to the members of company. Similarly, the members' personal property can not be held liable to pay the creditors of the company.
3.	**Characteristics of company**	In some cases company is treated as a natural person.

		(a) It can make contracts. (b) Open a bank account. (c) Can sue and be sued by others. (d) It can also own property.
4.	**Analysis of Case Law: Saloman Vs. Saloman Company Ltd.**	This point has clearly established the principle that once a company has been validly constituted under the **Companies Act, 2013,** it becomes a legal person distinct from its members and for this purpose, it is immaterial whether any member has a large or small proportion of the share capital, and whether he holds those shares beneficially or as a mere trustee.
5.	**Conclusion**	Hence, shareholders can not be held liable for the acts of the company.

Q.14. Comment on the following:
(b) A shareholder is held personally liable for the acts of the company, if he holds virtually the entire share capital of the company,
(d) Common seal acts as the official signature of a company. **(5 marks each; 2013 - Dec)**

Answer: (b) Please refer 2012 -June
(d)

S.No.	Heading	Description
1.	**Authenticity of the statement**	The statement is correct.
2.	**Contracts under the seal of the company**	➢ On incorporation, a company acquires legal entity with perpetual succession and a common seal. ➢ Since the company has no physical existence, it must act through its agents and all such contracts entered into by its agents must be under the seal of the company.
3.	**Official signature of the company**	The common seal acts as the official signature of a company. The name of the company must be engraved on its common seal.
4.	**Authenticity of a document**	➢ A rubber stamp of the company on a document does not make it authentic and legal unfess such document bears the common seal of the company. ➢ The Companies Act or the Articles of. Association of a company may requirecertain instruments or documents to be executed under the common seal of the company.
5.	**Safe custody of the common seal**	The person authorised to use the seal should ensure that it is kept under his personal custody and is used very carefully because any deed, instrument or a document to which seal is improperly or fraudulently affixed will involve the company in legal action and litigation.
6.	**Deeds or contracts to be under the common seal**	According to the Companies Act, the following deeds and contracts are required to be under the common seal of the company: ➢ Power of attorney ➢ Share certificates ➢ Share warrant ➢ Any deed as required by articles
7.	**Companies Amendment Act, 2015**	As per the said amendment, the mandatory requirement of Common seal has been removed.

Q.15. Answer the following citing the relevant provisions of jaw/case law, if any: "Separate personality of a company is a special privilege. In case of dishonest or fraudulent use of this privilege, corporate veil can be lifted". Discuss. (4 marks; 2014 - June)

Answer:

Doctrine of lifting of or piercing the corporate veil:

Sr. No.	Points	Description	
1.	**Meaning of lifting or piercing the corporate veil**	• The separate personality of a company is a statutory privilege and it must be used for legitimate business purposes only. • Where a fraudulent and dishonest use is made of the legal entity, the individuals concerned will not be allowed to take shelter behind the corporate personality. • The Tribunal will break through the corporate shell and apply the principle/doctrine of what is called as "lifting of or piercing the corporate veil". • The Tribunal will look behind the corporate entity and take action as though no entity separate from the members existed and make themembers or the controlling persons liable for debts and obligations of the company:	
2.	**When it is lifted**	**Concerned Case Law:** [BSN (UK) Ltd. v. Janardan Mohandas Rajan Pillai [1996] 86 Com Cases 371 (Bom).]	The corporate veil is lifted when in defence proceedings, such as for the evasion of tax, an entity relies on its corporate personality as a shield to cover its wrong doings.
3.	**Shareholders not permitted for the lifting of the veil for their purpose**	**Concerned Case Law: Premlata Bhatia v. Union of Indian (2004) 58 CL 217 (Delhi)**	This was held in wherein the premises of a shop were allotted on a licence to the individual licencee. She set up a wholly owned private company and transferred the premises to that company with the Government consent. She could not remove the illegality by saying that she and her company were virtually the same person.

In the following cases the Tribunal have lifted the corporate veil.

1	**Prevention of fraud and misconduct**	Where the medium of a company has been used for committing fraud or improper conduct, the' Courts have lifted the veil and looked at the realities of the situation. **[Gilford Motor Co. Vs. Home [1993] Ch 935]**
2	**Company acting as agent**	Where the company is in reality an agency or trust for someone else and the corporate facade is used to cover up that agency or trust. **[Re F G Films Ltd. (1953)1 All E.R. 615]**
3	**Protection of public policy**	Where the doctrine conflicts with public policy, Tribunal

		have lifted the corporation veil for protecting the public policy. **[Connors Vs. Connors Ltd. (1940) 4 All E.R. 179]**
4	**Enemy Character of Company**	Tribunal will lift the corporate veil if the company has enemy character. **[Daimler Co. Ltd. Vs. Continental Tyre and Rubber Co. (1916) 2 A.C. 307]**
5	**Evasion of taxes**	Where the veil has been used for evasion of taxes and duties, the Tribunal upheld the piercing of the veil to look at the real transaction. **[Re. DinshawManeckjee Petit A.I.R. 1927 Bombay 371]**
6	**To protect labour welfare legislation**	Where the purpose of company formation was to avoid the welfare legislation, the Tribunal will lift the corporate veil. Where it was found that the sole purpose for the formation of new company was to use it as a device to reduce the amount to be paid by way of bonus to workman the Supreme Court upheld the piercing of the veil to look at the transaction. **[Workmen of Associated Rubber Industries Ltd. Vs. Associated Rubber Industries Ltd. A.I.R. 1986 SC1]**
7	**Use ofcorporate veil for hiding criminal activities**	Where the defendant used the corporate structure as a device to conceal his criminal activities (evasion of customs and excise duties), the Tribunal could lift the corporate veil and treat the assets of the company as the realizable property of the shareholder.

Q.16. Comment with reasons on the following:
Piercing through corporate veil. **(5 marks; 2014 - Dec)**

Answer:
Please refer 2014- June

Q.17. In an annual general meeting of Amar (Pvt. Ltd., all the shareholders were killed in a bomb blast. State, whether the company is still in existence. If so, how?
(4 marks; 2014 - Dec)

Answer:

S. No.	Heading	Description
1.	**Perpetual Succession**	• Perpetual Succession, therefore, means that the membership of a company may keep changing from time to time, but that does not affect its continuity.
		• A company, being a separate legal person is unaffected by death or departure of any member and remains the same entity, despite total change in the membership.
2.	**Death only on winding of the company**	• An incorporated company never dies except when it is wound up as per law.
3.	**Change in membership**	• The membership of an incorporated company may change either because one shareholder has transferred his shares to another or his shares devolve on his legal representatives on his death or he ceases to be a member under some other provisions of the Companies Act. • Thus, perpetual succession denotes the ability of a company to maintain its existence by the constant succession of new individuals who step into the shoes of those who cease to be members of the company.
4.	**Survival of company even after death of all**	A company's life is determined by the terms of its Memorandum of

	the members during war	Association. It may be perpetual or it may continue for a specified time to carry on a task or object as laid down in the Memorandum of Association.

Note:
Professor L. C. B. Gower rightly mentions, "Members may come and go, but the company can go on forever. During the war all the members of one private company, while in general meeting, were killed by a bomb, but the company survived - not even a hydrogen bomb could have destroyed it.

Q.18. Comment on the following:
(a) A company incorporated under the Companies Act, 2013, being an artificial person, is not entitled to sue a natural person or to sue another company incorporated under the same Act. **(5 marks; 2015 - Dec)**
(b) A company incorporated under the Companies Act, 2013 never dies except when it is wound-up as per the law. **(5 marks; 2015 - Dec)**

Answer:
(a)

S. No.	Heading	Description
1.	**Authenticity of the statement**	A Company being a body corporate, can sue and be sued in its own name.
2.	**Legal Framework**	• To sue, means to institute legal proceedings against (a person) or to bring a suit in a Tribunal of law. • All legal proceedings against the company are to be instituted in its name. • Similarly, the company may bring an action against anyone in its own name.
3.	**Company's right to sue for damages**	• A company's right to sue arises when some loss is caused to the company, i.e. to the property or the personality of the company. Hence, the company is entitled to sue for damages for libel or slander as the case may be **[Floating Services Ltd. vs. MV San FranscecoDipaloa(2004) 52 SCL 762 (Guj)].** • A company, as a person distinct from its members, may even sue one of its own members.
4.	**Conclusion**	Hence, a company is entitled to sue a natural person or to sue another company incorporated under the **Companies Act, 2013** in its own name.

Answer
(b) Please refer 2014 - Dec

Q.19. Explain clearly the meaning of lifting of corporate veil' in relation to a company incorporated under the Companies Act, 2013. Examining the judicial decisions, state whether 'corporate veil' can be lifted in the following cases:
(a) Where the corporate veil has been used for improper conduct; and
(b) Where the acts of a company are opposed to workmen? **(4 marks; 2015 - Dec)**

Answer:

S. No.	Heading	Description
1.	**Lifting of Corporate Veil under Judicial Interpretation**	Ever since the decision in **Salomon vs. Salomon & Co. Ltd., (1897) A.C. 22,** normally Tribunal are reluctant or at least very cautious to lift the veil of corporate

		personality to see the real persons behind it. Nevertheless, Tribunal have found it necessary to disregard the separate personality of a company in the following situations:	
	(a) Where the corporate veil has been used for commission of fraud or improper conduct	**Case Laws: In Jones vs. Lipman, (1962) I.W.-L.R. 832**	• In this case the court lifted the veil and looked at the realities in the situation. • A agreed to sell certain land to B. Pending completion of formalities of the said deal, A sold and transferred the land to a company which he had incorporated with anominal capital of £100 and of which he and a clerk were the only shareholders and directors. This was done in order to escape a decree for specific performance in a suit brought by B. The Tribunal held that the company was the creature of A and a mask to avoid recognition and that in the eyes of equity A must complete the contract, since he had the ˅ full control of the limited company in which the property was vested, and was in a position to cause the contract in question to be fulfilled.
	(b) Where the acts of a company are opposed to workmen	**The Associated Rubber Industries Ltd. Bhavnagar & another, AIR 1986 SC 1**	➢ It has been decided in The Associated Rubber Industries Ltd. Bhavnagar & another, AIR 1986SC 1 that where the acts of the company are opposed to workmen the corporate veil may be lifted. ➢ **Brief facts of the case:** In this case, a new company was created wholly by the, principal company and with assets of its own except

			those transferred to it by theprincipal company and withno, business or income ofits own except receivingdividends from sharetransferred to it by theprincipal company i.e. onlyfor the purpose of splittingthe profits into two handsand thereby reducing theobligation to pay bonus.The Supreme Court heldthat the new company wasformed as a device toreduce the gross profits ofthe principal company andthereby reduce the amountto be paid by way of bonusto workmen.The amount of dividendsreceived by the newcompany should, thereforebe taken into account inassessing the gross profit ofthe principal company. Thecorporate veil, therefore waslifted in this case.

Q.20. Comment on the following:
Three companies incorporated with the same set of shareholders are treated as same companies under the Companies Act, 2013. **(5 marks; 2017 - Dec)**

Answer:

1.	**Separate Legal Entity**	**(i) Separate Corporate Personality**	On incorporation, a company becomes a separate legal person in the eyes of law. The company is vested with a corporate personality distinct from individuals who are its members.
		(ii) Own Name and acts	Being a separate legal entity, it bears its own name and acts under a distinct corporate name.
		(iii) Owned assets	Its assets are separate and distinct from those of its members.
		(iv) Different person from promoters	It is also different 'person' from the members who compose it.
		(v) Owned properties, borrowing . money etc	As such, it is capable of owning property, incurring debts, borrowing money, having a

			bank account, employing people, entering into contracts and suing or being sued in the same manner as an individual.
2.	**Conclusion**	Thus, the two companies which are incorporated with the same set of shareholders are nevertheless distinct and separate entities **[Patinson v. Bindya Debi AIR 1933 Pat 196]. [Theory of Corporate veil; Saloman v. Saloman& Co. Ltd.]**	

Q.21. Rani is a wealthy lady enjoying large dividend and interest income. She has formed three private companies and agreed with each of them to hold a block of investment as an agent for it. Income received was credited in the accounts of the company but the company handed back the amount to her as a pretended loan. This way, she divided her income in three parts in a bid to reduce her tax liability. Discuss the legality of the purpose for which the three companies were formed. (5 marks; 2010 - June) [CSEM - II]

Answer:

1.	**Leading Case Law**	**Sit Dinshato Manakjee Petit, AIR 1927 Bombay 371.** If a company is used as a means to evade tax, the **Tribunal** may disregard the corporate veil.
		Analysis of the case law
		(A) The Supreme Court held that the **Tribunal** is entitled to lift the mask of corporate entity, if it is used for tax evasion or to circumvent tax obligations. (B) In such cases individual shareholders may be held liable to pay income tax. (C) **In the given case,** the facts are similar to the above mentioned case. The reason to which the companies were formed by the assesses was purely and simply as a means of avoiding tax liability and the companies were nothing more than the assessee herself. (D) Therefore, the **Tribunal** disregarded the corporate veil and found that the companies were formed by the assessee for the purpose of avoiding tax.
2.	**Conclusion**	Hence, in view of the above case law Rani can be held liable.

Q.22. Six persons are the only members of Tab (Pvt.) ltd. All of them went to USA on a pleasure trip by aeroplane". On the way, the plane crashed and all the six members died. Does Tab (Pvt.) Ltd. still exist? Decide. (4 marks; 2016 - Dec)

Answer:

1.	**Perpetual Succession**	• An incorporated company never dies, except when it is wound up as per law. • A company, being a separate legal person is unaffected by death or departure of any member and it remains the same entity, despite total change in the membership. • A company's life is determined by the terms of its Memorandum of Association. • It may be perpetual, or it may continue for a specified time to carry on a task or object as laid down in the Memorandum of Association.
2.	**Conclusion**	The Company has perpetual succession, therefore, means that the membership of a company may keep changing from time to time, but that shall not affect its continuity. Therefore, TAB PVT. LTD. still exist despite of the death of all its members.

Q.23. Comment on the following:
Raman Pvt. Ltd. has only two shareholders, X and Y. All shares were fully paid-up X sold all his shares to Y and the company carries on its business activities thereafter.
(5 marks; 2018 - Dec)

Answer:
Under section 3A of Companies Act, 2013, if at any time the number of members of a company is reduced, in the case of a private company, below two, and the company carries on business for more than six months while the number of members is so reduced, every person who is a member of the company during the time that it so carries on business after those six months- , and is cognisant of the fact that it is carrying on business with less than two members, shall be severally liable for the payment of the whole debts of the company contracted during that time, and may be severally sued therefor.
Therefore in the above case of Raman Pvt. Ltd., out of the two shareholders X and Y, X sold all his shares to Y and the company carried on its business activities thereafter, pursuant to the referred section where the company carries Us business for more than six months, Mr. Y shall be severally liable for the payment of the whole debts of the company contracted after those six months, and may be severally sued therefor.

Q.24. Pick out the correct answer from the following and give reasons:
(I) Contracts which entered into, by agents or trustees on behalf of a prospective company before it has come into existence are called:
(1) Provisional contracts
(2) Pre-incorporation contracts
(3) Both provisional and pre-incorporation contracts
(4) None of the above. **(1 mark; 2009 - Nov)**

Answer:
Option 2: Pre-incorporation Contracts: Contracts made by promoters who act as agents or trustees of the company before its incorporation, are called pre-incorporation contracts. Such contracts cannot bind the company because the company has no legal status prior to its incorporation.

Q.25. Attempt the following:
Who shall be considered as promoter according to the definition given in the Companies Act, 2013? Explain. **(4 marks; 2014-Nov)**

Answer:
Definition of Promoter:
As per Sec. 2(69) of the Companies Act, 2013 Promoter means a person:
(a) Who has been named as such in a prospectus or is identified by the company in the annual return referred to in Sec. 92; or
(b) Who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise; or
(c) In accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act.

Provided that nothing in Sub-clause (c) shall apply to a person who is acting merely in a professional capacity.
Thus as per the provisions of Companies Act, 2013, "Promoter is a person who originates a scheme for the formation of the company, gets the memorandum and articles prepared, executed and registered and finds the first directors, settles the terms of preliminary contracts and prospectus and makes arrangements for advertising and circulating the prospectus and placing the capital".
The term 'promoter' is not just a term of law. It is term of business i.e. this term is to be understood in the practical business sense.

Q.26. Answer the following question:
Define the term 'Small Company' as contained in the Companies Act, 2013.
(4 marks; 2015 - May)

Answer:
Small Company:
As per Sec. 2(85) of the Companies Amendment Act, 2017
Small company means a company other than a public company
(a) Paid up share capital of which does not exceed fifty lakh rupees or a higher prescribed amount which shall not be more than ten crore rupees, and
(b) Turnover of which as per its of Profit and Loss Account for the immediately preceding financial year does not exceed two crore rupees or a higher prescribed amount which shall not be more than one hundred crore rupees.
Provided that nothing in this clause shall not apply to:
(A) A holding company or a subsidiary company
(B) A company registered u/s 8, or
(C) A company or body corporate governed by any special Act.

Q.27. Explain the concept of "Dormant Company" as envisaged in the Companies Act, 2013.
(4 marks; 2016-May)

Answer:
Dormant Company:
As per Sec. 455 of Companies Act, 2013, where a company is formed and registered under this Act, for a future project or to hold an asset or intellectual property and has no significant accounting transaction, such a company or an inactive company may make an application to the Registrar in such manner as is prescribed under Rule 3 of Companies (Miscellaneous) Rules, 2014 for obtaining the status of a dormant company.
"Inactive Company" means a company which has not been carrying on any business or operation, or has not made any significant accounting transaction during the last two financial year, or has not filed financial statements and annual returns during the two financial years.
"Significant Accounting transaction" means any transaction other than:
1. Payment of fees by a company to the Registrar;
2. Payment made by it to fulfill the requirements of this Act, or any other law.
3. Allotment of shares to fulfill the requirement of this Act, and;
4. Payment for maintenance of its office and records.

Q.28. K Ltd. was in the process of incorporation. Promoters of the company signed an agreement for the purchase of certain furniture for the company and payment was to be made to the suppliers of furniture by the company after incorporation. The company was incorporated and the furniture was received and used by it. Shortly after incorporation, the company went into liquidation and the debt could not be paid by the company for the purchase of the above furniture. As a result supplier sued the promoters of the company for the recovery of money.
Examine whether promoters can be held liable for the payment under the following situations:
(i) When the company has already adopted the contract after incorporation?
(ii) When the company makes a fresh contract with the suppliers in substitution of pre-incorporation contract?
(6, 8 marks; 2001 - Nov)

Answer:
The promoters remain personally liable on a contract made on behalf of a company which is not yet in existence. Such a contract is deemed to have been entered into personally by the promoters and they are liable to pay damages for failure to perform the promises made in the company's name, (Scot v. Lord Ebury) even though the contract expressly provided that only the company shall be answerable for performance.
In Kelner v. Baxter also it was held that the persons signing the contracts viz. Promoters were personally liable for the contract.

Further, a company cannot ratify a contract entered into by the promoters on its behalf before its incorporation. Therefore, it cannot by adoption or ratification obtain the benefit of the contract purported to have been made on its behalf before it came into existence as ratification by the company when formed is legally impossible.

The company can, if it desires, enter into a new contract, after its incorporation with the other party. The contract may be on the same basis and terms as given in the pre-of the pre-incorporation contract made by the promoters. The adoption of the pre-incorporation contract by the company will not create a contract between the company and the other parties even though the option of the contract is made as one of the objects of the company in its Memorandum of Association. It is, therefore, safer for the promoters acting on behalf of the company about to be formed to provide in the contract that: (a) if the company makes a fresh contract in terms of the pre-incorporation contract, the liability of the promoters shall come to an end: and (b) if the company does not make a fresh contract within a limited time, either of the parties may rescind the contract.

Thus applying the above principles, the answers to the questions as asked in the paper can be answered as under:

(i) The promoters in the first case will be liable to the suppliers of furniture. There was no fresh contract entered into with the suppliers by the company. Therefore, promoter's continue to be held liable in this case for the reasons given above.

(ii) In the second case obviously the liability of promoters comes to an end provided the fresh contract was entered into on the same terms as that of pre-incorporation contract.

Q.29. Teresa Ltd. is a company registered in New York (U.S.A.). The company has no place of business established in India, but it is doing online business through data interchange in India. Explain with reference to relevant provisions of the Companies Act, 2013 whether Teresa Ltd. will be treated as Foreign Company. (6 marks; 2018 - Nov)

Answer:

As per Sec. 2(42) of the Companies Act, 2013, Foreign company means any company or body corporate incorporated outside India which:

(a) has a place of business in India whether by itself or through an agent physically or through electronic mode; and

(b) conducts any business activity in India in any other manner.

As per Rule given in the companies (Specification of Definitions Details) Rules, 2014, term "Electronic mode", means carrying out electronically based, whether main server is installed in India or not including, but not limited to:

(i) Business to business and business to consumer transactions, data interchange and other digital supply transactions;

(ii) Offering to accept deposits or inviting deposits or accepting deposits or subscriptions in securities, in India or from citizens of India;

(iii) Financial statements, web based marketing, advisory and transactional services, database services and products, supply chain management;

(iv) Online services such as telemarketing, telecommuting, telemedicine, education and information research; and

(v) All related data communication services whether conducted by e-mail, mobile devices, social media, cloud computing, document management, voice or data transmission or otherwise;

Present Case:

In this case, Teresa Ltd. is a company registered in New York (U.S.A.). The company has no place of business established in India, but doing online business through data interchange in India. As the company has no place of business in India but carrying business through electronic mode as covered in above rule. So, Teresa Ltd. will be treated as Foreign Company.

Q.30. State whether the following statement is True or False and give reasons: An ultra-vires transaction will not effect the right to acquire the property of a Company. (1 mark; 2008 - Nov)

Answer:

True: In case of ultra vires contracts position of a company is like a minor, it can take the benefit but it cannot be made responsible. If a company acquires a property which is ultra vires, still it represents its money, hence the company will have a valid title.
[Ad Sait Vs Bank of Mysore, 1930]

Q.31. The object clause of the Memorandum of Association of RST Limited authorises it to publish and sell text-books for students. The company, however, entered into an agreement with Q to supply 100 laptops of worth Rs. 5 lac for resale purposes. Subsequently, the company refused to make payment on the ground that the transaction was ultra vires the company. Examine the validity of the company's refusal for payment to Q under the provisions of the Companies Act, 2013. (5 marks; 2010 - May)

Answer:

According to Companies Act, 2013 the powers of the company are limited to:

(i) Express powers i.e. powers expressly given by the Memorandum or conferred by the Companies Act, 2013 or other statute and;

(ii) Implied Powers I.e. Powers reasonably incidental or necessary to the company's main purpose.

The acts beyond the powers of a company are ultra vires and void and cannot be ratified even though every member of the company may have given his consent. [Ashbury Railway Carriage Company vs Riche]

The objects clause therefore is of fundamental Importance to the shareholder, creditors and others.

The object clause enables shareholders, creditors or others to know what its powers are and what is the range of its activities and enterprises.

Present Case:

In the given problem, the main object of RST Limited is to publish and sell textbooks for students. It therefore has no power to enter into an agreement with Q to supply 100 laptops. Such act can never be treated as express or implied power of the company. Q is deemed to be aware of the lack of powers of RST Limited. Thus, Q cannot enforce the agreement or liability against RST Limited, Hence the refusal of the company for the payment to Q is valid. [Ganga Metal Refining Company (Private) Limited CIT case (1963) 38 CC]

Q.32. Explain the doctrine of 'Indoor Management' as applicable in case of companies. Explain also the circumstances in which an outsider dealing with a company cannot claim any relief on the basis of doctrine of 'Indoor Management'. (8 marks; 2012 - May)

Answer:

The doctrine of Indoor Management is an exception to doctrine of Constructive Notice,

As per the doctrine of Indoor Management, the persons dealing with the company have right to assume that as far as the internal proceeding of the company are concerned everything has been done properly. It is necessary to read the registered documents and to see that the proposed dealing is not inconsistent therewith. They are not required to do anything more as per the regularity of the internal proceeding. This disadvantage of doctrine of constructive notice is called the Doctrine of Indoor Management. [According to the rule in Royal British Bank v Turquand].

In this case the directors of RBB also gave a bond to T. The Article empowered the directors to issue such bonds under the authority of a proper resolution. In fact no such resolution was passed. Notwithstanding that, it was held that T could sue on the bonds on the ground that he was entitled to assume that the resolution had been duly passed. Thus, the persons dealing with the company has notice of irregularity or where the person dealing with the company is put upon on inquiry or when an instrument purporting to be enacted on behalf of the company is a forgery.

The doctrine of Indoor Management is based on the maxim omnia praesumunturritesse acts (all things are presumed to have been done rightly). The doctrine seeks to protect outsiders against the company. Exceptions:

The doctrine of indoor management is subject to the following exceptions:

1. Knowledge of irregularity: Under the rule of indoor management the benefit cannot be claimed if a person dealing with a company has the knowledge of the irregularity in its internal management [Howard V. Patent Ivory Manufacturing Co. (1888) 38 Ch. D. 156.]
2. Acts void ab initio and forgery: The doctrine of indoor management will not be used, where the acts done in the name of the company are void ab initio. The doctrine is applicable only to those irregularities that otherwise might affect a genuine transaction. It does not apply to forgery. A company cannot be made liable for forgeries done by its officers [Ruben v. Great Fingall Consolidated Co.]
3. No knowledge: A person having no knowledge of Articles cannot ask for protection under indoor management.
4. Negligence: If the irregularities are discovered by the persons dealing with a company, on making proper inquires, he cannot claim the advantages of the rule of indoor management. No protection of the rule is possible, where the circumstances surrounding the contracts are so suspicious as to invite inquiry and the outsider dealing with the Co. does not make proper inquiry [Under Wood v. Bank of Liver Pool]
5. Act outside the scope of apparent authority: If an officer of a company enters into a contract with a third party and if the act of the officer is beyond the scope of his authority, the company is not bound.

Q.33. "The Doctrine of Indoor Management always protects the persons (outsiders) dealing with a company." Explain the above statement. Also, state the exceptions to the above rule. (5 marks; 2015 - May)

Answer:

As per the Companies Act, 2013, there is a provision which protects the outsiders to the company who are dealing with the company which is known as 'The doctrine of Indoor Management". As per this provision, persons dealing with the company though are supposed to have satisfied themselves regarding the competence of the company, can safely presume that internal proceedings have been observed properly or complied with. They need not inquire into the regularity of internal proceeding. This provides the protection to those persons dealing with the company. As the outsider is unknown about the internal proceedings of the company so that he can protect himself for being ruled by the certain circumstances based on the reasonable and justifiable grounds. They are bound to examine the registered documents of the company and ensure the consistency of the proposed dealing, but are not bound to do more. But there are certain exceptions to this rule of indoor management so that in such ground outsider cannot protect himself on the basis of doctrine of Indoor Management.

Exceptions of Doctrine of Indoor Management:

Please refer 2012 - May

Q.34. Explain the doctrine of 'Indoor management' in brief.

The Secretary of a Company issued a share certificate to 'A' under the Company's seal with his own signature and the signature of a Director forged by him. 'A' borrowed money from 'B' on the strength of this certificate. 'B' wanted to realise the security and requested the company to register him as a holder of the shares. Explain whether 'B' will succeed in getting the share registered in his name. (5 marks; 2007-May)

Answer:

Doctrine of Indoor Management:

The doctrine of indoor management is an exception to rules of constructive notice. As per the doctrine of indoor management, the persons dealing with the company have right to assume that as far as the internal proceeding of the company are concerned everything has been done properly, it is necessary to read the registered documents and to see that the proposed dealing is not inconsistent therewith. They are not required to do anything more as per the regularity of the internal proceeding. This disadvantage of doctrine of constructive notice is called the Doctrine of Indoor Management. [According to the rule in Royal British Bank V Turquand]

The doctrine of indoor management is based on the maxim omnia praesumunturritesse acts (all things are presumed to have been done rightly). The doctrine seeks to protect outsiders against the company. Exceptions: The doctrine of indoor management is subject to the following exceptions:

1. Knowledge of irregularity: Under the rule of indoor management the benefit cannot be claimed if a person dealing with a company has the knowledge of the irregularity in its internal management [Howard V. Patent Ivory Manufacturing Co. -(1888) 38 Ch. D. 156.]
2. Acts void ab initio and forgery: The doctrine of indoor management will not be used, where the acts done in the name of the company are void ab initio. The doctrine is applicable only to those irregularities that otherwise might affect a genuine transaction. It does not apply to forgery. A company cannot be made liable for forgeries done by its officers [Rulen V. Great Fingall Consolidated Co.]
3. No knowledge: A person having no knowledge of Articles cannot ask for protection under indoor management.
4. Negligence: If the irregularities are discovered by the persons dealing with a company, on making proper inquires, he cannot claim the advantages of the rule of indoor management. No protection of the rule is possible, where the circumstances surrounding the contracts are so suspicious as to invite inquiry and the outsider dealing with the Co. does not make proper inquiry [Under Wood V Bank of Liver Pool].
5. Act outsides the scope of apparent authority: If an officer of a company enters into a contract with a third party and if the act of the officer is beyond the scope of his authority, the company is not bound. The doctrine of Indoor Management as discussed in the Royal British Bank vs. Turquand (1956) 6E&B 327. In this case, the directors of RBB also gave a bond to T. The Article empowered the directors to issue such bonds under the authority of a proper resolution. In fact no such resolution was passed. Notwithstanding that, it was held that T could sue on the bonds on the ground that he was entitled to assume that the resolution had been duly passed. Thus, the persons dealing with the company has notice of irregularity or where the person dealing with the company is put upon on inquiry or when an instrument purporting to be enacted on behalf of the company is a forgery.

Present Case:

In the instant problem the doctrine of indoor management can apply only In case of irregularities which might otherwise affect the transaction but it cannot apply to forgery which must be regarded as nullify. Hence, 'B' will not succeed in getting the share registered in his name.

Q.35. The Articles of Association of XYZ Ltd. provides the Board of Directors has authority to issue bonds provided such issue is authorized by the shareholders by a necessary resolution in the general meeting of the company. The company was in dire need of funds and therefore, it issued the bonds to Mr. X without passing any such resolution in general meeting. Can Mr. X recover the money from the company? Decide referring the relevant provisions of the Companies Act, 2013. (4 marks; 2016-Nov)

Answer:

Provision:

According to the Doctrine of Indoor Management, if an act is authorised by the articles or memorandum, an outsider is entitled to assume that alt the detailed formalities for doing that act have been observed.

Case Study:

As per the case of the Royal British Bank Vs. Turquand [1956] 6E & B 327, the directors of R.B.B. Ltd. gave a bond to T. The articles empowered the directors to issue such bonds under the authority of a proper resolution. In fact, no such resolution was passed. Notwithstanding that, it was held that T could sue on the bonds on the ground that he was entitled to assume that the resolution had been duly passed. This is the doctrine of indoor management, popularly known as Turquand Rule.

Present case:

Since the given question is based on the above facts, accordingly here in this case Mr. X can recover the money from the company considering that all required formalities for the passing of the resolution have been duly complied.

Q.36. The persons (not being members) dealing with the company are always protected by the doctrine of Indoor management. Explain. Also, explain when doctrine of Constructive Notice will apply. (6 marks; 2018-Nov)

Answer:

Doctrine of Indoor Management

According to the "Doctrine of Indoor management" the outsiders, dealing with the company though are supposed to have satisfied themselves regarding the competence of the company to enter into the proposed contracts are also entitled to assume that as far as the internal compliance to procedures and regulations by the company is concerned, everything has been done properly. They are bound to examine the registered documents of the company and ensure that the proposed dealing is not inconsistent therewith, but they are not bound to do more. They are fully entitled to presume regularity and compliance by the company with the internal procedures as required by the Memorandum and the Articles. This doctrine is a limitation of the doctrine of "constructive notice" and popularly known as the rule laid down in the celebrated case of Royal British Bank V. Turquand. Thus, the doctrine of indoor management aims to protect outsiders against the company.

Doctrine of Constructive Notice

In consequences of the registration of the memorandum and articles of the company with the Registrar of Companies, a person dealing with the company is deemed to have constructive notice of their contents (T.R. Pratt (Bombay) Ltd. V.E.D. Sassoon & Co. Ltd.) This is because these documents are constructed as 'Public documents' Accordingly, if a person deals with a company in a manner incompatible with the provisions of the aforesaid documents or enters into transaction which is ultra vires these documents, he must do so at his peril.

The doctrine of constructive notice is not a positive one but a negative one like that of estoppels of which it forms parts. It operates only against the person who has been dealing with the company but not against the company Itself; consequently he is prevented from alleging that he did not know that the constitution of the company rendered a particular act or a particular delegation of authority ultra vires.

There is one limitation to the doctrine of constructive notice of the Memorandum and the Articles of a company.

The outsiders dealing with the company are on their part entitled to assume that as far as the internal proceedings of the company are concerned, everything has been done properly in accordance with the Memorandum and Articles and the Act. They are only bound to read the registered documents and satisfy themselves that the proposed dealing is not inconsistent

therewith, but are not bound to do more; they need not inquire into the regularity of the internal proceedings as required by the Memorandum and the Articles.
This limitation of the Doctrine of Constructive Notice is known as the 'Doctrine of Indoor Management' or the rule laid down in the celebrated case of Royal British Bank V. Turquand. Thus, whereas the Doctrine of Constructive Notice protects the company against outsiders, the Doctrine of Indoor Management seeks to protect outsiders against the company.

Q.37. Explain the meaning of 'Corporate Veil[1]. Under what circumstances it can be lifted? (6 marks; 1998 - Nov)

Q.38. A company is a person separate from its members.' Explain. Examine the circumstances under which the Courts may disregard the Company's Corporate Personality. (12 marks; 2000- Nov)

Q.39. Explain dearly the meaning of Lifting the Corporate Veil, as applicable in case of companies incorporated under the Companies Act, 2013. Under what circumstances the veil of a company can be lifted by the court? (5 marks; 2002 - Nov)

Q.40. Answer the following:
Some of the creditors of M/s Get Rich Quick Ltd. have complained that the company was formed by the promoters only to defraud the creditors and circumvent the compliance of legal provisions of the Companies Act, 2013. In this context they seek your advice as to the meaning of corporate veil and when the promoters can be made personally liable for the debts of the company. (5 marks; 2004 - Nov)

Answer:
As per the judicial point of view, a company is a separate legal entity different from its members (Saloman Vs. Saloman& Co. Ltd.). When there are cases of dishonesty and fraudulence in incorporation, the law lifts the veil. This veil is a fictional veil and not a wall between the company and its members, lifting the corporate veil may be defined as looking behind the company as a legal person and identifying the persons who are behind the scene and are responsible for the preparation of fraud.
The circumstances under which the court may lift the corporate veil may be broadly divided into following two heads:
1. Judicial Interpretations.
2. Statutory Provisions.
1. Judicial Interpretations:
Following are the cases under which the court has lifted the corporate veil:
(i) Avoidance of welfare legislation: Where the device of incorporation is used for reducing the amount to be paid by way of bonus to the workmen, the Supreme Court can upheld the lifting of the veil to look at the real transactions: [Workmen of Associated Rubber Industry v. Associated Rubber Co. (1986)].
(ii) Protection of Revenue: Where the medium of the company has been used for tax evasion or to circumvent tax obligation, courts have lifted the veil and looked at the realities of situation. [In Sir Dinashaw Mancekjee Petit, Re (1927)].
(iii) Where company is a sham: When the court finds that company is a mere cloak or sham and is used for some illegal or improper purpose, it may lift veil. The leading case on this was P.N.B. Finance, v. Shital Prashad(1983), where a person borrowed money from a company and invested it into three different companies in all of which he and his sons were the only members, the lending company was advised to bring together the assets of all the three companies, as they were created to do fraud with the lending company.
(iv) Where the company is acting as the agent of the shareholders:

Where a company Is devised to act as an agent of its shareholders or of another company it will be responsible for its acts. However, it will be a question of fact every case whether the company is acting as agent for its shareholders.

(v) Determination of character: Test of control is adopted in the cases when the trade is conducted with enemy country. In such cases the court will lift the veil at the times of war to see whether a company is controlled by enemy aliens. Consequently a company registered in England may be 'alien enemy' f its agents or the persons in defect control of its affair, are alien. (Daimler Co. Ltd. Vs. Continental Tyre And Rubber Co. Ltd. (1916)]

(vi) Prevention of fraud or improper conduct: The court will disregard the separate existence of the company, where it is shown the company is formed for evading contractual and statutory obligations [Gilford Motor Co. Ltd. v. Horne. (1933)].

2. Statutory Provision: Cases are as follows:

(i) Number of member below statutory minimum [Sec. 3A of the Companies Amendment Act, 2017]: If at any time the number of members of a company is reduced, in the case of a public company, below seven, in the case of a private company, below two, and the company carries on business for more than six months while the number of members is so reduced, every person who is a member of the company during the time that it so carries on business after those six months and is cognisant of the fact that it is carrying on business with less than seven members or two members, as the case may be, shall be severally liable for the payment o; the whole debts of the company contracted during that time and may be severally sued therefor."

(ii) Failure to refund application money [Sec. 39]: In case of issue of shares by a company to the public, if the company is unable to receive minimum subscription within thirty days from the first issue of the prospectus then ail moneys received from applicants shall have to be returned. If the amount is not refunded within fifteen days from the closure of issue the directors shall be liable to repay the money with interest at the rate of fifteen percent per annum [Rule 11 of Companies (Prospectus and allotment of Securities) Rules, 2014].

(iii) Fraudulent trading [Sec. 339]: On the winding up procedure of the company, if it is found that any business of the company has been carried on to defraud creditors, the court shall declare those persons personally liable for the debts and other liabilities of the company.

(iv) Group Accounts [Sec. 129]: Where the company has subsidiaries and group accounts, than the principle of separate legal entity may be disregarded. Along with the own profit and loss account and balance sheet, subsidiaries and group accounts have also to be laid down.

Q.41. Explain clearly the concept of "perpetual-succession" and "common-seal" in relation to a company Incorporated under the Companies Act, 2013/Companies Amendment Act, 2015. (5 marks; 2003 - May)

Answer:

Perpetual Succession:

Unlike a natural person a company never dies. It is an entity with a perpetual succession. The life of the company does not depend upon the life of any of its members; it is independent from the lives of its members. Even the death, insolvency, mental' disorder or retirement of a member does not effect the corporate existence of the company. It is created by the process of law and can be put to an end only by the process of law. Members may come and .member may go but the company will carry on to exist unless it is wound up. The company continuous to exist even if all its members are dead. The leading case on this point Is [K/9 Meat supplies (Guildford Ltd.)] where all the members of the private company were killed by a bomb but still the company was deemed to survive.

A company is of perpetual succession in the sense that inspite of the change in the membership of the company it persists to exist. It is generally said that members may come and members may go but the company goes on forever. Thus, a company never dies.

Common Seal:

Since a company has no physical existence, it cannot sign its name on a contract. So it takes the help of seal which is used as a substitute for its signature.

Companies Act, 2013 required common seal to be affixed on certain documents (such as BOE, share certificate etc).

However as per Companies Amendment Act, 2015, the use of Common Seal has been made optional. All such documents which required affixing the common seal may now instead be signed by two Directors or one Director and a Company Secretary of the company.

Q.42. State whether the following statement is correct or incorrect:
(iii) A company is a legal person but not a citizen. (1 mark; 2011 - Nov)

Answer:

(iii) Correct

Q.43. State whether the following statement is correct or incorrect:
The concept of legal personality of a company is of absolute nature. (1 mark; 2014 - May)

Answer:

This statement is correct.

State whether the following statement is correct or incorrect:
A limited company can become a partner in a partnership firm. (1 mark; 2015-Nov)

Answer:

Correct: As per Sec. 4 of the Indian Partnership Act, 1932, partnership is a relation between persons. A company being an artificial person falls within the definition of a person capable of contracting. Therefore, a company can become a partner in a partnership firm.

Q.44. F, an assesses, was a wealthy man earning huge income by way of dividend and interest. He formed three Private Companies and agreed with each to hold a bloc of investment as an agent for it. The dividend and interest income received by the company was handed back to F as a pretended loan. This way F divided his income into three parts in a bid to reduce his tax liability.
Decide, for what purpose three companies were established? Whether the legal personality of all the three companies may be disregarded? (5 marks; 2009 - May)

Answer;

The case is similar to that of Sir DinshawManeckjee Petit, and Juggilal vs. Commissioner of Income Tax. The three companies were formed by Mr. F purely and simply as a means of avoiding tax and the companies were nothing more than the assessee himself. Therefore, the whole idea of Mr. F was simply to split his income into three parts with a view to evade tax.

The legal personality of the three private companies may be disregarded because the companies were formed only to avoid tax liability and the company was nothing more than the assessee himself. It did no business, but was created simply as a legal entity to ostensibly receive the dividend and interest and to handover them over to the assessee as pretended loans. The same was upheld in Re Sir Dinshaw.

INCORPORATION OF COMPANY AND MATTERS INCIDENTAL THERETO

3. FORMATION OF COMPANY (2 QUESTIONS)

Notified Date of Section: 01/04/2014

Q.1. Mr. Ram Lai and his friend desire to incorporate a Public Company and approach you for help. Advise. **(5 marks; 2007-May)**

Answer:

Formation of Company:

Sec. 3 of the Companies Act, 2013 deals with the basic requirement with respect to the constitution of the company. In the case of a public company with or without limited liability any 7 or more persons can form a company for any lawful purpose by subscribing their names to memorandum and complying with the requirements of this Act in respect of registration. Persons who form the company are known as promoters. It is they who conceive the idea of forming the company. They take all necessary steps for its registration.

Formation of a company involves following procedures:

1. Reservation of name by filing e-application.
2. Drafting, signing and Submission of Memorandum of Association to ROC. The documents have to be e-filed and e-stamped.
3. Drafting, signing and submission of Articles of Association electronically. Stamp duty is to be paid electronically.
4. Consent of persons nominated as Directors to act as Directors to be submitted electronically.
5. Submission of statutory declaration of compliance.
6. Obtain certificate of incorporation digitally signed by ROC.
7. Allotment of Corporate Identity Number (CIN) by ROC on and from date mentioned in certificate of incorporation.

Documents to be filed for incorporation of a company [Sec. 7(1)]:

For incorporation of a company, the following documents are to be filed:

1. Memorandum and articles of the Company duly signed by all the subscribers to the memorandum in the manner prescribed.
2. A declaration in the form INC 8 by an advocate, a Chartered Accountant or Company Secretary in practice who is engaged in the formation of the Company any by a person named in the articles as a director, manager or secretary of the Company that all requirements of this Act and the rules made thereunder in respect of registration and matters precedent and incidental thereto have been complied with.
3. An declaration from each of the subscribers to the memorandum and from persons named as the first directors, if any, in the articles that he is not convicted of any offence in connection with the promotion, formation or management of any company, or that he has not been found guilty of any fraud or misfeasance or of any breach of duty to any company under this Act or any previous company law during the preceding five years and that ail the documents filed with the Registrar for registration of the company contain information that is correct and complete and true to the best of his knowledge and belief.
4. The address for correspondence till its registered office is established.
5. Particulars of every subscriber to the memorandum alongwith proof of identity as required in Sec. 7(1)(e).
6. Particulars of the persons mentioned in the articles as first directors of the Company, the Director Identification Number, proof of identity as specified in Sec. 7(1)(e).

7. Particulars of the interests of the persons mentioned in the articles as first directors in other firms or bodies corporate alongwith their consent to act as directors of the Company in the manner prescribed.

Certificate of incorporation:

The Registrar of Companies (ROC), on the basis of documents and information furnished under Sec. 7(1) of the 2013 Act registers all documents filed for incorporation of a company and on satisfaction, issues a certificate called 'Certificate of Incorporation' in prescribed form, No. INC 11 of the Companies (Incorporation) Rules, 2014 to the effect that the company has been incorporated under the Act. [Sec. 7(2) of the 2013 Act].

Certificate of incorporation does not mean all objects are legal: The certificate only proves conclusively that it has been properly incorporated. It does not prove that all the objects mentioned in it are legal or permissible.

Leading Case: Bowman v. Secular Society Ltd.

The certificate cannot validate illegal objects. A company cannot carry out an illegal object even if it is specified in the memorandum, [e.g. if a business or product is reserved for public sector or it requires license, the business cannot be started just because it is mentioned in the memorandum.

Q.2. XYZ a One-Person Company (OPC) was incorporated during the year 2014 -15 with an authorized capital of Rs. 45.00 lakhs (4.5 lakh shares of Rs. 10 each). The capital was fully subscribed and paid up. Turnover of the company during 2014-15 and 2015-16 was Rs. 2.00 crores and Rs. 2.5 crores respectively. Promoter of the company seeks your advice in following circumstances, whether XYZ (OPC) can convert into any other kind of company during 2016-17. Please, advise with reference to relevant provisions of the Companies Act, 2013 in the below mentioned circumstances:

(i) If promoter increases the paid up capital of the company by Rs. 10.00 lakhs during 2016-17

(ii) If turnover of the company during 2016-17 was Rs. 3.00 crores. (4 marks; 2018-Nov)

Answer:

Provision:

As per Rule 3 of Companies (Incorporation) Rules, 2014, One Person Company (OPC) cannot convert voluntarily into any kind of company unless two years have expired from the date of incorporation, except where the paid up share capital is increased beyond fifty lakh rupees or its average annual turnover during the relevant period exceeds two crore rupees.

Section 18 of the Companies Act, 2013 provides that a company of any class registered under this Act may convert itself as a company of other class under this Act by alteration of memorandum and articles of the company in accordance with the provisions of Chapter II of the Act.

Present Case:

XYZ, OPC was incorporated during the year 2014-15 with share capital of forty five lakh rupees. The turnover of the company during 2014-15 and 2015-16 was two crore rupees and two and a half crore rupees respectively. As the XYZ Ltd. is proposed to be converted in other company during 2016- 17. In light of above provision we require the paid up share capital and/or turnover of that relevant period only. So paid up share capital & turnover of the years 2014-15 and 2015-16 is not relevant. The turnover and paid up share capital for 2016-17 needs to be taken into consideration.

Advice:

With reference to the above provisions advice given in following circumstances:

1. If promoter of the company increases the paid up capital by ten lakh rupees in 2016-17, then total paid up share capital of the company happens to be fifty five lakh rupees, so as per above provisions XYZ, OPC can voluntarily convert into other kind of company during 2016-17.

2. if turnover of the company during 2016-17 was three crore rupees it can voluntarily convert in other kind of company as turnover of the company during 2016-17 exceeds two crore rupees.

3A. MEMBERS SEVERALLY LIABLE IN CERTAIN CASES. (1 QUESTION)

Notified Date of Section: 09/02/2018

Q.1. A public limited company has only seven shareholders. Being all the shares paid in full, one such shareholder purchased all the shares of another shareholder in a private settlement between them reducing the no. of shareholders to six. The company continues to carry on its business thereafter. Discuss with reference to the Companies Act, 2013 the implications of this transaction on the functioning of the company (5 marks; 2019- June)

4. MEMORANDUM (1 QUESTION)

Q.2. State whether the following statement is correct or incorrect:
(i) Memorandum of Association is the Charter of the company. (1 mark; 2013-Nov)

Answer:
Correct.

5. ARTICLES (3 QUESTIONS)

Notified Date of Section: 01/04/2014

Q.1. Answer the following:
A model form of Articles contained in Table 'F' relates to a company limited by
(a) Shares
(b) Guarantee
(c) Shares and Guarantee
(d) None of the above (1 mark; 2007 - May)

Answer:
Shares

Q.2. State whether the following statement is true or false and give reasons: (ii) Every Company which is registered under the Companies Act, 2013, need not have their own Articles of Association. (1 mark; 2009 - May)

Answer:
True: As per Sec. 5 (6) of the Indian Companies Act, 2013, a company limited by shares may either frame its own set of articles or may adopt all or any of the regulations contained in Table F.

Q.3. State whether the following statement is true or false and give reasons: The articles of Association of a Company can be altered by passing an ordinary resolution in the meeting of the shareholders. (1 mark; 2009 - Nov)

Answer:
Incorrect: The Articles of association can be altered only by special resolution. This is as per Sec. 14 of the Indian Companies Act, 2013.

6. ACT TO OVERRIDE MEMORANDUM, ARTICLES, ETC.

Notified Date of Section: 01/04/2014

7. INCORPORATION OF COMPANY (5 QUESTIONS)

Notified Date of Section: 01/04/2014

Q.1. Minu Limited was incorporated by furnishing false information. As per the Companies Act, 2013, state the power of the Tribunal in this regard. (7 marks; 2017 - Dec)

Answer:

Order of the Tribunal: where a **Compaq** has been got incorporated by furnishing **false** or incorrect information or representation or by suppressing any material fact **or** information in any of the documents or declaration filed or made for incorporating such company or by any fraudulent action, the Tribunal may, on an application made to it, on being satisfied that the situation so warrants:

(a)pass such **orders,** as it may think fit, for regulation of the management of the company including changes, if any, in its memorandum and articles, in public interest or in the interest of the company and its **members** and creditors, or

(b)Direct that liability of the **members** shall be unlimited, or

(c)Direct removal of the name of the company from the register of companies, or

(d)Pass an order for the winding up of the company, or

(e)Pass such other orders as it may deem fit.

Q.2. One of the subscribers to Memorandum of Association of a company under process of incorporation is a foreign national residing outside India. State the provisions "of Companies Act, 2013 regarding authentication of his signature and address. Will the requirement of business visa be applicable to his case if he is a person of Indian origin or overseas citizen of India? (4 marks; 2017 - Dec)

Answer:

Where subscriber to the memorandum is a foreign national residing outside India:

(a)In a country in any part of the Commonwealth, his signatures and address on the memorandum and articles of association and proof of identity shall be notarized by a Notary (Public) in that part of the Commonwealth.

(b)in a country which is a party to the Hague Apostille Convention, 1961, his signatures and address on the memorandum and articles of association and proof of identity shall be notarized before the Notary (Public) of the country of his origin and be duly apostillised in accordance with the said Hague Convention.

(c)in a country outside the Commonwealth and which is not a party to the Hague Apostille Convention, 1961, his signatures and address on the memorandum and articles of association and proof of identity, shall be notarized before the Notary (Public) of such country and the certificate of the Notary (Public) shall be authenticated by a Diplomatic or Consular Officer empowered in this behalf under **Section 3 of the Diplomatic and Consular Officers (Oaths and Fees) Act, 1948** (40 of 1948) or, where there is no such officer by any of the officials mentioned in **Section 6 of the Commissioners of Oaths Act, 1889** (52 and 53 Vic.C.10), or in any Act amending the same;

(d)Visited in India and intended to incorporate a company, in such case the incorporation shall be allowed if, he/she is having a valid Business Visa.

Explanation: For the purposes of this clause, it is hereby clarified that, in case of Person is of Indian Origin or Overseas Citizen of India, requirement of business Visa shall not be applicable.

Q.3. State the documents and information for registration of One Person Company (OPC) required to be filed with the Registrar of Companies. (6 marks; 2016-May)

Answer:

Documents and Information for registration of a One Person Company (OPC):

For the registration of the One Person Company (OPC), following documents and information are required to be filed with the Registrar within whose jurisdiction the registered office of the company is proposed to be situated -

1. Memorandum and Articles:

The Memorandum and Articles of the company duly signed by the subscriber to the Memorandum in such manner as prescribed in Rule 13 of Companies (Incorporation) Rules, 2014. (The Memorandum of OPC shall indicate the name of the other person, who shall, in the event of the subscriber's death or his incapacity to contract, become the member of the company.)

2. Declaration of Compliance:

A declaration in Form No. INC.8 by person who is engaged in the formation of the company (an advocate, a Chartered Accountant, a Cost Accountant or a Company Secretary in practice) and by a person named in the Articles (director, manager or secretary of the company), that all the requirements of this Act and the rules made thereunder in respect of registration and matters precedent or incidental thereto have been complied with.

3. Declaration from Subscribers to Memorandum:

A declaration from the subscriber to the Memorandum and from person named as the first director, if any, in the Articles stating that he is not convicted of any offence in connection with the promotion, formation or management of any company, or that he has not been found guilty of any fraud or misfeasance or of any breach of duty to any company under this Act or any previous company law during the last five years, and that all the documents filed with the Registrar for registration of the company contain information that is correct and complete and true to the best of his knowledge and belief.

4. Address for Correspondence:

The address for correspondence till its registered office is established.

5. Particulars of the subscriber:

The particulars (names, including surnames or family names, residential address, nationality) of every subscriber to the Memorandum alongwith the proof of identity, and in the case of a subscriber being a body corporate, such particulars as may is prescribed under Rule 16 of Companies Incorporation Rules, 2014.

6. Particulars of persons mentioned in the Articles:

The particulars (names, Including surnames or family names, the Director Identification Number, residential address, nationality) of persons mentioned In the Articles as the first directors of the company and such other particulars Including proof of identity as is prescribed, under Rule 17 of Companies Incorporation Rules 2014.

7. Particulars of interest of persons:

The particulars of the interests of the persons mentioned in the Articles as the first directors of the company in other firms or bodies corporate along with their consent to act as directors of the company in such form and manner as is prescribed under Rule 17 of Companies Incorporation Rules, 2014.

Note: Particulars provided in this provision shall be of the individual subscriber and not of the professional engaged in the incorporation of the company (The Companies (incorporation) Rules, 2014).

Q.4. Attempt the following:
(Decide, under the Companies Act, 2013 whether Mr. Prabhu can incorporate a new company using the phrase "Electoral Trust" with the name of the company.
(4 marks; 2014-May)

Answer:
Provision:
According to the Companies Act, 2013, if any person wants to incorporate a new company then the name of the proposed company should be such one that is allowed under the Companies act and Emblems of Names act. The word "Electoral Trust" Is specifically given for the Sec. 8 companies. It means as per Companies Act, 2013, if any person wants to form a Sec. 8 Company then he can use the phrase "Electoral Trust" with the name of the company otherwise he cannot use it. [As per Ministry of Corporate Affairs vide General Circular No. 12/2013 dated 28.06.2013]
Present Case:
Mr. Prabhu wants to incorporate a new company using the phrase "Electoral Trust " with the name of company. He can do so by complying with the provision of above mentioned circular i.e. only if he wants to form Sec. 8 Company.

Q.5. Which documents are required to be filed with the Registrar of Companies at the time of registration of a company under the provisions of the Companies Act, 2013?
(4 marks; 2011 - May)

Answer:
Documents required to be filed with ROC at the time of Incorporation of company:
As per Sec. 7 of Companies Act, 2013, There shall be filed with the Registrar within whose jurisdiction the registered office of a company is proposed to be situated, the following documents and information for registration, namely:
(a) Memorandum and Article: The Memorandum and Articles of the company duly signed by all the subscribers to the memorandum in such manner as prescribed in Rule 13 of Companies (Incorporation) Rules, 2014.
(b) Declaration of Compliance: A declaration in the Form No. INC.8 by an advocate, a Chartered Accountant, Cost Accountant or Company Secretary in practice, who is engaged in the formation of the company, and by a person named in the articles as a director, manager or secretary of the company, that ail the requirements of this Act and the rules made thereunder in respect of registration and matters precedent or incidental thereto have been complied with.
(c) Declaration from Subscribers to Memorandum:
An declaration from each of the subscribers to the memorandum and from persons named as the first directors, if any, in the articles that he is not convicted of any offence in .connection with the promotion,, formation or management of any company, or that he has not beer) found guilty of any fraud or misfeasance or of any breach of duty to any company under this Act or any previous company law during the preceding five years and that all the documents filed with the Registrar for registration of the company contain information that is correct and complete and true to the best of his knowledge and belief.
(d) Address far Correspondence:
The address for correspondence till its registered office is established
(e) Particulars of Subscribers:
The particulars of name, including surname or family name, residential address, nationality and such other particulars of every subscriber to the memorandum along with proof of identity, as may be prescribed and in^ the case of a subscriber being a body corporate, such particulars as is prescribed under Rule 16 of Companies Incorporation Rule 2014.
(f) Particulars of Persons mentioned in Articles:

The particulars of the persons mentioned in the articles as the first directors of the company, their names, including surnames or family names, the Director Identification Number, residential address, nationality and such other particulars including proof of identity as is prescribed under Rule 17 of Companies Incorporation Rule 2014. .

(g) Particulars of Interest of Persons:

The particulars of the interests of the persons mentioned in the articles as the first directors of the company in other firms or bodies corporate along with their consent to act as directors of the company in such form and manner as is prescribed under Rule 17 of Companies Incorporation Rule 2014.

8. FORMATION OF COMPANIES WITH CHARITABLE OBJECTS, ETC. (2 QUESTIONS)

Notified Date of Section: 01/04/2014

Q.1. Mr. V, alongwith six other persons desires to float a company for charitable purposes, as permissible under Section 8 of the Companies Act, 2013. He seeks your advise about the procedure to be followed to give effect to the above proposal. Advise him.

(5 marks; 2007 - Nov)

Answer:

Persons/Associations eligible to be registered and licensed as Companies under Sec. 8 of Companies Act, 2013.

A person or association of persons may propose to be registered under the Act as a Limited Company:

(a) with the objects of promotion of commerce, art, science, sports, education, research, social welfare, religion, charity, environment protection or any such other object;

(b) Intends to apply its profits if any, or other income in promoting its objects; and

(c) Intends to prohibit payment of any dividend to its members.

Procedure to Obtain license is given in Companies (Incorporation) Rules, 2016:

As per Rule 19,

1. A person or an association of persons (hereinafter referred to in this rule as "the proposed company"), desirous of incorporating a company with limited liability under Section 8(1) without the addition to its name of the word "Limited", or as the case may be, the words "Private Limited", shall make an application in Form INC-32 (SPICe) [Companies Incorporation) Sixth Amendment Rules, 2019 w.e.f 15th August, 2019] along with the fee as provided in the Companies (Registration Offices and Fees) Rules, 2014 to the Registrar for a license under sub-section (1) of section 8.
2. The memorandum of association of the proposed company shall be in Form No. INCA 3.
3. The application under sub-rule (1) shall be accompanied by the following documents, namely:

(a) the memorandum and articles of association of the proposed company;

(b) the declaration in Form No. INC.14 by an Advocate, a Chartered Accountant, Cost Accountant or Company Secretary in practice, that the memorandum and articles of association have been drawn up in conformity with the provisions of Section 8 and rules made thereunder and that all the requirements of the Act and the rules made thereunder relating to registration of the company under sec. 8 and matters incidental or supplemental thereto have been complied with;

(c) an estimate of the future annual income and expenditure of the company for next three years, specifying the sources of the income and the objects of the expenditure;

(d) the declaration by each of the persons making the application in Form No. INCA5.

All privileges and obligations of limited companies to apply to 'Sec. 8 Companies' [Sec. 8(2)].

The company registered under Sec. 8 shall enjoy all the privileges and be subject to all the obligations of limited companies.

Revocation of license: The Central Government may by order revoke the licence of the company where the company contravenes any of the requirements or the conditions of this sections subject to which a licence is issued or where the affairs of the company are conducted fraudulently, or violative of the objects of the company or prejudicial to public interest and on revocation the Registrar shall put 'Limited' or 'Private Limited' against the company's name in the register. But before such revocation, the Central Government must give it a written notice of its intention to revoke the licence and opportunity to be heard in the matter.

Intimation to Registrar of Revocation of License: Where the license is granted to a company registered under Sec. 8 has been revoked, the company shall apply to the Registrar in Form No. INC20 along with the fee to convert its status and change of name accordingly. [Rule 23 of Companies (Incorporation) Rules, 2014]

Q.2. A group of individuals intend to form a club namely 'Budding Pilots Flying Club' as limited liability company to impart class room teaching and aircraft flight training to trainee pilots. It was decided to form a limited liability company for charitable purpose under Section 8 of the Companies Act, 2013 for a period of ten years and thereafter the club will be dissolved and the surplus of assets over the liabilities, if any, will be distributed amongst the members as a usual procedure allowed under the Companies Act. Examine the feasibility of the proposal and advise the promoters considering the provisions of the Companies Act, 2013. **(5 marks; 2019-May)**

9. EFFECT OF REGISTRATION

Notified Date of Section: 01/04/2014

10. EFFECT OF MEMORANDUM AND ARTICLES (1 QUESTION)

Notified Date of Section: 01/04/2014

Q.1. What is the effect of the registration of the Memorandum of Association of a company on

(i) The subscribers of the Memorandum;

(ii) Such other persons as may from time to time become members of the company;

(iii) The company and

(iv) Outsiders dealing with the company? **(4 marks; 2014 - June)**

Answer:

When the Memorandum of Association of a company has been registered, it has the following effect:-

(i) The signatories become members of the company, the entry of their names in the register of members not being legally necessary and they are bound to observe all the provisions of the memorandum.

(ii) Such other persons as may from time to time become members of the company are bound by the memorandum, as if it had been signed by them, to observe all the provisions thereof.

(iii) The company is bound to observe all the provisions of its memorandum of association, as if it had been signed by the company.

(iv) The memorandum of association of a company is a public document, and every person dealing with the company is deemed to have notice of its contents. If a person deals with a company in a way contrary to its memorandum, he must take its consequences,

10A. COMMENCEMENT OF BUSINESS ETC.

11. COMMENCEMENT OF BUSINESS ETC.

Notified Date of Section: 01/04/2014

12. REGISTERED OFFICE OF COMPANY (1 QUESTION)

Notified Date of Section: 01/04/2014

Q.1. What is the importance of registered office of a company? State the procedure for shifting of registered office of the company from one State to another State under the provisions of the Companies Act, 2013. (8 marks each; 2011 - Nov)

Answer:

Registered Office Clause

State in which registered office will be situated has to be specified in Memorandum of Association under Registered office clause. Registered Office is really the permanent address of the company. It is residence of the company. It decides the domicile of the company.

Registered Office of Company as per Sec. 12.

1. A company shall, within thirty days of its incorporation and at all times thereafter, have a registered office capable of receiving and acknowledging all communications and notices as may be addressed to it. [Sec. 12(1)].
2. The company shall furnish to the Registrar in Form No. INC. 22 verification of its registered office within a period of thirty days of its incorporation in such manner as is prescribed under Rule 25 of Companies Incorporation Rules, 2014.
3. Every company shall -

(a) Paint or affix its name, and the address of its registered office, and keep the same painted or affixed, on the outside of every office or place in which its business is carried on, in a conspicuous position, in legible letters, and if the characters employed therefor are not those of the language or of one of the languages in general use in that locality, also in the characters of that language or of one of those languages; [Sec. 12(3)(a)].

(b) Have its name engraved in legible characters on its seal, if any; [Sec. 12(3)(b)].

(c) Get its name, address of its registered office and the Corporate Identity Number along with telephone number, fax number, if any, e- mail and website addresses, if any, printed in all its business letters, billheads, letter papers and in all its notices and other official publications; and

(d) Have its name printed on hundies, promissory notes, bills of exchange and such other documents as may be prescribed.

Importance of Registered Office Clause

Companies Act, 2013 and other Acts provide great importance to registered office. It actually decides domicile of a company.

1. Serving of notice on company: Any document can be served on a company by sending it by post under certificate of posting or by registered post or by speed post or courier or by hand delivery, or by means of such electronic or other mode as is prescribed under Rule 35 of Companies (Incorporation) Rules, 2014 at the registered office. [Section 20(1)]
2. Holding of AGM: Annual General Meetings of company must be held either in registered office, or in city/town/village in which registered office is situated. [Sec. 96(2)].

Provided that annual general meeting of an unlisted company may be held at any place in India if consent is given in writing or by electronic mode by all the members in advance: [Inserted by Companies (Amendment) Act, 2017]

3. Publications of advertisements: Following advertisements have to be published in newspapers in the district/State where registered office is situated:

(a) Advertisement Inviting public deposits should be published in one English and one vernacular newspaper in the State in which registered office is situated.

(b) Notice of closure of register of members and debenture holders is to be published in newspaper circulating in the district in which the registered office of the company is situated.

4. Depositing proxy, notice of EOGM, circular resolution: Proxy for meeting have to be deposited at registered office of the company. [Article 57 of Model Articles of Association Table-F of the 2013 Act] Sec. 100(2) of the Companies Act, 2013 provides for requisition of meeting by members. Though section does not specifically say so, as per Sec. 20, of the Companies Act, 2013 the requisition has to be submitted at registered office of the company.

If members want to circulate a resolution under Sec. 111 of the 2013 Act, they have to deposit requisition in writing at registered office.

Change of Registered Office from one State to another

In order to the change its registered office from one State to another the Companies Act, 2013 lays down the following steps and procedure:

1. Resolution of the Board of Directors: The first step in changing registered office is that the Board of Directors must adopt a resolution to that effect and convene a general meeting of members in which the change is approved.
2. Special resolution: A special resolution must be passed by the company in the general body meeting of shareholders/members. [Sec. 13(1)]
3. Approval of the Central Government (Power now delegated to Regional Director vide Notification No. SO 4090(E) dt. 19-12-2016 w.e.f -19.12.2016): The alteration of the Memorandum relating to the change of the registered office from one state to another shall not have any effect, unless it is approved by the Central Government (Power now delegated to Regional Director vide Notification No. SO 4090(E) dt. 19- 12-2016 w.e.f 19.12.2016) on an application in Form INC. 23 and in such manner as is prescribed in Rule 30 of Companies (Incorporation) Rules, 2014. Hence, the company will have to make the required application after the name is approved by the members by special resolution. [Sec. 13(4)]
4. Disposal of application: The Central Government (Power now delegated to Regional Director vide Notification No. SO 4090(E) dt. 19- 12-2016 w.e.f 19.12.2016) shall dispose of the application within sixty days and before passing its order, it may satisfy itself that the alteration has the consent of creditors, debentureholders and other persons concerned with the company, or that adequate provisions have been made by the company either for the due discharge of their liabilities or adequate security has been provided for such discharge. [Sec. 13(5)]
5. Registration with Registrar: The company shall file a certified copy of the Central Government (Power now delegated to Regional Director vide Notification No. SO 4090(E) dt. 19-12-2016 w.e.f 19.12.2016) order approving the alteration with the Registrar of each of the States in Form No. INC 28 along with the fees within 30 days from the date of receipt of certified copy of order, who shall register the same. The Registrar of the State where the registered office is being shifted to shall issue a fresh certificate of incorporation indicating the alteration. [Sec. 13(7)]

13. ALTERATION OF MEMORANDUM (5 QUESTIONS)

Notified Date of Section: 01/04/2014

Q.1. Pluto Ltd. was incorporated on 10th June, 2013 in Delhi and is engaged in the business of providing specialized catering services for corporate events. The Board of directors proposed to venture into event management services, which requires the alteration of the object clause of the Memorandum of Association of the company. Draft the necessary resolution assuming relevant data.

(4 marks; 2019 - June)

Q.2. Explain the procedure for change of name of a company, as provided in the Companies Act, 2013. (8 marks; 2012-May)

Answer:

Procedure for the change of name under the Companies Act, 2013 and Rule 33 of Companies (Incorporation) Rules, 2014:

According to Sec. 13(1) of the Companies Act, 2013, a company may by special resolution and after complying with the procedure specified in this section after the provisions if its Memorandum.

The Name Clause in the Memorandum states the name of the company. It can be changed in the following manner:

1. Resolution of the Board of Directors: The first step in changing Name is that the Board of Directors must adopt a resolution to that effect and convene a general meeting of members in which the change is approved.
2. Special Resolution: A Special Resolution for name change must be passed by the company in the General Meeting of shareholder's or members.
3. The change in name must be in accordance with the provisions of Sec. 4(2) and (3): These sub sections prohibit a company from registering with a name similar to an existing company's name or with names listed as undesirable by the Act.
4. Approval of Central Government (Power now delegated to ROC vide Notification No. S0 1353(E), dated. 21 -05-2014, w.e.f 21.05.2014: Any

change in the name of a company shall be effected only with the approval of the Central Government (Power now delegated to ROC vide Notification No. SO 1353(E), dated. 21-05-2014, w.e.f 21.05.2014 in writing by filing Form No. INC 24.

However, no such approval shall be necessary where the change in the name of the company is only the deletion therefrom or addition thereto, of the word "Private", on the conversion of any one class of companies to another class. However finder Sec, 14 and Rule 33, for alteration of AOA in case of conversion from private to Public Company and vice versa, approval of Central Government Power now delegated to ROC vide Notification No. SO 1353(E), dated. 21-05-2014, w.e.f 21.05.2014, shall be obtained by filing Form No. INC.27.

5. Documents to be filed: The documents are required to be filed with the Registrar, who will then register the new name in place of the old name of the company and issue a fresh certificate of incorporation in the new name.

The documents are:

(i) Special Resolution passed by company under Sec. 13(1).

(ii) Approval of Central Government under Sec. 13(2) (Power now delegated to ROC vide Notification No. SO 1353(E), dated. 21 -05- 2014, w.e.f 21.05.2014).

6. Entry in Register of Companies by Registrar: On any change in the name of a company, the Registrar shall enter the new name in the register of companies in place of the old name and issue a fresh certificate in Form No. INC.25 of incorporation with the new name and the change in the name shall be complete and effective only on the issue of such a certificate.
7. Restrictions: The change of name shall not be allowed to a company which has defaulted in filing its annual returns or financial statements or any document due for filing with the Registrar or which has defaulted in repayment of matured deposits or debentures or interest on deposits or debentures. [The Companies (Incorporation) Rules, 2014]

Q.3. Explain the provisions of law and procedure relating to alteration of object clause stated in the Memorandum of Association of a company under Indian Companies Act, 2013. (8 marks; 2012-Nov)

Q.4. Rishi Pharmacy Ltd. decided to take up the business of food processing because of the downward trend in pharmacy business. There is no provision in the object clause of the Memorandum of Association to enable the company to carry on such business. State whether its object clause can be amended? Mention briefly the procedure to be adopted for change in the object clause. (5 marks; 2016 - May)

Q.5. The object clause of the Memorandum of Vardhman Industries Ltd., empowers it to carry on real-estate business and any other business that is allied to it. Due to a downward trend in real-estate business the management of the company has decided to take up the business of Food processing activity. The company wants to alter its Memorandum, so as to include the Food Processing Business in its objects clause.
State whether the company can make such change as per the provisions of the Companies Act, 2013? (4 marks; 2017-May)

Answer:

Alteration of Object Clause:

According to Sec. 13(1) of the Companies Act,. 2013, a company may be special resolution and after complying with the procedure specified in this section alter the provisions of it's MOA.

The Object Clause can be altered in the following way:

1. Resolution of Board of Directors: The first step in altering object is that the BOD must adopt a resolution to that effect and convene a general meeting of members in which the alteration is approved.
2. Special Resolution: Change in object clause can be effected simply by passing a special resolution in general meeting of members. [Sec. 13(1) of the 2013 Act].
3. Filing with ROC: The special resolution should be filed with ROC in Form No. MGT 14 within thirty days from the date of resolution [Sec. 13(6)(a) of the 2013 Act],
4. Entry in Register of Companies by ROC: The Registrar will register the document and then only the alteration becomes effective. [Sec. 13(10) of the 2013 Act]
5. Special provision in case of listed Company which has raised money from public and has unutilised amount out of money so raised.

(i) Passing Special Resolution by Postal Ballot

(ii) Notice to Shareholders

Notice in respect of the Resolution for altering the objects shall contain the following particulars:

(a) the total money received,

(b) the total money utilized for the objects stated in the prospectus,

(c) the unutilized amount out of the money so raised through prospectus,

(d) the particulars of the proposed alteration or change in the objects,

(e) the justification for the alteration or change in the objects,

(f) the amount proposed to be utilised for the new objects,

(g) the estimated financial impact of the proposed alteration on the Earnings & Cash Flow of the Company,

(h) the other relevant information which is necessary for the members to take an informed decision on the proposed resolution,

(i) the place from where any Interested person may obtain a copy of the Notice of the Resolution to be passed.

(iii) Publication in Newspaper

(a) Details of the resolution shall be published in the Newspapers (one in English and one in vernacular language) which is in circulation at the place where the Registered Office of the Company is situated.

(b) The Advertisement giving details of each resolution to be passed for change in objects shall be published simultaneously with the despatch of Postal Ballot Notices to Shareholders.

(iv) Placing on Website of Company

The Notice shall also be placed on the Website of the Company, if any.

(v) Opportunity to Dissenting Shareholders

Dissenting Shareholders shall be given an opportunity to exit by the Promoters and Shareholders having control, in accordance with SEBI Regulations.

14. ALTERATION OF ARTICLES (1 QUESTION)

Notified Date of Section: 01/04/2014

Q.1. The Board of Directors of Sindhu Limited wants to make some changes and to alter some Clauses of the Articles of Association which are to be urgently carried out, which include the increase in Authorized Capital of the company, issue of shares, increase in borrowing limits and increase in the number of directors.

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

Answer:

Alteration in Articles of Association:

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

(1) Alteration by special resolution: Subject to the provisions of this Act and the conditions contained in its memorandum, if any, a company may, by a special resolution alter its articles.

(2) Filing of alteration with the registrar: Every alteration of the articles and a copy of the order of the Central Government approving the alteration, shall be filed with the Registrar, together with a printed copy of the altered articles, within a period of fifteen days in such manner as may be prescribed, under Rule 33 of the Companies (Incorporation) Rules, 2014 who shall register the same.

(3) Any alteration made shall be valid: Any alteration of the articles registered as above shall, subject to the provisions of this Act, be valid as if it were originally contained in the articles.

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

15. ALTERATION OF MEMORANDUM OR ARTICLES TO BE NOTED IN EVERY COPY

Notified Date of Section: 01/04/2014

16. RECTIFICATION OF NAME OF COMPANY (2 QUESTIONS)

Notified Date of Section: 01/04/2014

Q.1. India Cosmetics Limited was a registered company Under Indian Companies Act, 2013. Later on, another company, India Cosmetics and Assessories Limited was formed and registered. Being similarity in the names of both Companies, India Cosmetics Limited lodged the complaint against India Cosmetics and Assessories Limited to the Registrar of Companies stating that there is sufficient similarity between these two names which may mislead or defraud to the public. India Cosmetics and Accessories Limited is intending to alter its name.

Advice the India Cosmetics and Accessories Limited to alter the name of the Company according to the provisions of the Companies Act, 2013. (5 marks; 2009-May)

Answer:

Provision:

Sec. 13(1) of Indian Companies Act, 2013, provides that the name of a company may be changed at any time by passing a special resolution at a general meeting of the company.

As per Sec. 13(2), any change in the name of a company shall be subject to the provisions of sub-section (2) and (3) of Sec. 4 and shall not have effect except with the approval of Central Government in writing (Power delegated to ROC vide Notification No. SO 1353(E), dated 21.05.2014 w.e.f. 21.05.2014)

Rectification of name of company in case of similarity of Names Sec. 16, provided that if, through inadvertence or otherwise, a company on its first registration or on its registration by a new name, is registered by a name which -

In the opinion of the Central Government (Power now delegated to Regional Director vide Notification No. SO 4090(E) dt. 19-12-2016 w.e.f 19.12.2016), is identical with or too nearly resembles the name by which a company in existence had been previously registered, whether under this Act or any previous company law, it may direct the company to change its name and the company shall change its name or new name, as the case may be, within a period of three months from the issue of such direction, after adopting an ordinary resolution for the purpose [Sec. 16(1)(a)].

Present Case:

The problem asked in the question is based upon the provision of Sec. 16(1)(a) of the Companies Act, 2013. The new company registered under the name India Cosmetics Accessories Ltd. is identical in name with the existing India Cosmetics Limited. According to the aforesaid provisions of Sec. 16(1)(a) the newly setup company should change its name. In such a case, the company can, on Its own, change the name by obtaining previous approval of Central Government (Power now delegated to Regional Director) and then by passing an ordinary resolution. Such a change should be made within three months of the date of the direction of the Regional Director being received or such longer period as the Regional Director may deem fit to allow. The application for changing the name is required to be made to the Registrar of Companies in e-form INC 1 with a fee of one thousand rupees, [w.e.f 24. 7. 2011]

Q.2. What restrictions are applicable under the Companies Act, 2013 when Articles of Association of a company are altered? (8 marks; 2014 - May)

Answer:

Limitations to alteration: The alterations made in the articles will be valid, until they fall within any one of the following categories given below:

1. The alteration must not authorise anything expressly or impliedly forbidden by the Companies Act.
2. The alteration must not exceed the power or modify the memorandum.
3. The alteration must not contain anything illegal.
4. The alteration must not be inconsistent with any alteration made by Central Government when its has passed order under oppression and Mis-management.
5. The alteration must be bona fide for the benefit of the Company as a whole.
6. The alteration must not make the articles unalterable as it is regarded bad in law.
7. Retrospective operation of articles.
8. The alteration must not constitute a fraud on the minority by a majority.
9. An alteration of articles to effect a conversion of a public company into a private company cannot be made without the approval of the Central Government.
10. There cannot be alteration of the articles so as to compel an existing member to take or subscribe for more shares or in any way extend liability to contribute to share capital, unless he gives his consent in writing.
11. A company cannot justify breach of contract with third parties or avoid a contractual liability by altering articles.

12. An alteration should not increase the liability of a member unless he has agreed thereto in writing.

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

Notified Date of Section: 01/04/2014

18. CONVERSION OF COMPANIES ALREADY REGISTERED (3 QUESTIONS)

Notified Date of Section: 01/04/2014

Q.1. Board of Directors of a private company decided to convert it into a public company. State the steps to be taken for such conversion in order to comply with the requirements under the Companies Act, 2013. (5 marks; 2007-Nov)

Q.2. Describe the procedure for converting a private company into a public company under the provisions of the Companies Act, 2013. (8 marks; 2011 - May)

Answer:

Conversion of Private Company into Public Company [Sec. 14]: Where a private company alters its articles by passing special resolution in such a manner that they no longer include the restrictions and limitations which are required to be included in the articles of a private company, then such company shall cease to be a private company from the date of such alteration. [1st Proviso]

"Provided further that any alteration having the effect of conversion of a public company into a private company shall not be valid unless it is approved by an order of the Central Government on an application made in such form and manner as may be prescribed:

Provided also that any application pending before the Tribunal, as on the date of commencement of the Companies (Amendment) Act, 2019, shall be disposed of by the Tribunal in accordance with the provisions applicable to it before such commencement"

Filing with the Registrar: Every alteration of the articles and a copy of the order of the Central Government approving the alteration shall be filed with the Registrar, together with a printed copy of the altered articles, within a period of fifteen days in such manner as is prescribed, under Rule 33 and Form No. INC 27 of the Companies (Incorporation) Rules, 2014, who shall register the same. Any alteration of the articles registered as above shall, subject to the provisions of this Act, be valid as if it were originally in the articles.

If a private company is converted into a public company, it will have to make the following consequential changes:

1. Change name clause of memorandum of association by deleting the word private from its name.
2. Increase its directors to three.
3. Increase its number of members, to seven.
4. Delete those clauses from articles which are not suitable for a public company.
5. Give notice to ROC.

Q.3. State whether Correct or Incorrect.

If the Central Government permits, a public company can be converted into a private company. (1 mark; 2011 - Nov)

Answer:

Correct

19. SUBSIDIARY COMPANY NOT TO HOLD SHARES IN ITS HOLDING COMPANY (5 QUESTIONS)

Notified Date of Section: 12/09/2013

Q.1. ABC Ltd. holds 75% equity share capital of DEF Ltd. and controls composition of Board of Directors of DEF Ltd. ABC Ltd. goes for public issue for raising further share capital. Board of Directors of ABC Ltd. allot 10% of the issue to DEF Ltd. Referring to the provisions of the Companies Act, 2013 examine the validity of Board's decision to allot 10% of issue to DEF Ltd. DEF Ltd. holds certain number of shares as a legal representative of a deceased member of ABC Ltd. and has a right to vote at a general meeting of ABC Ltd. in respect of such shareholdering, will this right be affected by issue of 10% to DEF Ltd. by ABC Ltd.? (4 marks; 2017 - Dec)

Answer:

In accordance with the provisions of the **Companies Act, 2013,** as contained in **Section 19(1),** a subsidiary company shall not either by itself or through its nominees hold shares in its holding company and no holding company shall allot or transfer its shares to any of its subsidiary companies and any such allotment or transfer of shares of a company to its subsidiary company shall be void.

Therefore, ABC Limited cannot allot 10% shares of public issue to DEF Limited, in view of the above provisions. Allotment of shares to DEF Limited shall be void.

Further, in the following circumstances, where a subsidiary can hold the shares of its holding company:

1. Where the subsidiary company holds such shares as the legal representative of a deceased member of the holding company; or
2. Where the subsidiary company holds such shares as a trustee; or
3. Where the subsidiary company is a shareholder even before it became a subsidiary company of its holding company.

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

Q.2. Vayu Ltd. holds more than 50% of nominal value of the equity capital of Stream Ltd. In these circumstances, Stream Ltd. wants to become a member of Vayu Ltd. Can Stream Ltd. do so? Discuss the rights of the said subsidiary in such a case. (4 marks; 2009 - Dec) [CSEM - II]

Answer:

1.	**Provision of Sec. 19 of Companies Act, 2013**	As per this section 19 of the Companies Act, 2013, subsidiary company shall not either by itself or through its nominees hold shares in its holding company and no holding company shall allot or transfer its shares to any of its subsidiary - companies. Any such transaction shall be considered void.
2.	**Exceptions**	However, there are certain exceptions to the provision. (a)Where the subsidiary company holds such shares on the legal representative of a deceased member of holding company; or (b)Where the subsidiary company holds shares as a trustee; or (c)Where the subsidiary company is a shareholder even before it became a subsidiary company of the holding company.

Q.3. State, giving reasons, whether the following statement is correct or incorrect: (iii) A Subsidiary Company cannot hold shares of its Holding Company. (1.5 marks; 2016-May)

Answer:

The given statement is incorrect.

Sec. 19 of the Companies Act, 2013 states exceptions under which subsidiary company can hold shares in its holding company. These are - (a) where the subsidiary company holds such shares as the legal representative of a deceased member of the holding company; or

(b) where the subsidiary company holds such shares as a trustee, or
(c) where the subsidiary company is a shareholder even before it became a subsidiary company of the holding company.

Q.4. Anson Limited held equity shares in Booban Limited. Later on Anson Limited became a subsidiary company of Booban Limited. Decide under the Companies Act, 2013 whether it is necessary for Anson Limited to surrender the equity shares of Booban Limited? (5 marks; 2014 - May)

Answer:

Subsidiary company not to hold shares in its holding company:

According to Sec. 19 of the Companies Act, 2013, no company shall either by itself or through its nominees.

(i) hold any shares in its holding company; and
(ii) no holding company shall allot or transfer its shares to any of its subsidiary companies; and
(iii) any such allotment or transfer of shares of a company made to its subsidiary company shall be void.

Following are the exceptions:

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

Present Case:

Anson Limited held equity shares in Booban Limited. Lateron Anson Limited became a subsidiary company of Booban Limited.

Following the provisions of Sec. 19 of the Companies Act, 2013, it is not necessary for Anson Ltd. to surrender the equity shares of Booban Ltd. as Anson Ltd. held equity shares before it became a subsidiary company.

Q.5. As at 31st March, 2018, the paid-up share capital of S Ltd. is Rs. 1,00,00,000 divided into 10,00,000 equity shares of Rs. 10 each. Of this, H Ltd. is holding 6,00,000 equity shares and 4,00,000 equity shares are held by others. Simultaneously, S Ltd. is holding 5% equity shares of H Ltd. out of which 1 % shares are held as a legal representative of a deceased member of H Ltd. On the basis of the given information, examine and answer the following queries with reference to the provisions of the Companies Act, 2013:

(i) Can S Ltd. make further investment in equity shares of H Ltd. during 2018-19?
(ii) Can S Ltd. exercise voting rights at Annual general meeting of H Ltd.?
(iii) Can H Ltd. allot or transfer some of its shares to S Ltd.? (4 marks; 2019 - May)

20. SERVICE OF DOCUMENTS (1 QUESTION)

Notified Date of Section: 01/04/2014

Q.1. Answer the following:

Discuss the provisions of law contained in the Companies Act, 2013 as regards to the service of documents. (4 marks; 2012 - Nov)

Answer:

Serving of Documents

Persons Served on	Mode of serving [Sec 20 and Rule 35 of Companies (In-corporation) Rules, 2014.]
Service to Officer [Sec 20(1)]	A document may be served on a Company or an Officer thereof by: (a) by sending it to the Company or the Officer at the Registered Office of the Company: (i) by Registered Post, or (ii) by Speed Post, or

	(iii) by Courier Service, (b) by leaving it at its Registered Office, or (c) by means of electronic transmission, or (d) by other modes as is prescribed under Rule 35 of Companies (Incorporation) Rules 2014. Note: Where Securities are held with a Depository, the records of the beneficial Ownership may be served by such Depository on the Company by means of electronic or other mode.
Service to ROC/Member [Sec. 20(2)]	A document may be served on the Registrar or any Member: (a) by sending it to him by Post or by Registered Post or by Speed Post or by Courier, or (b) by delivering at his Office or Address, or (c) by means of electronic or other prescribed mode, or (d) by other mode as is prescribed under Rule 35 of Companies (Incorporation) Rules, 2014. Note: • Provisions of the Act or Rules for filing of documents with the ROC in electronic mode, also apply, • A member may request for delivery of any document through a particular mode, for which he shall pay such fees as may be determined by the Company in its AGM.

Rule 35 of Companies (Incorporation) Rules, 2014:

A document may be served on a company or an officer, the ROC or any member through electronic transmission.

Electronic transmission means a Communication

(a) delivered by: .

(i) facsimile telecommunication or e-mail when directed to the Facsimile Number or E-Mail Address, respectively, which the Company/Officer /ROC/ Member has provided from time to time for sending communications to the company / Officer/ ROC/Member respectively,

(ii) posting of an Electronic Message Board or Network that the Company/Officer/ROC/Member has designated for such communications, and which transmission shall be validly delivered upon the posting, or

(iii) other means of electronic communication, in respect of which the Company/Officer/ROC/Member has put in place reasonable systems to verify that the Sender is the person purporting to send the transmission, and,

(b) that creates a record that is capable of retention, retrieval and review, and which may thereafter be rendered into clearly legible tangible form.

Again as per Rule 35(5), Courier (as mentioned in Sec 20) means: a document sent through a courier which provides proof of delivery.

In case of delivery by post

Such service shall be deemed to have been effected.

(i) in the case of a notice of a meeting at the expiration

(ii) In the case of a notice of a meeting, at the completion of forty-eight hours after the letter containing the same is posted and,

(iii) In any other case, at the time at which the letter would be delivered in the ordinary course of post.

21. AUTHENTICATION OF DOCUMENTS, PROCEEDINGS AND CONTRACTS

Notified Date of Section: 12/09/2013

22. EXECUTION OF BILLS OF EXCHANGE, ETC.

Notified Date of Section: 12/09/2013

ACCEPTANCES OF DEPOSITS BY COMPANIES

73. PROHIBITION ON ACCEPTANCE OF DEPOSITS FROM PUBLIC

Notified Date of Section: 01/04/2014

Q.1. Comment on the following:
Provisions of Section 73(1) are not applicable to guarantee companies and Section 8 companies (i.e., associations not for profit). (5 marks; 2009 - June) [CSEM - II]

Answer:

1.	**Authenticity of the statement**	The statement is not correct.
2.	**Applicability of Section 73(1)**	**Section 73(1) of the Companies Act, 2013,** and Companies (Acceptance of Deposit) Rules, 2014, are also applicable to companies limited by guarantee and. association not for profit viz, **Section 8** companies; having share capital and formed for promoting commerce, art, science, religion, charity or any other useful object.
3.	**Provisions of Sec. 73(1)**	**Acceptance of deposit:** • no company shall invite, accept or renew deposits under **Companies Act, 2013** from the public • except in a manner provided under this Chapter: Provided that nothing in this sub-section shall apply to a banking company and NBFC as defined in the Reserve Bank of India Act, 1934 and • To such other company as the Central Government may, after consultation with the Reserve Bank of India, specify in this behalf.

Q.2. A single fixed deposit holder, after marriage, applied for adding the name of his wife as joint-holder. The company refused to do so. What are the remedies available to the deposit holder? (4 marks; 2011 - June)

Answer:

Remedy not available	There is no remedy available to the deposit holder because addition of one or more name(s) as joint holder(s), on a fixed deposit receipt during the period of the fixed deposit is not permissible.

Q.3. Comment on "Issue of unsecured debentures by a company to another company, where the debentures have an option for compulsory conversion into equity shares within seven years, cannot be termed as deposits. (5 marks; 2016 - Dec)

Answer:

1.	**Analysis of the Present Case**	**Section 73 of Companies Act, 2013** read with **Rule 2(1) (c)** of **Companies (Acceptance of Deposits) Rules, 2014** define the term 'deposit'. As per **clause (ix) of Rule 2 (1)(c),** deposit shall not include any amount raised by issue of bonds or debentures secured by first charge or a charge ranking pari passu with the first charge on any assets referred to in **Schedule III** of **the Companies Act, 2013** excluding intangible assets of the company or the bonds or debentures compulsorily convertible into shares of the company within **10** years. In view of comprehensive reading of the above clause the unsecured debenture issued having option of compulsory conversion into shares of the company within **10** years shall not be treated as deposits. **Amendment made by Companies (Amendment)Act, 2017** In **Section 73 of the Principal Act,** in sub-Section (2),— clause (d) shall be omitted;
2.	**Conclusion**	**In the above case** the unsecured debentures issued by the company having option ' of compulsory conversion into shares of the company within seven years cannot be treated as deposits.

Q.4. Define the term 'deposits' and list out the receipts of money which are not considered as deposits. (8 marks; 2016 - Dec)

Answer:

As per **Section 2(31) of the Companies Act, 2013** "deposit" includes any receipt of money by way of deposit of loan or in any other form by accompany, but does not include such categories of amount as may be prescribed in consultation with the Reserve Bank of India.

"Deposit" includes any receipt of money by way of deposit or loan or in any other form, by a company, but does not include:

(i) any amount received from the Central Government or a State Government, or any amount received from any other source whose repayment is guaranteed by the Central Government or a State Government or any amount received from a local authority, or any amount received from a statutory authority constituted under an Act of Parliament or a State Legislature;

(ii) any amount received from foreign governments, foreign or international banks, multilateral financial institutions (including, but not limited to, International Finance Corporation, Asian Development Bank, Commonwealth Development Corporation and International Bank for Industrial and Financial Reconstruction), foreign governments owned development financial institutions, foreign export credit agencies, foreign collaborators, foreign bodies corporate and foreign citizens, foreign authorities or persons resident outside India subject to the provisions of **Foreign Exchange Management Act, 1999** and rules and regulations made there under;

(iii) any amount received as a loan or facility from any banking company or from the State Bank of India or any of its subsidiary banks or from a banking institution notified by the Central Government **under Section** 51 **of the Banking Regulation Act, 1949,** or a corresponding new bank as defined in **clause (d)** of **Section** 2 **of the Banking Companies** (Acquisition and Transfer of Undertakings) **Act, 1970,** or in clause (b) of Section (2) of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980 or from a co-operative bank as defined in **clause (b-ii)** of **Section** 2 **of the Reserve Bank of India Act, 1934;**

(iv) any amount received gs a loan or financial assistance from Public Financial Institutions notified by the Central Government in this behalf in consultation with the Reserve Bank of India, or any regional financial institutions or Insurance Companies or Scheduled Banks as defined in the **Reserve Bank of India Act, 1934;**

(v) any amount received against issue of commercial paper or any other instruments issued in accordance with the guidelines or notification issued by the Reserve Bank of India;

(vi) any amount received by a company from any other company;

(vii) Any amount received and held pursuant to an offer made in accordance with the provisions of the Act towards subscription to any securities, including share application money or advance towards allotment of securities pending allotment, so long as such amount is appropriated only against the amount due on allotment of the securities applied for.

(viii) Any amount received from a person who, at the time of the receipt of the amount, was a director of the company. The director from whom money is received, furnishes to the company at the time of giving the money, a declaration in writing to the effect that the amount is not being given out of funds acquired by him by borrowing or accepting ' loans or deposits from others;

(ix) any amount raised by the issue of bonds or debentures secured by a first charge or a charge ranking pari passu with the first charge on any assets referred to in **Schedule III** of the Act excluding intangible assets of the company or bonds or debentures compulsorily convertible into shares of the company within ten years. If such bonds or debentures are secured by the charge of any assets referred to in **Schedule III** of the Act excluding intangible assets, the amount of such bonds or debentures shall not exceed the market value of such assets as assessed by a registered valuer;

(x) any amount received from an employee not exceeding his annual salary, under a contract of employment with the company in the nature of non-interest bearing security deposit;

(xi) any non-interest bearing amount received or held in trust;

(xii) any amount received in the course of or for the purposes of the business of the company:

a. As an advance for the supply of goods or provision of services provided that such advance is appropriated against supply of goods or provision of services within a period of three hundred and sixty five days from acceptance of such advance. In case of any advance which is subject matter of any legal proceedings before any Court of law, the said time limit of three hundred and sixty five days shall not apply.

b. As advance, accounted for in any manner whatsoever, received in connection with consideration for an immovable property under an agreement or arrangement, provided that such advance is adjusted against the property in accordance with the terms of agreement or arrangement.

c. As security deposit for the performance of the contract for supply of goods or provision of services.

d. As advance received under long term projects for supply of capital goods except those covered under item (b) above.

If the amount received under (a), (b) and (d) above becomes refundable (with or without interest) because the company accepting the money does not have necessary permission or approval to deal in the goods or properties or services for which the money is taken, the amount received shall be deemed to be a Deposit under these rules.

(xiii) any amount brought in by the promoters of the company by way of unsecured loan in pursuance of the stipulation of any lending financial institution or a bank subject to fulfillment of the following conditions:,

a. the loan is brought in pursuance of the stipulation imposed by the lending institutions on the promoters to contribute such finance; and

b. the loan is provided by the promoters themselves or by their relatives or by both and

c. The exemption under this sub-clause shall be available only till the loans of financial institution or bank are repaid and not thereafter.

(xiv) Any amount accepted by a Nidhi Company in accordance with the rules made under **Section 406** of the Act.

Q.5. Comment on the following:

A private company incorporated under the Companies Act, 2013 may - issue debentures to any number of persons and can accept deposits from the public. (5 marks; 2017 - Dec)

Answer:

According to the definition of private company under **Section 2(68),** a private limited company may not make an invitation to the public to subscribe for any securities *of the company. However, under **Section 42** read with **Section 2(68),** if may issue such security to any person (number of persons not exceeding 200).

In terms of provisions of **Section 73(2)** read with Exemption Notification dated 5th June, 2015, a private company may accept from its members monies not exceeding one hundred percent of aggregate of the paid-up share capital and free reserves, subject to the passing of a resolution in general meeting and subject to such rules as may be prescribed in consultation with the Reserve Bank of India, accept deposits from its, members on such terms and conditions, as may be agreed upon between the company and its members, subject to the fulfillment of certain conditions, as provided under the Act.

Q.6. Comment on the following:

(a) A private limited company can accept deposit from its members under the provisions of the Companies Act, 2013. (5 marks; 2018 - June)

Answer:

A private limited company can accept deposit from its members in accordance with **Section 73 of the Companies Act, 2013** and rules made thereunder. Moreover, the Government has exempted the private companies vide notification dated 13th June, 2017, from applicability of Section 73(1)(a) to (e).

Accordingly, a private company may accept deposit from its members:

(A)Not exceeding one hundred percent of aggregate of the paid up share capital, free reserves and securities premium account; or

(B)Is a start-up, for five years from the date of its incorporation; or

(C)If it fulfils all of the following conditions, namely:

(a)is not an associate or a subsidiary company of any other company;

(b)if the borrowings of such a company from banks or financial institutions or any body corporate is less than twice of its paid up share capital or fifty crore rupees, whichever is lower; and

(c)Such a company has not defaulted in the repayment of such borrowings subsisting at the time of accepting deposits under this section:

Provided that the company referred to in clause (A), (B) or (C) shall file the details of monies accepted to the Registrar in such manner as may be specified.

Q.7. A private company and a banking company, can freely accept deposits.

(5 - Marks; 2019 - June)

Q.8. Shine Well Ltd. has accepted deposits from the public under the Companies (Acceptance of Deposits) Rules, 2014. The company has now decided to repay some of its deposits before maturity. Can the company do so? If yes, what are the conditions attached thereto? **(4 marks; 2011 - June) [CSEM - II]**

Answer:

Provisions of Companies (Acceptance of Deposits) regarding premature repayment of deposits, Rules 2014.			
1.	**Repayment after 6 months but before the expiry period of the deposit**	The said rule states that a company may, on the request of the depositor, repay its deposits, after the expiry of a period of six months from the date' of such deposit but before the expiry of the period for which such deposit was accepted	
		1. Interest Rate	The rate of interest payable on such deposit shall be reduced by one per cent, from the rate which the company would have paid had the deposit been accepted for the period for which such deposit had actually run and me company shall not pay interest at any rate higher than the rate so reduced.
		2. Exception	Nothing contained in this rule shall apply to the repayment of any deposit before the expiry of the period for which such deposit was accepted by the company, if such repayment is made solely for the purpose of- (a)complying with the provisions of Rule 3; or (b)Providing war risk or other related benefits to the personnel- of the naval, military or air forces or to their families, on an application made by the associations or societies formed by such personnel, during the period of emergency declared under article 352 of the Constitution.
		3. Renewal on higher rate of interest -	• where a company referred to in under sub-section (2) of Section 73 or any eligible company • permits a depositor to renew his deposit, • before the expiry of the period for which such deposit was accepted by the company, • for availing of a higher rate of interest,

			• the company shall pay interest to such depositor at the higher rate • If such deposit is renewed in accordance with the other provisions of these rules and for a period longer than the unexpired period of the deposit.

Q.9. Sun-beam Ltd. failed to pay interest on repayment of deposits. One depositor approached the consumer forum with the request to issue order against the company for payment of interest on deposits. The company contended that the consumer forum was not a proper authority to issue such directions. Advise the company suitably,

(8 marks; 2014 - Dec)

Answer:

1.	**Analysis of given Problem**	The given facts are similar to a decided case law. The National Consumer Dispute Redressal Commission pointed out that after the Amendment Act, 1993, a consumer forum can direct payment of amounts due to a depositor under the provisions of **Section 18 of the Consumer Protection Act, 1986.** An order directing. payment of the outstanding amount to the depositors can now be made under the provisions of the **Section 14.**
2.	**Conclusion**	Hence, the contention of Sun beam Ltd. is not valid. Payment of interest to the deposit holder should be made as per the order of the consumer forum.

Q.10. Prism Ltd. has accepted Rs. 10 lakh as advance towards the supply of goods to certain parties. As per the agreement, the company will supply the goods after two years from the date of deposit. Later on, internal auditors qualified their report on the ground that the company has violated the provisions of the Companies Act, 2013. Directors explained that this is required to complete the order. Examining the relevant provisions of the Companies Act, 2013 state whether the explanation given by the directors is justified.

(4 marks; 2016 - June)

Answer:

2.	**Analysis of the given Problem**	In case of any advance which is subject matter of any legal proceedings before any Tribunal of law, the said time limit of three hundred and sixty five days shall not apply. **In the present case** Prism Ltd. has accepted Rs. 10 lakhs as advance towards the supply of goods to certain parties on an agreement to supply goods after two years from date of deposit.
3.	**Conclusion**	Considering the legal provision the amount so accepted by the company is deposit.

Q.11. Board of Directors of Green Field Ltd. decides to accept deposits from the public at a compound interest rate of 12% per annum. Examining the provisions of the Companies Act, 2013, advise whether the Board can go ahead with its proposal.

(Marks; 2016 - June)

Answer:

1.	**Section 2(31)**	According to the **Section 2(31)** of the Act read with Rule 2(c) of **Companies (Acceptance of Deposits) Rules, 2014** "deposit" includes any receipt of money by way of deposit or loan or in any other form by a company, but does not include any amount received in the course of or for the purposes of the business of the company as an advance for the supply of goods or provision of services provided that such advance is appropriated against supply of goods or provision of services within a period of three hundred and sixty five days from acceptance of such advance.
2.	**Analysis of the given Problem**	In case of any advance which is subject matter of any legal proceedings before any Tribunal of law, the said time limit of three hundred and sixty five days shall not apply. **In the present case** Prism Ltd. has accepted Rs. 10 lakhs as advance towards

		the supply of goods to certain parties on an agreement to supply goods after two years from date of deposit.
3.	**Conclusion**	Considering the legal provision the amount so accepted by the company is deposit.

Q.12. Board of Directors of Green Field Ltd. decides to accept deposits from the public at a compound interest rate of 12% per annum. Examining the provisions of the Companies Act, 2013, advise whether the Board can go ahead with its proposal.

(^ marks; 2016 - June)

Answer:

1.	**Section 73(2)**	As per **Rule 3(6) of the Companies (Acceptance of Deposits) Rules,2016** no company under **Section 73(2)** or any eligible company shall invite or accept or renew any deposits in any form, carrying rate of interest or pay brokerage thereon at a rate exceeding the maximum rate of interest or brokerage prescribed by the Reserve Bank of India for acceptance of deposits by non-banking financial companies. **Amendment made by Companies (Amendment)Act, 2017** In **Section 73 of the principal Act,** in sub- section**(2),**— clause (d) shall be omitted;
2.	**Conclusion**	Green Field Ltd. is advised to go ahead with the proposal carrying a rate of interest not exceeding the maximum rate of interest or brokerage prescribed by the Reserve Bank of India for acceptance of deposits by non-banking financial companies.

Q.13. Suresh, a member of Ruchi Ltd., wants to inspect the register of deposits maintained by the company as required under the provisions of the Companies Act, 2013. The company refused to provide the register for inspection without assigning any reason. Referring to the provisions of the Act, examine the validity of the company's refusal. What shall be your answer if the same Register is demanded by the statutory auditors of the company for inspection and for their audit? **(4 marks; 2016 - Dec)**

Answer:

1	**Rule 14 of Companies (Acceptance of deposits) Rules, 2014**	According to **Rule 14 of Companies (Acceptance of deposits) Rules, 2014,** every company accepting deposits shall, from the date of such acceptance, keep at its registered office one or more separate registers for deposits accepted/renewed. In absence of any enabling provision, this register is not open for inspection by members and company may refuse to open it for inspection.
2	**Conclusion**	**In the given case** Ruchi Limited can refuse to provide the register for inspection without giving any reason because it is not open for inspection but in case of statutory auditors, the company cannot to do so. The Statutory Auditors have a right to inspect and' check every register maintained by the company.

Q.14. Fun and Frolic Ltd. has received Rs. 5 lakh from its Promoters as unsecured loan in pursuance of the stipulation of credit facilities from Bank. Can the company accept the unsecured loan? What would be your answer if the company has repaid in full its amount of credit facilities and after such repayment, company continues this unsecured loan? Referring to the provisions of the Companies Act, 2013 advise the company.

(4 mark; 2018 - June)

Answer:

According to Rule 2 of the Companies (Acceptance of Deposit) Rules, 2014 any amount brought in by the promoters of the company by way of unsecured loan in pursuance of the stipulation of any lending financial institution or a bank, shall not be treated as deposit, subject to fulfillment of the following conditions, namely:

(a)The loan is brought in pursuance of the stipulation imposed by the lending institutions on the promoters to contribute such finance;.

(b)The loan is provided by the promoters themselves or by their relatives or by both; and
(c)The exemption under this sub-clause shall be available only till the loans of financial institution or bank are repaid and not thereafter;

Accordingly, in case of Fun and Frolic Ltd. Rs. 5 Lakhs may be accepted from the Promoters, as the same is in pursuance to stipulation of credit from bank. Once the credit facilities are paid in entirety and the company continues to retain the unsecured loan, it shall be treated as deposit under the Companies Act, 2013.

Q.15. Explain provisions for 'Appointment of Trustee for Depositors' under the Companies Act, 2013. (6 marks; 2018 - May)

Answer:

Appointment of Debenture Trustee:

Under Section 71 (5) of the Companies Act, 2013, no company shall Issue a prospectus or make an offer or invitation to the public or to its members exceeding five hundred for the subscription of its debentures, unless the company has. before such issue or offer, appointed one or more debenture trustees and the conditions governing the appointment of such trustees shall be such as is prescribed under Rule 18 of Companies (Share Capital and Debentures) Rules, 201.4.

The rules framed under the Companies Act for the issue of secured debentures provide that before the appointment of debenture trustee or trustees, a written consent shall be obtained from such debenture trustee or trustees proposed to be appointed and a statement to that effect shall appear in the letter of offer issued for inviting the subscription of the debentures.

Further according to Rule 18(2) of the Companies (Share Capital and Debentures) Rules, 2014 no person shall be appointed as a debenture trustee, if he:

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

Q.16. Define the term 'deposits' and list out the receipts of money which are not considered as deposits. (8 marks; 2016-Dec) [CS Exe - II]

Answer:

As per Section 2(31) of the Companies Act, 2013 "deposit" includes any receipt of money by way of deposit or loan or in any other form by a company, but does not include such categories of amount as may be prescribed under Rule 2(1) (c) of the Companies (Acceptance of Deposits) Rules, 2014 (Division Two) in consultation with the Reserve Bank of India. "Deposit" includes any receipt of money by way of deposit or loan or in any other form, by a company, but does not include:

(i) any amount received from the Central Government or a State Government, or any amount received from any other source whose repayment is guaranteed by the Central Government or a State Government or any amount received from a local authority, or any amount received from a statutory authority constituted under an Act of Parliament or a State Legislature;

(ii) any amount received from foreign governments, foreign or international banks, multilateral financial institutions (including, but not limited to, International Finance Corporation, Asian Development Bank, Commonwealth Development Corporation and International -Bank for Industrial and Financial Reconstruction), foreign governments owned development financial institutions, foreign export credit agencies, foreign collaborators, foreign bodies corporate and foreign citizens, foreign authorities or persons resident outside India subject to the provisions of Foreign Exchange Management Act, 1999 and rules and regulations made there under;

(iii) any amount received as a loan or facility from any banking company or from the State Bank of India or any of its subsidiary banks or from a banking institution notified by thè Central Government under Sec. 51 of the Banking Regulation Act, 1949, or a corresponding new bank as defined in clause (d) of Sec. 2 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, or in clause (b) of sec. (2) of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980 or from a co-operative bank as defined in clause (b-ii) of Sec. 2 of the Reserve Bank of India Act, 1934;

(iv) any amount received as a loan or financial assistance from Public Financial Institutions notified by the Central Government in this behalf In consultation with the Reserve Bank of India, or any regional financial institutions or insurance Companies or Scheduled Banks as defined in the Reserve Bank of India Act, 1934;

(v) any amount received against issue of commercial paper or any other instruments Issued in accordance with the guidelines or notification issued by the Reserve Bank of India;

(vi) any amount received by a company from any other company;

(vii) any amount received and held pursuant to an offer made in accordance with the provisions of the Act towards subscription to any securities, including share application money or advance towards allotment of securities pending allotment, so long as such amount is appropriated only against the amount due on allotment of the securities applied for.

(via) any amount received from a person who, at the time of the receipt of the amount, was a director of the company. The director from whom money is received, furnishes to the company at the time of giving the money, a declaration in writing to the effect that the amount is not being given out of funds acquired by him by borrowing or accepting loans or deposits from others;

(ix) any amount raised by the issue of bonds or debentures secured by a first charge or a charge ranking pari passu with the first charge on any assets referred to in Schedule III of the Act excluding intangible assets of the company or bonds or debentures compulsorily convertible into shares of the company within ten years. If such .bonds or debentures are secured by the charge of any assets referred to in Schedule III of the Act excluding intangible assets, the amount of such bonds or debentures shall not exceed the market value of such assets as assessed by a registered valuer;

(x) Any amount received from an employee not exceeding his annual salary, under a contract of employment with the company in the nature of non-interest bearing security deposit;

(xi) Any non-interest bearing amount received or held in trust;

(xii) Any amount received in the course of or for the purposes of the business of the company:

(a) As an advance for the supply of goods or provision of services provided that such advance is appropriated against supply of goods or provision of services within a period of three hundred and sixty five days from acceptance of such advance. In case of any advance which is subject matter of any legal proceedings before any Court of law, the said time limit of three hundred and sixty five days shall not apply.

(b) As advance, accounted for in any manner whatsoever, received in connection with consideration for an immovable property under an agreement or arrangement, provided that such advance is adjusted against the property in accordance with the terms of agreement or arrangement.

(c) As security deposit for the performance of the contract for supply of goods or provision of services.

(d) As advance received under long term projects for supply of capital goods except those covered under item (b) above.

if the amount received under (a), (b) and (d) above becomes refundable (with or without interest) because the company accepting the money does not have necessary permission or approval to deal in the goods or properties or services for which the money is taken, the amount received shall be deemed to be a Deposit under these rules.

(xiii) Any amount brought in by the promoters of the company by way of unsecured loan in pursuance of the stipulation of any lending financial institution or a bank subject to fulfillment of the following conditions:

(a) The loan is brought in pursuance of the stipulation imposed by the lending institutions on the promoters to contribute such finance; and

(b) The loan is provided by the promoters themselves or by their relatives or by both and

(c) The exemption under this sub-clause shall be available only till the loans of financial institution or bank are repaid and not thereafter.

(xiv) Any amount accepted by a Nidhi Company in accordance with the rules made under section 406 of the Act.

Q.17. Prism Ltd. has accepted Rs. 10 lakhs as advance towards the supply of goods to certain parties. As per the agreement, the company will supply the goods after two years from the date of deposit. Later on, internal auditors qualified their report on the ground that the company has violated the provisions of the Companies Act, 2013. Directors explained that this is required to complete the order. Examining the relevant provisions of the Companies Act, 2013 state whether the explanation given by the directors is justified. **(4 marks; 2016 - June) [CS Exe - II]**

Answer:

Provision:

According to the Sec. 2(31) of the Act read with Rule 2(c) of Companies (Acceptance of Deposits) Rules, 2014 "deposit" includes any receipt of money by way of deposit or loan or in any other form by a company, but does not include any amount received in the course of or for the purposes of the business of the company as an advance for the supply of goods or provision of services provided that such advance is appropriated against supply of goods or provision of services within a period of three hundred and sixty five days from acceptance of such advance.

Present Case:

In case of any advance which is subject matter of any legal proceedings before any Tribunal of law, the said time limit of three hundred and sixty five days shall not apply.

In the present case Prism Ltd. has accepted Rs. ten lakhs rupees as advance towards the supply of goods to certain parties on an agreement to supply goods after two years from date of deposit.

Considering the legal provision the amount so accepted by the company is deposit.

Q.18. Certain companies are exempted from the provisions of Sec. 73 of the Companies Act, 2013. **(5 marks; 2007-Dec) [CS Exe - II]**

Answer:

The statement is Correct

Companies exempted from provisions of Sec. 73

Section 73(1) of Companies Act, 2013 provides that following would be exempted:

(a) Banking company;

(b) Non banking financial Companies as defined in the Reserve Bank of india Act, 1934;

(c) Such classes of financial companies as the central Government may, after consultation with the reserve Bank of India specify in this behalf.

Q.19. Provisions of Section 73(1) are not applicable to guarantee companies and Section 8 companies (i.e., associations not for profit). (5 marks; 2009 - June) [CS Exe - II]

Answer:

Provision:

The Statement is Incorrect.

As per Sec. 73(1) on and after the commencement of this Act, no company shall invite, accept or renew deposits under this Act from the public except in a manner provided under this Chapter:

Provided that nothing in this sub-section shall apply to a banking company and non-banking financial company as defined in the Reserve Bank of India Act, 1934 (2 of 1934) and to such other company at the Central Government may, after consultation with the Reserve Bank of India, specify In this behalf. Thus as per to Section 73(1) of the Companies Act, 2013, and Companies (Acceptance of Deposit) Rules, 2014, are also applicable to companies limited by guarantee and association not for profit viz, Section 8 companies; having share capital and formed for promoting commerce, art, science, religion, charity or any other useful object.

Q.20. State the procedure to be followed by companies to accept deposits from its members according to the Companies Act, 2013. What are the exemptions available to the Private Limited Companies? (6 marks; 2018-Nov)

Answer:

Acceptance of Deposits by Company from its members:

According to Sec. 73(2) of the Companies Act, 2013, a company may, subject to the passing of a resolution in general meeting and subject to such rules as may be prescribed in consultations with the Reserve Bank of India, accept deposits from its members on such terms and conditions, including the provision of security, if any, or for the repayment of such deposits with interest, as may be agreed upon between the company and its members, subject to the fulfillment of the following conditions, namely:

(a) by issuance of a circular to its members including therein a statement showing the financial position of the company, the credit rating obtained, the total number of depositors and the amount due towards deposits in respect of any previous deposits accepted by the company and such other particulars in such form and in such manner as may be prescribed;

(b) Filing a copy of the circular along with such statement with the Registrar within 30 days before the date of issue of the circular;

(c) depositing, on or before the thirtieth day of April each year, such sum which shall not be less than twenty per cent of the amount of its deposits maturing during the following financial year and kept in a scheduled bank in a separate bank account to be called deposit repayment reserve account [Companies (Amendment) Act, 2017]

(d) certifying that the company has not committed any default in the repayment of deposits accepted either before or after the commencement of this Act or payment of interest on such deposits and where a default had occurred, the company made good the default and a period of five years had lapsed since the date of making good the default; and;

(e) Providing security, if any for the due repayment of the amount of deposit or the interest thereon including the creation of such charge on the property or assets of the company:

Provide that in case where a company does not secure the deposits or secures such deposits partially, then, the deposits shall be termed as "unsecured deposits" and shall be so quoted in every circular, form, advertisement or in any document related to invitation or acceptance of deposits.

Exemptions to Private Limited Companies:

In case of private company - points (a) to (d) above shall not apply to private Companies -

(A) which accepts from its members monies not exceeding 100% of aggregate of the paid up share capital, free reserves, and securities premium accounts, or

(B) Which is a start-up, for five years from the date Of its incorporation; or

(C) Which fulfils all of the following conditions, namely:

(a) It is not an associate or a subsidiary company of any other company;

(b) if the borrowings of such a company from banks or financial institutions or any body corporate is less than twice of its paid up share capital or fifty crore rupees, whichever is lower; and

(c) Such company has not defaulted in the repayment of such borrowings subsisting at the time of accepting deposits under this section:

Provided that the company referred to in clauses (A), (B) or (C) shall file the details of monies accepted to the Registrar in such manner as may be specified.

Q.21. State, with reasons, whether the following statements are True or False?

(i) ABC Private Limited may accept the deposits from its members to the extent of Rs. 50.00 Lakh, if the aggregate of its paid-up capital, free reserves and security premium account is Rs. 50.00 Lakh.

(ii) A Government Company, which is eligible to accept deposits under Section 76 of the Companies Act, 2013 cannot accept deposits from public exceeding 25% of the aggregate of its paid-up capital, free reserves and security premium account.

(1 mark each; 2019-May)

Q.22. Shine Wei! Ltd. has accepted deposits from the public under the Companies (Acceptance of Deposits) Rules, 2014. The company has now decided to repay some of its deposits before maturity. Can the company do so? If yes, what are the conditions attached thereto? (4 marks; 2011 - June) [CS Exe - II]

Answer:

Provisions of Companies (Acceptance of Deposits) regarding premature repayment of deposits, Rules 2014, [Rule 15]

Repayment after six months but before the expiry period of the deposit

The said rule states that a company may, on the request of the depositor, repay its deposits, after the expiry of a period of six months from the date of such deposit but before the expiry of the period for which such deposit was accepted Interest Rate:

The rate of interest payable on such deposit shall be reduced by one per cent, from the rate which the company would have paid had the deposit been accepted for the period for which such deposit had actually run and the company shall not pay interest at any rate higher than the rate so reduced. Exception:

1. Nothing contained in this rule shall apply to the repayment of any deposit before the expiry of the period for which such deposit was accepted by the company, if such repayment is made solely for the purpose of:

(a) Complying with the provisions of rule 3; or

(b) Providing war risk or other related benefits to the personnel of the naval, military or air forces or to their families, on an application made by the associations or societies formed by such personnel, during the period of emergency declared under article 352 of the Constitution

2. Where a company referred to in under sub-section (2) of Section 73 or any eligible company permits a depositor to renew his deposit, before the expiry of the period for which such deposit was accepted by the company, for availing of a higher rate of interest, the company shall pay interest to such depositor at the higher rate if such deposit is renewed in accordance with the other provisions of these rules and for a period longer than the unexpired period of the deposit.

Q.23. Board of directors of Green Field Ltd: decides to accept deposits from the public at a compound interest rate of 12% per annum. Examining the provisions of the Companies Act, 2013, advise whether the Board can go ahead with its proposal.

(4 marks; 2016- June) [CS Exe - II]

Answer:

Provision:

As per Rule 3(6) of the Companies (Acceptance of Deposits) Rules, 2016 no company under Sec. 73(2) or any eligible company shall invite or accept or renew any deposits in any form, carrying a rate of interest or pay brokerage thereon at a rate exceeding the maximum rate of interest or brokerage prescribed by the Reserve Bank of India for acceptance of deposits by non-banking financial companies.

Advise:

Green Field Ltd. is advised to go ahead with the proposal carrying a rate of interest not exceeding the maximum rate of interest or brokerage prescribed by the Reserve Bank of India for acceptance of deposits by non-banking financial companies.

Q.24. Atul Ltd. has passed a resolution in its general meeting regarding accepting deposits from its members. Can this company accept deposits from its members under the Companies Act, 2013? if yes, state the conditions to be fulfilled regarding this.

(8 marks; 2016 - May)

Answer:

Acceptance of Deposits from Members:

According to Sec. 73(2) of the Companies Act, 2013 a company may, subject to the passing of a resolution in general meeting and subject to such rules as may be prescribed in consultation with the Reserve Bank of India, accept deposits from its members on such terms and conditions as prescribed under Rule 3 of Companies (Acceptance of Deposits) Rules,

2014, including the provision of security, if any, or for the repayment of such deposits with interest, as may be agreed upon between the company and its members, subject to the fulfillment of the following conditions, namely:

(a) Issuance of a circular to its members including therein a statement showing the financial position of the company, the credit rating obtained, the total number of depositors and the amount due towards deposits in respect of any previous deposits accepted by the company and such other particulars in Form No. DPT. 1 and in such manner as is prescribed under Rule 4 of Companies (Acceptance of Deposits) Rules, 2014;

(b) Filing a copy of the circular along with such statement with the Registrar within thirty days before the date of issue of the circular;

(c) depositing, on or before the thirtieth day of April each year, such sum which shall not be less than twenty per cent of the amount of its deposits maturing during the following financial year and kept in a scheduled bank in a separate bank account to be called deposit repayment reserve account [Companies (Amendment) Act, 2017];

(d) certifying that the company has not committed any default in the repayment of deposits accepted either before or after the commencement of this Act or payment of interest on such deposits and where a default had occurred, the company made good the default and a period of five years had lapsed since the date of making good the default; and;

(e) Providing security, if any for the due repayment of the amount of deposit or the interest thereon including the creation of such charge on the property or assets of the company:

Provided that in case where a company does not secure does not secure the deposits or secures such deposits partially, then, the deposits shall be termed as secures such deposits partially, then, the deposits shall be termed as"unsecured deposits" and shall be so quoted in every circular, form, advertisement or in any document related to invitation or acceptance of deposits.

Present Case: Atul Ltd. has passed a resolution in its general meeting regarding accepting deposits from its members. Hence, Atul Ltd. can accept deposits from its members by following the above procedure.

Q.25. Suresh, a member of Ruchi Ltd., wants to inspect the register of deposits maintained by the company as required under the provisions of the Companies Act, 2013. The company refused to provide the register for inspection without assigning any reason. Referring to the provisions of the Act, examine the validity of the company's refusal. What shall be your answer if the same Register is demanded by the statutory auditors of the company for inspection and for their audit? (4 marks; 2016-Dec) [CS Exe - II]

Answer:

Provision:

According to Rule 14 of Companies (Acceptance of deposits) Rules, 2014, every company accepting deposits shall, from the date of such acceptance, keep at its registered office one or more separate registers for deposits accepted/renewed.

In absence of any enabling provision, this register is not open for inspection by members and company may refuse to open it for inspection.

Present Case:

In the given case Ruchi Limited can refuse to provide the register for inspection without giving any reason because it is not open for inspection but in case of statutory auditors, the company cannot to do so. The Statutory Auditors have a right to inspect and check every register maintained by the company.

74. REPAYMENT OF DEPOSITS, ETC., ACCEPTED BEFORE COMMENCEMENT OF THIS ACT

Notified Date of Section: 01/04/2014

75. DAMAGES FOR FRAUD.

Notified Date of Section: 01/06/2016

76. ACCEPTANCE OF DEPOSITS FROM PUBLIC BY CERTAIN COMPANIES

Notified Date of Section: 01/04/2014

Q.1. ABC Ltd. having a networth of Rs. 80 crores and turnover of Rs. 30 crores wants to accept deposits from public other than its members. Referring to the provisions of the Companies Act, 2013, state the conditions and the procedures to be followed by ABC Ltd. for accepting deposits from public other than its members. (4 marks; 2018 - June)

Answer:

Eligible company: As per Section 76 of the act a public company which is having a net worth of more than Rs. 100 crores , OR having a net turnover of Rs. 500 crores , is an Eligible company.

Only an eligible public company can accept deposits from publics subjected to certain conditions.

Prior consent of company, in general meeting, by SR File the SR to the registrar before making any initiation.

If proposed deposit is less than net worth of the company then consent of the company can be obtained by OR.

Terms and conditions for eligible companies to accept deposits from public: A company cannot accept the following deposit.

Demand deposit: Deposits payable within 6 months or after 36 months from the date of acceptance. Deposits may be accepted in joint name but not more than 3 joint depositors.

Since, ABC Ltd. has a net worth of Rs. 80 crores and turnover of Rs. 30 crores, which is less than the prescribed limits, hence, it cannot accept deposit from public other than its members. If the company wants to accept deposits from public other than its members, it has to fulfill the eligibility criteria of net worth or Turnover or both and then the other conditions as stated above.

Q.2. ABC Ltd. having a networth of Rs. 80 crores and turnover of Rs. 30 crores wants to accept deposits from public other than its members. Referring to the provisions of the Companies Act, 2013, state the conditions and the procedures to be followed by ABC Ltd. for accepting deposits from public other than its members. (8 marks; 2017-Nov)

Answer:

Acceptance of Deposits from Public other than that of Members. Provision:

According to Sec. 76 of the Companies Act, 2013, notwithstanding anything contained in Sec. 73, a public company, having such networth or turnover as prescribed under Rule 2(e) of the companies (Acceptance of Deposits) Rule, 2014, which is networth not less than one hundred crore rupees or a turnover not less than five hundred crore rupees, may accept deposits from persons other than its members subject to compliance with the requirement provided in Sec. 73(2).

Present Case:

Networth of ABC Ltd. = Rs. 80 Crores Turnover of ABC Ltd. = Rs. 30 Crores.

Thus, ABC Ltd. cannot accept deposit from public since it does not fulfill the criteria given under Sec. 76 of the Companies Act, 2013.

76 A. PUNISHMENT FOR CONTRAVENTION OF SECTION 73 OR SECTION 76.

DECLARATION AND PAYMENT OF DIVIDEND

123. DECLARATION OF DIVIDEND (34 QUESTIONS)

Notified Date of Section: 01/04/2014

Q.1. A company declared dividend at an Annual General Meeting for the financial year ended 31st March, 2013 without providing for depreciation on certain immovable properties on the ground that these assets were acquired as investment for the purpose of the earning supplementary income, though shown in the balance sheet under the head "Fixed Assets", and not for the purpose of any business carried on by the company. If the company had provided depreciation on the said immovable properties, the company would have suffered loss for the financial year ended 31st March, 2013. Answer the following in the context of the above and with reference of The Companies Act, 2013:

(i) Is it in order for the company to declare dividend for the financial year ended 31st March, 2013 without providing for depreciation on certain immovable properties?

(ii) Is it possible for the Board of Directors of the company to revoke the dividend which has been declared at the Annual General Meeting?

(4 marks; 2013 - Dec)

Answer:

(i) According to Section 127 of the Companies Act, 2013, a company can declare and pay dividend only after making adequate provisions for depreciation as provided in the Act. It is immaterial whether the assets are used for the purpose of business of the company or as. investment for earning supplementary income so long as these assets are not intended for resale i.e. stock-in-trade. As the provisions of Section 127 are mandatory in nature, it is not in order for the company to declare dividend for the financial year ended 31st March 2013 without providing for depreciation on certain immovable properties. Further the financial statement for the financial year ended 31st March 2013 cannot be said to show a true and fair view of the state of affairs.

(ii) Ordinarily a dividend once declared becomes a debt and cannot be revoked except with the consent of the shareholders, because the declaration of dividend creates a debt to the shareholders in whose favour it is declared. But where a dividend has been declared illegally as in this case, the Board of Directors will be justified in revoking the declaration of dividend.

Q.2. PWL Limited is facing loss in business during the current Financial Year 2015-16. In the immediate preceding three financial years, the company had declared dividend at the rate of 8%, 10% and 12% respectively. To maintain the goodwill of the company, the Board of Directors has decided to declare 12% interim dividend for the current financial year. Examine the applicable provisions of the Companies Act, 2013 and state whether the Board of Directors can do so?.

(3 marks; 2015 - Dec)

Answer:

Declaration of interim Dividend: According to Section 123 (3) of the Companies Act, 2013, the Board of Directors of a company may declare Interim dividend during any financial year out of the surplus in the profit and loss account and out of profits of the financial year in which such interim dividend is sought to be declared.

However, in case the company has incurred loss during the current financial year up to the end of quarter immediately preceding the date of declaration of interim dividend,

such interim dividend shall not be declared at a rate higher than the average dividends declared by the company during the immediately preceding three financial years.

In the given case the company is facing loss during the current financial year 2015-16. In the immediate preceding three financial years, the company declared dividend at the rate of 8%, 10% and 12%. As per the above mentioned provision, such interim dividend shall not be declared at a "rate higher than the average dividends declared by the company during the immediately preceding three financial year [i.e. 8 + 10 + 12 = 30/3 =10%]. Therefore, decision of Board of Directors to declare 12% of the interim dividend for the current financial year is not tenable.

Q.3. The Board of Directors of Nimbahera Chemicals Limited proposes to transfer more than 10% of the profits of the company to the reserves for the current year. Advise the Board of Directors of the said company mentioning the relevant provisions of the Companies Act, 2013. (4 marks; 2017 - June)

Answer:

The first proviso to 123 (1) of the Companies Act, 2013 provides that a company may, before the declaration of any dividend in any financial year, transfer such percentage of its profits for that financial year as it may consider appropriate to the reserves of the company. Therefore, under the Companies Act, 2013 the amount transferred to reserves out of profits for a financial year has been left at the discretion of the company acting vide its Board of Directors. Therefore, the company is free to transfer any part of its profits to reserves as it deems fit.

Q.4. Referring to the provisions of the Companies Act, 2013, examine the validity of the following:

The Board of Directors of ABC Limited proposes to declare dividend at the rate of 20% to the equity shareholders, despite the fact that the company has defaulted in repayment of public deposits accepted before the commencement of this Act.

(4 Marks; 2017 - Dec)

Answer:

As per Section 123(6) of Companies Act, 2013, no company shall be able to declare dividend in case of default in repayment of public deposits as per Sections 73 and 74 of the Act.

Hence, the action of directors of ABC Limited is not valid.

Q.5. BET Ltd. incurred loss in business up to current quarter of financial year 2017-18. The company has declared dividend at the rate of 11%, 16% and 18% respectively in the immediate preceding three years. In spite of the loss, the Board of Directors of the company have decided to declare interim dividend @ 15% for the current financial year. Examine the decision of BET Ltd. stating the provisions of declaration of interim dividend under the Companies Act, 2013.

(4 marks; 2018 - Dec)

Answer:

Interim Dividend: under Section 123(3) of the Companies Act, 2013, the Board of Directors of a company may declare interim dividend during any financial year out of the surplus in the profit and loss account and out of profits of the financial year in which such interim dividend is sought to be declared.

Although, in case the company has incurred loss during the current financial year up to the end of the quarter immediately preceding the date of declaration of interim dividend, such interim dividend shall not be declared at a rate higher than the average dividends declared by the company during the immediately preceding three financial years.

In the given case, interim dividend by BET Ltd. shall not be declared at a rate higher than the average dividends declared by the company during the immediately preceding three financial years [i.e. (11+16+18)/3=45/3=15%]. Hence, decision of Board of Directors to declare 15% of the interim dividend. for the current financial year is tenable.

Q.6. Simplex Ltd. has a credit balance of Rs. 10,00,000 in Securities Premium Reserve. It did not earn profit during the year and thus was unable to declare dividend. Bapi, the accountant of the Company, suggested that Securities Premium Reserve of Rs. 10,00,000 may be used for payment of dividend. Comment. (4 Marks; 2019 - June)

According to section 52 of the Companies Act, 2013, where a company issues shares at a premium, whether for cash or otherwise, a sum equal to the aggregate 'amount of the premium received on those shares shall be transferred to a "securities premium account" and the provisions of this Act relating to reduction of share capital of a company shall, except as provided in this section, apply as if the securities premium account were the paid-up share capital of the company.

The securities premium account may be applied by the company—
(a) towards the issue of unissued shares of the company to the members of the company as fully paid bonus shares;
(b) in writing off the preliminary expenses of the company;
(c) in writing off the expenses of, or the commission paid or discount allowed on, any issue of shares or debentures of the company;
(d) in providing for the premium payable on the redemption of any redeemable preference shares or of any debentures of the company; or
(e) for the purchase of its own shares or other securities, under section 68.
As such dividend cannot be declared

Q.7. Write short note on the Interim dividend. (4 marks; 2009 - June)

Answer:

1.	**When dividend is said to be interim dividend**	A dividend declared in between two annual general meeting of the company, by the directors is known as 'interim dividend'. However, all the provisions relating to the payment of dividend shall be applicable on the interim dividend also.
2.	**Declaration of interim dividend** by **BOD, Sec. 123(3)**	**Section 123(3)** provides that the Board of Directors of a company may declare interim dividend during any financial year out of the surplus in the profit and loss account and out of profits of the financial year in which such interim dividend is sought to be declared.
3.	**Rate of Interim dividend in case of loss**	In case the company has incurred loss during the current financial year up to the end of the quarter immediately preceding the date of declaration of .interim dividend, such interim dividend shall not be declared at a rate higher than the average dividend declared by the

		company during the immediately preceding three financial years.

Q.8. Write a note on the Divisible profits (4 marks; 2011 - Dec) [CSEM - II]

Answer:

1.	**Which profit of the company is divisible profit**	All the profits of a company cannot be said to be divisible profits. Only those profits which can legally be distributed to the shareholders of the company in the form of dividend are called as divisible profits.
2.	**Meaning of divisible profit**	In **Buenos Aryes Great Southern Rly, Co. Vs Preston (1911),** divisible profits' were described to mean the profits which the directors considered should be distributed after making provision for past losses, reserve and for other purposes.
3.	**Determination of divisible profit**	The following four consideration may govern the determination of divisible profits: (a) Principles of Accounting (b) Provisions of Memorandum and Articles (c) Provisions of the Companies Act, and (d) Legal Decisions.

Q.9. Distinguish between 'Interim dividend' and 'final dividend'. (4 marks; 2014 - Dec)

Answer:

The following are the main points of distinguish between interim and final dividend:

Sr. No.	Basis	Interim Dividend	Final Dividend
1.	**Meaning**	Dividend which is paid in the middle of the year is known as interim dividend.	Dividend which is recommended by the board of directors and approved by the shareholders in AGM is known as final dividend.
2.	**Share-holder's approval**	Interim dividend can be declared by the board of directors and it does not require approval of the shareholder.	Final dividend is recommended by the board of directors and must be approved by the shareholders.
3.	**Decrease in rate**	Since interim dividend does not require approval of shareholders, rate of interim dividend cannot be decreased.	The shareholders cannot increase the rate of dividend than the one recommended by the Board. The shareholders may, however, declare the payment of dividend on equity shares at a rate lower than the one recommended by the directors in their report.
4.	**Sources**	A company may declare interim dividend during any financial year out of the surplus in the profit and loss account and out of profits of the financial year in which such interim dividend is sought to be declared.	A company can pay final dividend form the following sources: out of current profits put of profits of previous financial year s out of money provided by the Central or State Government.

5.	**Restriction in case of loss**	In case the company has incurred loss during the current financial year up to the end of the quarter immediately preceding the date of declaration of interim dividend, such interim dividend shall not be declared at a rate higher than the average dividends declared by the company during the immediately preceding 3 financial years.	If due to inadequacy or absence of profits in any financial year, any company proposes to declare final dividend out of the accumulated profits earned by it in previous years and transferred by the company to the reserves, such declaration of dividend shall be made as per Companies (Declaration and Payment of Dividend) Rules, 2014.

Q.10. Can the dividend be declared out of previous years' profits transferred to reserve?

(6 marks; 2008 - Dec) [CSEM - II]

Answer:

1.	**Dividend in case of absence or inadequacy of profits: Section 123(1) of Companies Act, 2013**	Second proviso to **Section 123(1) of Companies Act, 2013** states that owing to inadequacy or absence of profits in any financial year, any company proposes to declare dividend out of the accumulated profits earned by it in previous years and transferred by the company to the reserves, such declaration of dividend shall not be made except in accordance with such rules as may be prescribed in this behalf.
2.	**Conditions for declaring dividend in case of inadequacy or absence of profits (Rule 3 of Companies Declaration..) 2014**	In the event of adequacy or absence of profits in any year, a company may declare dividend out of surplus subject to the fulfillment of the following conditions, namely:
	(a) Rate of dividend	The rate of dividend declared shall not exceed the average of the rates at which dividend was declared by if in the three years immediately preceding that year: Provided that this sub rule shall not apply to a company which has not declared any dividend in each of preceding **3** financial years.
	(b) Amount to be drawn from profits	The total amount to be drawn from such accumulated profits shall not exceed one-tenth of the sum of its paid-up share capital and free reserves as appearing in the latest audited financial statement.
	(c) First utilisation of amount so drawn	The amount so drawn shall first be utilized to set off the losses incurred in the financial year in which dividend is declared before any dividend in respect of equity shares is declared.
	(d) Balance of reserve	The balance of reserves after such withdrawal shall not fall below fifteen per cent of its paid up share capital as appearing in the latest audited financial statement.
	(e) Setting off previous losses and depreciation	No company shall declare dividend unless carried over previous losses and depreciation not provided in

		previous year are set off against profit of the company of the current year the loss or depreciation, whichever is less, in previous years is set off against the profit of the company for the year for which dividend is declared or paid.

Q.11. Comment on the "Dividend can be paid out of capital if the articles of association authorise such payment". (5 marks; 2011 - Dec) [CSEM - II]

Answer:

1.	**Authenticity of the statement**	Dividend cannot be paid out of capital as per **Section 123(1) of Companies Act, 2013**
2.	**Sources of dividend**	Dividend may be paid out of the following: Three **sources only:** (a) out of current profits, (b) out of profits for any previous financial year or years, and (c) out of money provided by Central 'or State Government for the payment of dividend. Accordingly, dividends are not allowed to be declared out of capital. If the memorandum or articles give power to the Company to pay dividends out of capital such a power shall be invalid.

Q.12. Comment on of the "Dividend can be paid out of capital only if the articles of association of a company authorises such payment" (5 marks; 201-2 - Dec) [CSEM -II]

Answer:

Already Done.

Q.13. The Board of directors of a company in a meeting held on 30th April, 2013 declared interim dividend. In another meeting held on 18tfl May, 2013, the Board revoked the interim dividend declared without assigning any reason. Advise the company in the matter.

(8 marks; 2013 - Dec)

Answer:

1.	**Interim Dividend**	The Board of directors may declare interim dividend. The interim dividend is paid between two annual general meeting of the Company.
2.	**Dividend includes Interim Dividend Sec.2(35) of Companies Act, 2013**	**Section 2(35) of Companies Act, 2013,** defines 'Dividend to include interim dividend. Interim dividend stands on the same footing as that of the final dividend. Therefore, the interim dividend once declared becomes debt and payable within 30 days of declaration.
3.	**Power of BOD to declare interim dividend Sec. 123(3)**	The Board of directors is authorised to declare interim dividend. Hence, if articles does not provide otherwise, Board may declare interim dividend.
4.	**Revocation of declare dividend**	A dividend including interim dividend once declared becomes a debt and cannot be revoked, except with the consent of the shareholders.

5.	**Liabilities of directors in case of illegal declaration of dividend**	But where a dividend has been illegally declared, the directors will be justified in revoking the declared dividend. If an illegally declared dividend is paid, theri the directors shall be responsible, liable and accountable to the company personally.
6.	**Conclusion**	Applying the provisions of the Act as stated above to the given case, it can be concluded that the interim dividend declared by the Board of Directors of the company cannot be revoked. Hence, the resolution passed by the Board of directors for revocation of interim divided declared without assigning any reason is invalid.

Q.14. Referring to the provisions of Companies Act, 2013 advice a public company which declared dividend on 30th September, 2018 as to the procedures to be followed in this regard for payment of dividend. Whether any intervening holidays in the month of October 2018 shall be taken into account in calculating the time limit? (3 marks; 2019 - June)

Q.15. Board of Directors of AVB Limited wants to declare dividend? 15 lakhs out of capital profits for the year ended 31st March, 2017, without making a provisions for depreciation. Referring to the provisions of the Companies Act, 2013, you being the Secretary of the Company advise the board whether it can go ahead with its proposal?

(4 marks; 2017 - June)

Answer:

In accordance with the provisions of the **Companies Act, 2013,** as contained in third proviso to **Section 123(1),** no dividend shall be declared or paid by a company from its reserves other than free reserves. As per **Section 2(43) of the Companies Act, 2013,** "free reserves" means such reserves which, as per the latest audited balance sheet of a company, are available for distribution as dividend.

Further according to **Section 123(2),** for the purposes of declaration of dividend by a company as per **Section 123(1)** (a), depreciation shall be provided in accordance with the provisions of **Schedule II. Therefore, in the given case,** AVB Limited can neither declare dividend from capital profit and nor it can declare dividend without making provision for depreciation.

Q.16. The Board of Directors of American Express Ltd. declared interim dividend third time during the financial year 2015-16. After declaration, the Board of Directors decided to revoke third interim dividend as they noticed that company's financial position did not permit payment of such interim dividend. The Board of Directors seek your advice in this matter.

Please advise the Board as a company secretary. Will your advice be different in case it was a regular dividend instead of interim dividend?

(4 marks; 2017 - Dec)

Answer:

The Board of Directors may declare interim dividend and the amount of dividend including interim dividend shall be deposited in a separate bank account within 5 days from the date of declaration of such dividend. A dividend when declared becomes debt and a shareholder is entitled td'sue for recovery of the same after expiry of the 30 days prescribed under **Section 127.**

Section 2(35) defines 'Dividend' to include interim dividend.

Therefore, the interim dividend once declared cannot be revoked except with the consent of the shareholders.

Based on aforesaid facts, Board of Directors of American Express Limited cannot revoke the interim dividend and should pay the same.

No, Regular dividend also cannot be revoked even by the shareholders. It's a statutory debt against the company once it is declared.

Q.17. The Board of Directors of Peculiar Ltd. proposes to recommend a final dividend of Rs. 25 each to all the equity shareholders of the company. The company seeks your opinion on the following:

(1) The company wants to deposit the-dividend amount to co-operative bank.

(2) The company is a defaulter in the repayment of deposits and proposes to repay its all deposit after the payment of dividend within 10 days.

(3) Dividend will be declared out of the capital reserves of the company.

(4) The company wants to pay such dividend through the cash counter by way of cash voucher. (4 marks; 2018 - June)

Answer:

The Peculiar Ltd. has to follow below procedure for recommending final dividend:

1. Referring to Section 123(4) of the Companies Act, 2013, the amount of the dividend has to be deposited in a scheduled bank. The company should first ensure that said Co-operative bank is scheduled bank from the list of scheduled bank available at RBI website, and then it may deposit the dividend amount in the scheduled Co-operative Bank.

2. Referring to Section 123(6) of the Companies Act, 2013 a company which fails to comply with the provisions relating to acceptance and repayment of deposits shall not, so long as such failure continues, declare any dividend on its equity shares. Hence Peculiar Ltd. cannot declare dividend till the failure persists.

3. Referring, to third proviso to Section 123(1), no dividend shall be declared or paid by a company from its reserves other than free reserves.

Free reserves, as per Section 2(43), means such reserves which,, as per the latest audited balance sheet of a company, are available for distribution as dividend: Provided that:

1. Any amount representing unrealised gains, notional gains or revaluation of assets, whether shown as a reserve or otherwise, or
2. Any change in carrying amount of an asset or of a liability recognised in equity, including surplus in profit and loss account on measurement of the asset or the liability at fair value, shall not be treated as free reserves; Hence dividend cannot be declared out of the capital reserves of the company.

4. Referring to Section 123(5) dividend shall not be payable in cash. Hence company's proposal to pay dividend through cash counter by way of cash voucher is not permitted under law.

Q.18. Board of directors of KM Ltd. proposes to transfer 11.33% of the net profits of the company for the financial year 2015-16 to general reserves. Examining the provisions of the Companies Act, 2013, advise the Board whether it can go ahead with its proposal.

(4 marks; 2016 - Dec)

Answer:

1	A company may, "before the declaration of any dividend In any financial year, transfer such percentage of its profits for that financial year as it may consider appropriate to the reserves of the company.

2	Hence, Board of Directors of KM Ltd. may transfer 11.33% of the net profit to general reserves.

Q.19. Comment on the following:
A resolution was passed by the shareholders in an annual general meeting approving final dividend @ 20% for the financial year 2007-08 and one month later the Board of directors decided to pay further dividend @ 5% for the financial year 2007-08.
(5 marks; 2008 - Dec) [CSEM - II]

Answer:

1.	Company cannot declare further dividend for the same F. YR.	According to the provisions of the Companies Act, 2013, the company can declare dividend only once in a year when the dividend is declared the company cannot declare further dividend for the same year.
2.	Analysis of the given problem	As in the given case, the resolution was passed in Annual General Meeting approving of final dividend of 20% for the financial year 2007-08 and thereafter the Board of Directors decided to pay further dividend of 5% for the financial year 2007-08 which he cannot declare according to the provisions of Companies Act.

Q.20. Examine the validity of the resolution passed at the annual general meeting of a public company for payment of dividend at a rate higher than that recommended by the board of directors. Is it possible for the board of directors of the company to revoke the dividend declared at the annual general meeting?
(5 marks;) [CA Final -I]

Answer:

Payment of Dividend at a Higher Rate:

As per Regulation 80 of Table F of the Companies Act, 2013, a company in General meeting may declare dividends, but no dividend shall exceed the amount recommended by the Board of the company. The shareholders at an AGM may reduce the amount of dividend recommended by the Board, but they cannot increase it. Hence, the resolution passed at the AGM for payment of dividend at a rate higher than that recommended by the Board is not valid.

Revocation of Declared Dividend:

Ordinarily, a dividend once declared at AGM, cannot be revoked, except, with the consent of the shareholders, for a declaration of dividend creates a debt to the shareholders in whose favour it is declared. If a dividend is declared and the amount is paid or credited to the shareholders as dividend, the character of the credit or payment as dividend cannot be altered by a subsequent resolution [Kishanchand chellavam vs. CIT]

Exception: But where a dividend has been illegally declared due to events intervening-after the declaration, such as fire destroying the company's property, or the out break of a war, or the imposition of new heavy tax burden or other causes diminishing the assets of the company makes it advisable to conserve the remaining assets the BOD will be justified in revoking the declaration of dividend as directed by the court.

Q.21. The Board of Directors of M/s RPP Ltd. in a meeting held on 29th May, 2009 declared an Interim dividend payable on the paid up equity share capital of the

company. In the board meeting scheduled for 10th June, 2009, the board wants to revoke the said declaration. State with reference to the provisions of the Companies Act, 2013 whether the board of directors can do so.

(5 marks; 2009 – May; 2012 - May) [CA Final -I]

Answer:

Revocation of interim Dividend

Final dividend is paid only after it is approved in the AGM. Interim dividend is usually paid in the middle of the year if BOD find that profitability of the company is good and is likely to be maintained for balance part of the year, or there is adequate surplus profit and loss account.

Usually, interim dividend is announced when major part of current financial year (say at least 8-9 months or so) is over and trends in profitability are good.

Board can declare Interim Dividend out of profits [Sec. 123(3) of the Companies (Amendment) Act, 2017.

The Board of Directors of a company may declare interim dividend during any financial year or at any time during the period from closure of financial year till holding of the annual general meeting out of the surplus in the profit and loss account or out of profits of the financial year for which such interim dividend is sought to be declared or out of profits generated in the financial year till the quarter preceding the date of declaration of the interim dividend: Provided that in case the company has incurred loss during the current financial year up to the end of the quarter immediately preceding the date of declaration of interim dividend, such interim dividend shall not be declared at a rate higher than the average dividends declared by the company during immediately preceding three financial years.

Subject to the provisions of Sec. 123 of the Companies Act, 2013, the Board may from time to time pay to the members such interim dividends as appear to it to be justified by the profits of the company [Clause 81 of Model Articles of company limited by shares as contained in Table-F of Schedule I of the 2013 Act],

Thus, BOD can declare dividend out of surplus in Statement of Profit and Loss Account at the beginning of the year or profit during the current financial year after following provision of Companies Act, 2013.

Legal Provisions applicable to Interim Dividend

According to Sec. 2(35) dividend includes Interim Dividend.

All provisions relating to dividend equally apply to interim dividend also. Provisions regarding depositing amount in separate bank account, payment within thirty days, transfer of unpaid dividend to special account, interest for late payment, transfer to Investor Protection Fund after seven years, penalty for non payment etc. will obviously apply to interim dividend also.

In case of listed companies, if shares are in demat form, fifteen days advance notice is required to be given to stock exchange for fixing 'record date'. If shares are not in demat form, twenty one days notice is required.

Present Case:

In view of the above Legal Provisions, the Board of RPP Ltd. must deposit the amount of interim dividend declared on 29th May, 2009 into a separate Bank A/c on or before 3rd June, 2009, i.e., within five days from 29th May, 2009 the day when interim dividend was declared. As stated above, the amount once deposited into a separate Bank A/c, can be used only for payment of interim dividend.

As per the provisions of Companies Act, 2013, the Board of RPP Ltd. has no power to revoke the interim dividend declared on 29th May, 2009 and shall not have any power to use the interim dividend amount transferred to a separate Bank A/c for any other purpose.

In case if the interim dividend amount has not been transferred to a separate Bank A/c and is not paid within the time, the company and its directors will become liable to the applicable penal provisions of the said Act.

Q.22. A Public Company has been declaring dividend at the rate of 20% on equity shares during the last 5 years. The Company has not made adequate profits during the year ended 31st March, 2009, but it has got adequate reserves which can be utilised for maintaining the rate of dividend at 20%.. Advise the Company as to how it should go about if it wants to declare dividend at the rate of 20% for the year 2008-2009. Would your answer be different if the company utilised only the profits made in the previous years and retained in the profit and loss account for the purpose of payment of dividend at the rate of 20% for the year 2008-2009? (5 marks; 2009- Nov) [CA Final -I]

Or

CBA Ltd. wants to declare dividend in the year 2013-14 though it will not earn any profit this year due to heavy losses. The company has been declaring dividend for the last 5 years. To maintain its reputation the company wants to declare dividend this year too out of accumulated past profits. Explain how the company can achieve the objective to declare dividend. (5 marks; 2014-May) [CA Final -I]

Or

PET Ltd., incurred loss in business upto current quarter of financial year 2017-18. The company has declared dividend at the rate of 12%, 15% and 18% respectively in the immediate preceding three years. Inspite of the loss, the Board of Directors of the company have decided to declare interim dividend @ 15% for the current financial year. Examine the decision of PET Ltd. stating the provisions of declaration of interim dividend under the Companies Act, 2013. (4 marks; 2018 - May)

Answer:

Declaration of Interim Dividend:

According to Sec. 123(3) of the Companies (Amendment) Act, 2017, the Board of Directors of a company may declare interim dividend during any financial year or at any time during the period from closure of financial year till holding of the annual general meeting out of the surplus in the profit and loss account or out of profits of the financial year for which such interim dividend is sought to be declared or out of profits generated in the financial year till the quarter preceding the date of declaration of the interim dividend: Provided that in case the company has incurred loss during the current financial year up the end of the quarter immediately preceding the date of declaration of interim dividend, such interim dividend shall not be declared at a rate higher than the average dividends declared by the company during immediately preceding three financial years."

Present Case:

Average rate of dividend of preceding three financial year

$$= \frac{12 + 15 + 18}{3} = 15\%$$

Thus, the decision of BOD to declare interim dividend at the rate of fifteen percent is as per the permissible limit. So, the BOD can do so.

Q.23. X & Co. Ltd. made a loss of Rs. 20 lakhs after providing for depreciation for the year ended 31st March, 2009 and as a result the company was not in a position to declare any dividend for the said year out of profits. However, the Board of Directors of the company announced the declaration of dividend of 15% on the equity shares payable out of free reserves. The paid up share capital of the company and its free reserves as on 31st March, 2009 are Rs. 2 crores and 10 crores respectively. The average dividend declared by the Company in the last five years is 25%. Examine the validity of declaration of dividend.

(5 marks; 2010-May) [CA Final -I]

Answer:

Declaration of Dividend out of Reserve

Please refer 2009 - Nov

Present Case

Rate of Dividend declared = 15%

Rate of Dividend declared in the last 3 years = 25%

Paid up share capital + Free Reserve = 12 Cr.

Total amount that can be withdrawn from accumulated profit = $\frac{1}{10}$th of 12 Cr. = 1.2 Cr.

Since 15% is less than 25% company can declare dividend of 15%.

Q.24. The agenda for the meeting of the Board of Directors of M/s. Brilliant Enterprises Ltd. held on 20-3-2011 for adopting the annual accounts for the year ended 31-12-2010 included an item relating to payment of dividend. At the meeting it became apparent that the profits made during the year ended 31-12-2010 were inadequate to declare dividend. The Board was keen to maintain the rate of 20% dividend on the equity shares as declared in the previous years so as to maintain the image of the company. The company has some accumulated profits earned in previous years, which were transferred to reserves. Advise the company as to how it should go about to achieve the objective to pay dividend at the rate of 20% on the equity shares. (5 marks; 2011 - May) [CA Final -I]

Answer:

Declaration of Dividend Out of Reserve

Please refer 2009 - Nov

Rate of Dividend to be declared = 20%

Thus: Company can declare a dividend at the rate of twenty percent provided It has followed the provisions mentioned above.

Q.25. The Board of Directors of Nimbahera Chemicals Limited propose to transfer more than 10% of the profits of the company to the reserves for the current year. Advise the Board of Directors of the said company explaining the relevant provisions of the Companies Act, 2013 and the rules thereunder.

(5 marks; 2012-Nov) [CA Final -I]

Answer:

Transfer to Reserves

As per 2nd Proviso to Sec. 123(1) of Act, 2013, a company may, before the declaration of any dividend in any financial year, transfer such percentage of its profits for that financial year as it may consider appropriate to the reserves of the company.

Therefore, the company may transfer such percentage of profit to reserves before declaration of dividend as it may consider necessary. Such transfer is not mandatory and the percentage to be transferred to reserves is to be decided at the discretion of the company.

Present case:

The Board of Directors of Nimbahera Chemicals Limited propose to transfer more than ten percent of the profits of the company to the reserves for the current year.

Thus in light of above provisions the BOD of Nimbahera Chemicals may transfer more than ten percent of the profits of the company to the reserves for the current year provided they satisfy the applicable conditions mentioned above.

Q.26. Referring to the provisions of the Companies Act, 2013, examine the validity of the following:

The Board of Directors of ABC Limited proposes to declare dividend at the rate of 20% to the equity shareholders, despite the fact that the company has defaulted in repayment of public deposits accepted before the commencement of this Act.

(3 marks; 2015-May) [CA Final -I]

Answer:

Prohibition on declaration of Dividend

Provision:

The Companies Act, 2013, by virtue of Sec. 123 (6) specifically provides that a company which fails to comply with the provisions of Sec. 73 (Prohibition on acceptance of deposits from public) and Sec. 74 (Repayment of deposits etc., accepted before the commencement of this Act) shall not, so long as such failure continues, declare any dividend on its equity shares.

Present Case:

In the given case, the BOD of ABC Limited proposes to declare dividend at the rate of twenty percent to the equity shareholders, despite the fact that the company has defaulted in repayment of public deposits accepted before the commencement of Companies Act, 2013. As per the above provision, the BOD of ABC Limited shall not declare any dividend on its equity shares. The declaration of dividend is thus not valid.

Q.27. WL Limited is facing loss in business during the current financial year 2015-16. In the immediate preceding three financial years, the company had declared dividend at the rate of 8%, 10% and 12% respectively. To maintain the goodwill of the company, the Board of Directors has decided to declare 12% interim dividend for the current financial year. Examine the applicable provisions of the Companies Act, 2013 and state whether the Board of Directors can do so?

(3 marks; 2015 - May) [CA Final -I]

Answer:

Declaration of Interim Dividend:

According to Section 123(3) of the Companies Amendment Act, 2013, the Board of Directors of a company may declare interim dividend during any financial year or at any time during the period from closure of financial year till holding of the annual general

meeting out of the surplus in the profit and loss account or out of profits of the financial year for which such interim dividend is sought to be declared or out of profits generated in the financial year till the quarter preceding the date of declaration of the interim dividend;
Provided that in case the company has incurred loss during the current financial year up to the end of the quarter immediately preceding the date of declaration of interim dividend, such interim dividend shall not be declared at a rate higher than the average dividend declared by the company during immediately preceding three financial year.
Declaration of dividend out of Accumulated Profit
Please refer 2009 - Nov [1] (b) on page no. 324
Present Case:
As per the above provision WL Limited can declare maximum interim dividend as follows:
Average rate of dividend of preceding three financial year

$$= \frac{8\% + 10\% + 12\%}{3}$$

$$= 10\%$$

The BOD has decided to declare twelve percent interim dividend for the current financial year which is more than maximum permissible limit. So, the BOD cannot do so.

Q.28. The Directors of Som Limited proposed dividend at 12% on equity shares for the financial year 2015-16. The same was approved in the annual general meeting of the company held on 20'h September, 2016. The Directors declared the approved dividends. They seek your opinion on the following matter:
Ms. Nini was the holder of 1,000 equity shares on 31st March, 2016, but she has transferred the shares to Mr. Raj, whose name has been registered on 20th May, 2016. Who will be entitled to the above dividend? (2 marks; 2016-Nov) [CA Final -I]

Provision:
As per Sec. 123(5), dividend shall be payable only to the registered shareholder of the share or to his order or to his banker.
As per Sec. 126, where the shares has been transferred by the one holder to another holder then if share transferred before payment of dividend then it shall not be treated as pending transfer of shares and transferee would be entitled to receive the amount of dividend.
Present Case: In the present case, Ms. Nini who has transferred one thousand equity shares on 31sl March, 2016 to Mr. Raj but transfer has been registered on name of Mr. Raj as on 20th May, 2016. The dividend is declared by the company on 20th September 2016. So while declaration of dividend there is no transfer of shares pending against the company so that as on 20th September 2016, Mr, Raj is entitled to receive amount of dividend.

Q.29. During the financial year 2016-17, Universal Limited declared an interim dividend for the second time. After declaration, the Board of Directors decided to revoke the second interim dividend as its financial position was poor, to accommodate the said interim dividend.

(i) Examine the validity of the Board's decision under the provisions of the Companies Act, 2013. (2 marks; 2017-Nov) [CA Final -I]

Answer:

Provision:

As per Sec. 2(35), of the Companies Act, 2013, dividend includes any interim dividend. Therefore, ail the provisions applicable to.final dividend shall equally apply to interim dividend. Thus, interim dividend once declared, is de >t to company and cannot be revoked.

Present Case:

In this case, Universal Limited declared interim dividend second time during the financial year 2016-17. After declaration BOD decided to revoke the second interim dividend as its financial position was poor, to accommodate the said interim dividend. But, as a general rule BOD of Universal Limited cannot revoke dividend after declaration. However, if it is proved that dividend was declared ultra virus as stated above the company may revoke declared dividend.

Q.30. What will be your answer, if the Board proposes to transfer more than 10% of the profits of the company to the reserves for the current year before the declaration of any dividend?

(2 marks; 2017- Nov) [CA Final -I]

Answer:

Provision:

As per 2nd Proviso to Sec. 123(1), company at its own discretion may transfer certain amount or percentage of profit to reserves as it may deemed necessary.

Present Case:

So, here, BOD of Universal Limited can validly transfer more than 10% of the profits of the company to the reserves for the current year before the declaration of any dividend as per Sec. 123(1).

Q.31. Alpha Ltd., A Section 8 company is planning to declare dividend in the Annual General Meeting for the Financial Year ended 31-03-2018. Mr. Chopra is holding 800 equity shares as on date. State whether the act of the company is according to the provisions of the Companies Act, 2013.

(2 marks; 2018- May)

Answer:

Provision

According to Sec. 8(1) of the Companies Act, 2013, Sec. 8 companies are prohibited from paying any dividend to its members. Their profits are intended to be applied only in promoting the objects of the company. Present Case:

Alpha Ltd., a Sec. 8 company is planning to declare dividend in AGM. Thus, as per Sec. 8(1), Alpha Ltd. cannot declare dividend.

Q.32. YZ Ltd. is a manufacturing company and has proposed a dividend @ 10% for the year 2017-18 out of the current year profits. The company has earned a profit of Rs. 910 crores during 2017-18. YZ Ltd. does not intend to transfer any amount to the general reserves of the company out of current year profit. Is YZ Ltd, allowed to do so? Comment.

(3 marks; 2018- Nov)

Answer:

Transfer to Reserve [Sec. 123]:

A company may, before the declaration of any dividend in any financial year, transfer such percentage of its profits for that financial year as it may consider appropriate to the reserves of the company. The amount to be transferred to reserves out of profits for a financial year has been left at the discretion of the company acting vide its Board of Directors. The company is free to transfer any part of its profits to reserves as it deems fit. There is no restriction to transfer any specific amount (i.e. even no amount can be transferred) to the reserves before declaration of dividend.

Present Case:

YZ Limited has earned a profit of Rs. 910 crores for the financial year 2017-18. It has proposed a dividend @ 10%. However, it does not intend to transfer any amount to the reserves of the company out of current year profit.

As per the provisions stated above, the amount to be transferred to reserves out of profits for a financial year is at the discretion of the YZ Ltd. acting vide its Board of Directors.

Q.33. Alex limited is facing loss in business during the financial year 2018- 19. In the immediate preceding three financial years, the company had declared dividend at the rate of 7%, 11 % and 12% respectively. The Board of Directors has decided to declare 12% interim dividend for the current financial year atleast to be in par with the immediate preceding year. Is the Act of the Board of Directors valid?

(3 marks; 2019 - May)

Q.34. The Directors of East West Limited proposed dividend at 15% on equity shares for the financial year 2017-2018. The same was approved-in the Annual general body meeting held on 24th October, 2018. The Directors declared the approved dividends.

Mr. Binoy was the holder of 2000 equity of shares on 31s1 March, 2018, but he transferred the shares to Mr. Mohan, whose name has been registered on 18th June," 2018. Who will be entitled to the above dividend?

(2 marks; 2019 - May)

124. UNPAID DIVIDEND ACCOUNT. (2 QUESTIONS)

Notified Date of Section:07/09/2016

Q.1. Supreme Ltd. declared dividend @ 10% on its 10 lakhs equity shares of Rs. 10 each on 30th September, 2016. The dividend warrants were despatched to all the shareholders except three shareholders, holding in total 50,000 shares, due to dispute regarding title over the shares pending in court. On ascertaining the position on 30th October, 2016, it was observed that dividend warrants for Rs. 1.50 lakhs were not encashed by the remaining shareholders. Explain, with reference to provisions of the Companies Act, 2013, the actions to be taken by the company to deal with the unpaid/unclaimed amount of dividend. Also state the consequences if default is done in this matter.

(8 marks; 2017 -May) [CA Final -I]

Answer:

Unpaid Dividend Account [Sec. 124 of the Companies Act, 2013]

1. Where a dividend has been declared by a company but has not been paid or claimed within thirty days from the date of the declaration

to any shareholder entitled to the payment of the dividend, the company shall, within seven days from the date of expiry of the said period of thirty days, transfer the total amount of dividend which remains unpaid or unclaimed to a special account to be opened by the company in that behalf in any scheduled bank to be called the Unpaid Dividend Account.

2. The company shall, within a period of ninety days of making any transfer of an amount under sub-section (1) to the Unpaid Dividend Account, prepare a statement containing the names, their last known addresses and the unpaid dividend to be paid to each person and place it on the website of the company, if any, and also on any other website approved by the Central Government for this purpose, in such form, manner and other particulars as may be prescribed.
3. If any default is made in transferring the total amount referred to in Sub- Section (1) or any part thereof to the Unpaid Dividend Account of the company, it shall pay, from the date of such default, interest on so much of the amount as has not been transferred to the said account, at the rate of twelve per cent, per annum and the interest accruing on such amount shall enure to the benefit of the members of the company in proportion to the amount remaining unpaid to them.
4. Any person claiming to be entitled to any money transferred under subsection (1) to the Unpaid Dividend Account of the company may apply to the company for payment of the money claimed.
5. Any money transferred to the Unpaid Dividend Account of a company in pursuance of this Section which remains unpaid or unclaimed for a period of seven years from the date of such transfer shall be transferred by the company along with interest accrued, if any, thereon to the Fund established under sub-section (1) of Sec. 125 and the company shall send a statement in the prescribed form DIV 5 of the details of such transfer to the authority which administers the said Fund and that authority shall issue a receipt to the company as evidence of such transfer^
6. All shares In respect of which dividend has not been paid or claimed for seven consecutive years or more shall be transferred by the company in the name of investor Education and Protection Fund along with a statement containing such details as may be prescribed.

Provided that any claimant of shares transferred above shall be entitled to claim the transfer of shares from Investor Education and Protection Fund in accordance with such procedure and on submission of such documents as is prescribed under Rule 6 of Investor Education and Protection Fund Authority (Accounting, Audit, Transfer and Refund) Rules, 2016.

Explanation:

For the removal of doubts it is hereby clarified that in case any dividend is paid or claimed for any year during the said period of seven consecutive years, the share shall not be transferred to Investor Education and Protection Fund.

7. If a company fails to comply with any of the requirements of this section, the company shall be punishable with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees and every officer of the company

who is in default shall be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees.

Q.2. Komal Ltd. declares a dividend for its shareholders in its AGM held on 27th September, 2018. Referring to provisions of the General Clauses Act, 1897 and Companies Act, 2013, advice:

(i) The dates during which Komal Ltd. is required to pay the dividend?

(ii) The dates during which Komal Ltd. is required to transfer the unpaid or unclaimed dividend to unpaid dividend account? (4 marks; 2018-Nov)

Answer:

Provisions:

As per Sec. 124 of the Companies Act, 2013, where a dividend is declared by a company shall be required to be paid within 30 days from the date of the declaration to any shareholder entitle to payment of the dividend.

If it is not paid or claimed within 30 days from the date of the declaration the company shall within next 7 days from date of expiry of the said period of 30 days, transfer the total amount of dividend which remains unpaid or unclaimed to a special account to be opened by the company in that behalf to be called the unpaid dividend account.

As per Sec. 9 of the General Clauses Act, 1897, for computation of time, the section states that in any legislation or regulation, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time to use the word "from" and for the purpose of including the last in a series of days or any other period of time, to use the word "to".

Present Case:

Komal Ltd. declares a dividend for its shareholders in its AGM held on 27th September, 2018.

Thus, as per provisions of the General Clauses Act, 1897, while calculating 30 days from the date of declaration of dividend, date on which AGM is held is excluded and last 30th day shall be included.

As per above provisions of the Companies Act, 2013 & the General Clauses Act, 1897, Komal Ltd. shall be adviced as follows:

(i) AGM of Komal Ltd. is held on 27th September, 2018, in which it has declared dividend. The company is required to pay declared dividend within 30 days from date of declaration i.e. from 28th September, 2018 to 27th October, 2018. In this series of 30 days, 27th September, 2018 will be excluded and last 30th day i.e. 27th October, 2018 will be included.

Accordingly Komal Ltd. shall be required to pay dividend within 28th September 2018 and 27th October 2018 (both days inclusive)

(ii) If declared dividend remains unpaid or unclaimed for 30 days as above, it shall within 7 days from the date of expiry of said period of 30 days transferred to unpaid Dividend Account. So the amount of unpaid or unclaimed dividend shall be required to be transferred to Unpaid Dividend Account within 28th October 2018 to 3rd November, 2018 (Both days inclusive).

125. INVESTOR EDUCATION AND PROTECTION FUND. (4 QUESTIONS)

Q.1. Write a note on the Investor education and protection fund
(4 marks; 2010 - Dec) [CSEM - II]

Answer

1.	**What shall be credited to IEPF? Sec. 125(2)**	**Section 125(2) of Companies Act, 2013** prescribes the following the list which shall be credited to the Fund—	
		(a)	the amount given by the Central Government by way of grants after due appropriation made by Parliament by law in this behalf for being utilised for the purposes of the Fund;
		(b)	donations given to the Fund by the Central Government, State Governments, companies or any other institution for the purposes of the Fund;
		(c)	the amount in the Unpaid Dividend Account of companies transferred to the Fund under sub section (5) of **Section 124;**
		(d)	The amount in the general revenue account of the Central Government which had been transferred to that account.
		(e)	the amount lying in the investor Education and Protection
		(f)	the interest or other income received out of investments made from the Fund;
		(g)	the amount received **under sub-section (4) of Section 38;**
		(h)	the application money received by companies for allotment of any securities and due for refund; matured deposits with companies other than banking companies;
		(i)	matured debentures with companies;
		(k)	interest accrued on the amounts referred to in clauses (h) to (j);
		(l)	sale proceeds of fractional shares arising out of issuance of bonus shares, merger and amalgamation for seven or more years;
		(m)	Redemption amount of preference shares remaining unpaid or unclaimed for seven or more years; and (n) such other amount as may be prescribed.

Q.2. Write a note on the "Investor Education and Protection Fund (IEPF)"
(4 marks; 2013 - June) [CSEM-II]

Answer:
Please refer 2010- Dec

Q.3. Rise Ltd., a company with diversified interests, has constituted Investor Education and Protection Fund as required under the provisions of the Companies Act, 2013. The company has so far not deposited any amount to the fund. The President (Finance) has asked you, the Company Secretary, to submit a note on amounts payable to the credit of the fund and the period within which amount shall be paid. Prepare the said note. (4 marks; 2016 - Dec)

Answer:

Rise Limited

The President (Finance) Date

_____

Sir,

Sub: Details on amount payable to Investor Education and Protection Fund constituted under **Companies** Act, **2013.**

According to **Section 125(1) of the Companies Act, 2013** the Central Government shall establish a Fund to be called the Investor Education and Protection Fund. Therefore,

company is not required to constitute such fund. According to **Section 125(2) of the Companies Act, 2013** the following amounts shall be credited to the Fund establishing by the Government by the company:

(a) The amount given by the Central Government by way of grants after due appropriation made by Parliament by law in this behalf for being utilised for the purposes of the Fund;

(b) donations given to the Fund by the Central Government, State Governments, Companies or any other institution for the purposes of the Fund;

(c) the amount in the Unpaid Dividend Account of companies transferred to the Fund under **sub-section (5) of Section 124;**

(d) the amount lying in the Investor Education and Protection Fund.

(e) the interest or other income received out of investments made from the Fund;

(f) the amount received under **sub-section (4) of Section 38;**

(g) the application, money received by companies for allotment of any securities and due for refund;

(h) matured deposits with companies other than banking companies;

(i) matured debenturesj/vith companies;

(j) interest accrued on the amounts referred tojn clauses (hj to (j);

(k) sale proceeds of fractional shares arising out of issuance of bonus shares, merger and amalgamation for seven or more years;

(l) redemption amount of preference shares remaining unpaid or unclaimed for seven or more years; and

(m) Such other amount as may be prescribed:

Provided that no such amount referred to in clauses (h) to (j) shall form part of the Fund unless such amount has remained unclaimed and unpaid for a period of seven years from the date it became due for payment.

This is for your information and record please. Best Regards

Company Secretary

Q.4. M/s. USA Industries Limited has constituted "Investor Education and Protection Fund" as required under the Companies Act, 1956 but so far no amounts have been deposited into the said account. Explain with reference to the above said enactment, the amounts payable to the credit of the said account and the period within which the amounts shall be paid.

(5 marks; 2011 - Nov) [CA Final -I]

Answer:

As Per Sec. 125(1) of Companies Act, 2013 Central Government shall establish a Fund to be called the Investor Education and Protection Fund

(herein referred to as the Fund).

As per Sec. 125(2) There shall be credited to the Fund:

(a) the amount given by the Central Government by way of grants after due appropriation made by Parliament by law in this behalf for being utilised for the purposes of the Fund;

(b) donations given to the Fund by the Central Government, State Governments, companies or any other institution for the purposes of the Fund;

(c) the amount in the Unpaid Dividend Account of companies transferred to the Fund under sub-section(5) of section 124;

(d) the amount in the general revenue account of the Central Government which had been transferred to that account under sub-section (5) of Section 205A of the

Companies Act, 1956, as it stood immediately before the commencement of the Companies (Amendment) Act, 1999, and remaining unpaid or unclaimed on the commencement of this Act;

(e) the amount lying in the Investor Education and Protection Fund under section 205C of the Companies Act, 1956;

(f) the interest or other income received out of investments made from the Fund;

(g) the amount received under sub-section (4) of Section 38;

(h) the application money received by companies for allotment of any securities and due for refund;

(i) matured deposits with companies other than banking companies;

(j) matured debentures with companies;

(k) interest accrued on the amounts referred to in clauses (h) to (j);

(l) sale proceeds of fractional shares arising out of issuance of bonus shares, merger and amalgamation for seven or more years;

(m) Redemption amount of reference shares remaining unpaid or unclaimed for seven or more years; and

(n) such other amount as may be prescribed:

Provided that no such amount referred to in clauses (h) to (j) shall from part of the Fund unless such amount has remained unclaimed and unpaid for a period of seven years from the date it became due for payment.

126. RIGHT TO DIVIDEND, RIGHTS SHARES AND BONUS SHARES TO BE HELD IN ABEYANCE PENDING REGISTRATION OF TRANSFER OF SHARES (1 QUESTION)

Notified Date of Section: 01/04/2014

Q.1. A company declared dividend on 21st November, 2018. It reports on 22nd December, 2018 that it could not pay dividend to 46 members as they are not traceable for last three years. Advise the company with regard to unpaid dividend under the provisions of the Companies Act, 2013.

(3 marks; 2018 - Dec)

Answer:

Under section 126(1) of the Companies Act, 2013 where a dividend has been declared by a company but has not been paid or claimed within thirty days from the date of the declaration to any shareholder entitled to the payment of the dividend, the company shall, within seven days from the date of expiry of the said period of thirty days, transfer the total amount of dividend which remains unpaid or unclaimed to a special account to be opened by the company in that behalf in any scheduled bank to be called the Unpaid Dividend Account.

In the above case, the company declared dividend on 21st November, 2018, the dividend remains unpaid after 30 days of declaration i.e. 22nd December, 2018. The company is advised to transfer the remaining unpaid or unclaimed dividend to a special account called the Unpaid Dividend Account in any scheduled bank within seven days from the date of expiry of the said period of thirty days. Further any money transferred to the Unpaid Dividend Account of a company which remains unpaid or unclaimed for a period of seven years from the date of such transfer shall be transferred by the company along with interest accrued, if any, thereon to the Investor Education and Protection Fund.'

127. PUNISHMENT FOR FAILURE TO DISTRIBUTE DIVIDENDS. (10 QUESTIONS)

Q.1. TREEZA LTD. declared dividend for the Financial Year 2013-2014 on 1st July., 2014 but did not pay the same to the shareholders within the prescribed time. Explain with reference to the provisions of Companies Act, 2013.

(i) What are the penal provisions against such violation?

(ii) Under what circumstances no offence shall be deemed to have been committed?

(2 + 2 = 4 marks; 2014 - Dec)

Answer:

(i) Punishment for failure to distribute dividends:

- Section 127 of Companies Act, 2013 provides that when a dividend has been declared by a company but has not been paid or the warrant in respect thereof has not been posted within 30 days from the date of declaration to any shareholder entitled to the payment of the dividend.
- Every director of the company shall, if he is knowingly a party to the default, be punishable with imprisonment which may extend to 2 years and with fine which shall not be less than ? 1,000 for every day during which such default continues and the company shall be . liable to pay simple interest at the rate of eighteen per cent per annum during the period for which such default continues.

(ii) No offence under Section 127 of Companies Act, 2013 shall be deemed to have been committed:

(a) Where the dividend could not be paid by reason of the operation of any law;

(b) Where a shareholder has given directions to the company regarding the payment of the dividend and those directions cannot be complied with and the same has been communicated to him;

(c) Where there is a dispute regarding the right to receive the dividend;

(d) Where the dividend has been lawfully adjusted by the company against any sum due to it from the shareholders; or

(e) Where, for any other reason, the failure to pay the dividend or to post the warrant within the period under section 127(1) was not due to default on the part of the company.

Q.2. Star Gold Ltd., declared and paid dividend in time to all its equity holders for the financial year 2014-15, except in the following two cases:

(i) Mrs. Sheela, holding 250 shares had mandated the company to directly deposit the dividend amount in her bank account. The company, accordingly remitted the dividend but the bank returned the payment on the ground that there was difference in surname of the payee in the bank records. The company, however, did not inform Mrs. Sheela about this discrepancy.

(ii) Dividend amount of Rs. 50,000 was not paid to Mr. Mohan, deceased, in view of court order restraining the payment due to family dispute about succession.

You are required to analyse these cases with reference to provisions of the Companies Act, 2013 regarding failure to distribute dividends.

(5 marks; 2016 - June)

Answer:

(i) Section 127 of the Companies Act, 2013 provides for punishment for failure to distribute dividend on time. One of such situations is where a shareholder has given directions to the company regarding the payment of the dividend and those directions cannot be complied with and the same has not been communicated to her. In the given situation, the company has failed to communicate to the shareholder Mrs. Sheela about

non-compliance of her direction regarding payment of dividend. Hence, the penal provisions under Section 127 will be applicable.

(ii) Section 127, inter-alia, provides that no offence shall be deemed to have been committed where the dividend could not be paid by reason of operation of law. In the present circumstance, the dividend could not be paid because it was not allowed to be paid by the court until the matter was resolved about succession.

Hence, there will not be any liability on the company and its Directors etc.

Q.3. Write note on the "Punishment for failure to distribute dividend and exceptions"

(4 marks; 2016 - June)

Answer:

1	**Punishment for Failure to Distribute Dividends**	**Section 127 of Companies Act 2013** provides that when a dividend has been declared by a company but has not been paid or the warrant in respect* thereof has not been posted within thirty days from the date of declaration to any shareholder entitled to the payment of the dividend, every director of the Company shall, if he is knowingly a party to the default, be punishable with imprisonment which may extend to two years and with fine which shall not be less than one thousand rupees for every day during which such default continues and the company shall be liable to pay simple interest at the rate of eighteen percent per annum during the period for which such default continues.
2	**Exceptions**	Proviso to **Section 127** has provided a list where no offence under this section shall be deemed to have been committed: (a) where the dividend could not be paid by reason of the operation of any law; (b) where a shareholder has given directions to the company regarding the payment of the dividend and those directions cannot be complied with and the same has been communicated to him; (c) where there is a dispute regarding the right to receive the dividend; (d) where the dividend has been lawfully adjusted by the company against any sunn due to it from the shareholder; or (e) Where, for any other reason, the failure to pay the dividend or to post the warrant within the period under this section was not duef to any default on the part of the company.

Q.4. A company for the financial year 2011-12 declared dividend on 19th September, 2012 but failed to distribute the same within the prescribed period. A case was filed against a director in this regard. The director has contended that he had resigned before the declaration of dividend. Decide fate of the director in the light of the relevant provisions of the Companies Act, 2013.

(4 marks; 2013 - Dec)

Answer:

1.	**Punishment for failure to distribute dividends Sec. 127**	Any failure (director) of the company, who is knowingly a party to the default, liable for punishment with simple imprisonment for a term which may extend to two years and also fine of atleast Rs. 1,000 for every day during which such default continues.
2.	**Case Law Study N. Kumar**	(i) **Brief Facts of the case:** A company for the

	V.M.O. Roy, Assistant Director S.E.I.O.	financial year 1995-96, declared the dividend on 19.9.1996 and failed to distribute same within the prescribed period. A complaint has been filed against the company and its directors on 23.8.2006. for the contravention of the provision **u/s 127 of the Act.** A director contended that he had resigned before the declaration of dividend so he could not be held liable for the contravention of **Section 127 of Companies Act, 2013.** **(ii)** **Decision of the court:** The Tribunal held that the director was not **a** whole time director to be aware about the entire affairs of the company. The director could not be held vicariously liable for the contravention under **section 127** and therefore the proceedings were liable to be quashed as against the director.

Q.5. In Evergreen Ltd., the Board of directors declared an interim dividend but could not distribute the dividend due to objections of audit committee that the accounts considered by the Board were false; and true financial results were inflated by not incorporating outstanding liabilities and over-valuation of inventories. A shareholder filed a suit for non-payment of dividend. One of the directors contended that he never attended the Board meeting where the issue relating to payment of interim dividend was declared on the basis of false accounts. Discuss about the validity of contention of the director.

(4 marks; 2014 - Dec)

Answer:

The contention of the absentee director is correct and he is not liable for the payment of dividend on false accounts declared in a meeting where the director to become liable was absent. The facts of the case is similar to the case law of Nagendra Prabhu v. the Popular Bank ZLR (1961) 1 Ker340.

Q.6. The Annual General Meeting of ABC Limited declared a dividend at the rate of 30 percent payable on paid up equity share capital of the Company as recommended by Board of Directors on 30th April, 2013. But the Company was unable to post the dividend warrant to Mr. Ranjan, an equity shareholder of the Company, up to 30,h June, 2013. Mr. Ranjan filed a suit against the Company for the payment of dividend along with interest at the rate of 20 percent per annum for default period. Decide in the light of provisions of the Companies Act, 2013, whether Mr. Ranjan would succeed? Also state the directors' liability in this regard under the Act. **(5 marks; 2013- Nov) [CA Final -I]**

Answer:

Provisions relating to Time Limit tor payment of Dividend and Punishment for failure to distribute dividends

According to Sec, 127 of the Companies Act, 2013, where a dividend has been declared by a company but has not been paid or the warrant in respect thereof has not been posted within thirty days from the date of declaration to any shareholder entitled to the payment of the dividend, every director of the company shall, if he is knowingly a party

to the default, be punishable with imprisonment which may extend to two years and with fine which shall not be less than one thousand rupees for every day during which such default continues and the company shall be liable to pay simple interest at the rate of eighteen percent per annum during the period for which such default continues.

However, the following are the exceptions under which no offence shall be deemed to have been committed.

(a) Where the dividend could not be paid by reason of the operation of any law.
(b) Where a shareholder has given directions to the company regarding the payment of the dividend and those directions cannot be complied with and the same has been communicated to him.
(c) Where there is a dispute regarding the right to receive the dividend.
(d) Where the dividend has been lawfully adjusted by the company against any sum due to it from the shareholder, or
(e) Where, for any other reason, the failure to pay the dividend or to post the warrant within the period under this section was not due to any default on the part of the company.

Present Case:

Mr. Ranjan's Right

The company was unable to post dividend warrant within thirty days of declaration. Thus as per Sec. 127 of the Companies Act, 2013, Mr. Ranjan can file a suit against the company for payment of dividend. But he would be entitled to dividend along with simple interest at the rate of eighteen percent and not twenty percent for the default period.

Directors Liability

Every director of the company, if he is knowingly a party to the default, punishable with imprisonment for a term which may extend to two years and also to a fine of one thousand rupees for every day during which such default continues.

Q.7. Star Ltd. declared and paid dividend in time to all its equity holders for the financial year 2014-15, except in the following case:

Mrs. Sheeia, holding 250 shares had mandated the company to directly deposit the dividend amount in her bank account. The company, accordingly remitted the dividend but the bank returned the payment on the ground that there was difference in surname of the payee in the bank records. The company, however, did not inform Mrs. Sheeia about this discrepancy.

You are required to analyse this case with reference to provisions of the Companies Act, 2013 regarding failure to distribute dividends. (4 marks; 2015-Nov) [CA Final -I]

Or

PQ Ltd. declared and paid 10% dividend to all its share holders except Mr. Kumar, holding 500 equity shares, who instructed the company to deposit the dividend amount directly in his bank account. The company accordingly remitted the dividend, but the bank returned the payment on the ground that the account number as given by Mr. Kumar doesn't tally with the records of the bank. The company, however, did not inform Mr. Kumar about this discrepancy. Comment on this issue with reference to the provisions of the Companies Act, 2013 regarding failure to distribute dividend. - (2 marks; 2019-May)

Answer:

Provision:

Sec. 127 of the Companies Act, 2013 provides for punishment for failure to distribute dividend on time. One of such situations is where a shareholder has given directions to the company regarding the payment of the dividend and those directions cannot be complied with and the same has not been communicated to her.

Present Case:

In the given case, the company has failed to communicate to the shareholder Mrs. Sheela about non-compliance of her direction regarding payment of dividend. Hence, the penal provisions under Section 127 will be applicable.

Q.8. Star Ltd. declared and paid dividend in time to all its equity holders for the financial year 2014-15, except in the following case:

(ii) Dividend amount of Rs. 50,000 was not paid to Mr. Mohan, deceased, in view of court order restraining the payment due to family dispute about succession.

You are required to analyse this case with reference to provisions of the Companies Act, 2013 regarding failure to distribute dividends. (4 marks; 2015 - Nov) [CA Final -I]

Answer:

Provision:

Sec. 127, inter-alia, provides that no offence shall be deemed to have been committed where the dividend could not be paid by reason of operation of law as well as due to existence of dispute regarding the right to receive dividend.

Present Case:

In the present case, the dividend could not be paid because it was not allowed to be paid by the court until the matter was resolved about succession. Hence, there will not be any liability on the company and its Directors etc.

Q.9. The Directors of Som Limited proposed dividend at 12% on equity shares for the financial year 2015-16. The same was approved in the annual general meeting of the company held on 20th September, 2016. The Directors declared the approved dividends. They seek your opinion on the following matter:

Mr. Ashok, holding equity shares of face value of Rs. 10 lakhs has not paid an amount of Rs. 1 lakh towards call money on shares.

Can the same be adjusted against the dividend amount payable to him?

(2 marks; 2016 - Nov) [CA Final -I]

Answer:

Provision:

As per Sec. 127 of the Companies Act, 2013, the dividend shall be paid within thirty days from the date of declaration, in case where the dividend warrant, is posted by the company within thirty days of declaration of dividend, it is considered to be a sufficient compliance of Sec. 127. As per Sec. 127, where dividend is lawfully adjusted by the company against any sum due to it from the shareholder then no default is deemed to have been committed by the company.

Present Case:

The directors of Som Ltd. wants to adjust dividend declared at twelve percent on equity shares for the financial year 2015-16 in case of Mr. Ashok who has not paid an amount of one lakh rupees towards call on shares. So that as per Sec. 127 directors can validity

adjust any sum due to it by shareholder from amount of dividend. Here, company can adjust the dividend amount payable to Mr. Ashok against his pending due.

Q.10. Karan was holding 5000 equity shares of Rs. 100 each of M/s. Future Ltd. A final call of Rs. 10 per share was not paid by Karan. M/s. Future Ltd. declared dividend of 10%. Examine with reference to relevant provisions of the Companies Act, 2013, the amount of dividend Karan should receive.

(3 marks; 2018-Nov)

Answer:

As per Sec. 127 of the Companies Act, 2013, where a dividend has been declared by a company but has not been paid or the warrant in respect thereof has not been posted within 30 days from the date of declaration to any shareholder entitled to the payment of the dividend, every director of the company shall, if he is knowingly a party to the default, be punishable with imprisonment which may extend to two years.

However, where the dividend has been lawfully adjusted by the company against any sum due to it from the shareholder, no offence shall be deemed to have been committed. [Provision to Sec. 127]

Present Case:

In this case, Karan, one of the shareholder of M/s. Future Ltd. has not paid a final call of Rs. 20 per share of 5,000 equity shares. The company has declared dividend of 10%. So, the dividend payable to Karan is Rs. 50,000 and call amount to be receivable from Karan is also Rs. 50,000. So as per above provisions the company can lawfully adjust amount due from Karan and it is not deemed to be default.

As per above provisions Karan shall not receive any amount of dividend.

ACCOUNT OF COMPANIES

128. BOOKS OF ACCOUNT, ETC., TO BE KEPT BY COMPANY (11 QUESTIONS)

Notified Date of Section: 01/04/2014

Q.1. Comment on the following: (i) It is not obligatory for every company to preserve its books of account. (2012 - June)

Answer:

1	**Authenticity of the Statement**	Maintenance of books of account would mean records maintained by the company to record the specified financial transaction. It has been specifically provided that every company shall keep proper books of account. This section specifies the main features' of proper books of account as under - (i) The company must keep the books of account with respect to items specified in clauses (i) to (iv) of **sub-section 2(13) of the Companies Act, 2013** hereinafter referred as Act, which defines "books of account". (ii) The books of account must show all money received and expended, sales and purchases of goods and the assets and liabilities of the company. (iii) The books of account must be kept on accrual basis and according to the double entry system of accounting. (iv) The books of account must give a true and fair view of the state of the affairs of the company or its branches.
2	**Place of Keeping Books of Account**	Section 128(1) requires every company to prepare and keep the books of account and other relevant books and papers and financial statements at its registered office. However, all or any of the books of accounts may be kept at such other place in India as the Board of directors may decide. When the Board so decides the company is required within seven days of such decision to file with the Registrar a notice in writing giving full address of that other place.
3	**Maintenance of Books of account in electronic form**	The maintenance of books of account and other books and papers in electronic mode is permitted and is optional. Such books of accounts or other relevant books or papers maintained in electronic mode shall remain accessible in India so as to be usable for subsequent use (the **Companies (Accounts) Rules, 2014.**
4	**Conclusion**	Hence, it is incorrect to say that it is not obligatory for every company to preserve its book of accounts.

Q.2. Comment on the following:
Where a company has a branch office, whether in India or abroad, the original books of account, records, etc. of the branch office, will have to be maintained in the registered office of the company. (5 marks; 2013 - June)

Answer:

1	**Authenticity of the Statement**	The Statement is incorrect.
2	**Reason**	Because, a company has a branch office whether in India or outside, the books of account relating to transaction effected at the branch office may be kept at that office. **(Section 128 of Companies Act, 2013)**

Q.3. Comment on the following:
A director of a company has an absolute right of inspection of the books of account. (5 marks; 2013 - Dec)

Answer:

1	**Section 128(3)**	As provided in **sub-Section (3) of Section 128 of the Companies Act, 2013,** any director can inspect the books of accounts and other books and papers of the company during business hours.

2	**Section 2(12)**	The expression "Books and Papers" has been defined in **Section 2(12)** which includes accounts, deeds, vouchers, writings and documents. The company is, therefore, required to make available the aforesaid books and papers for inspection by any directors.
3	**Inspection by BOD**	Such inspection may be done by any type of director- nominee, independent, promoter or whole time. The proviso to sub-**Section 3** provides that a director of the Company can inspect the books of accounts of the subsidiary, only on authorisation by way of the resolution of Board of Directors.
4	**Rule 4(2)**	Where any other financial information maintained outside the country is required by a director, the director shall furnish a request to the company setting out the full details of the financial information sought and the period for which such information is sought (Rule 4(2)).
5	**Rule 4(3)**	The said information shall be provided to director within 15 days of receipt of request (Rule 4(3)).
6	**Rule 4(4)**	The director can seek the information only individually and not by or through his attorney holder or agent or representative (Rule 4(4)).

Q.4. Referring to the provisions of the Companies Act, 2013, explain whether the Company Secretary being a Chief Financial Officer of the company can be held liable for maintenance of books of account of the company. (4 marks; 2016 - June)

Answer:

1	**Persons responsible to maintain books**	The person responsible to take all reasonable steps to secure compliance by the company with the requirement of maintenance of books of accounts etc. shall be: (sub-section 6): (i) Managing Director, (ii) Whole-Time Director, in charge of finance (iii) Chief Financial Officer (iv) Any other person of a company charged by the Board with duty of Complying with provisions of **Section 128.**
2	**Conclusion**	Therefore, a Company Secretary t>eing a Chief Financial Officer of the company can be held liable for maintenance of books of accounts of the company.

Q.5. Comment on the Chief Financial Officer is responsible to maintain books of account of the company. (5 marks; 2018 - Dec)

Answer:

As per Section 128 of the Companies Act, 2013 provides that to maintenance of Books of accounts by the company. According to sub section (6) of Section 128 if the Managing Director, the Whole-Time Director in charge of finance, the Chief Financial Officer or any other person of a company charged by the Board with the duty of "complying with the provisions of Section 128, fails to comply with the provisions shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees or with both.

Accordingly it is the responsibility of the Chief Financial Officer along with Managing Director and whole time director in charge of finance of the company to maintain the Books of Accounts of the company.

Q.6. Vir is a director in DJA Ltd. (the company). The company holds 75% shares of MRN Ltd. Vir wants to inspect the books of MRN Ltd. Examining the provisions of the Companies Act, 2013 advise whether Vir, the director of DJA Ltd. can be allowed to inspect the books of MRN Ltd. (4 marks; 2015 - June)

Answer:

1	**Analysis of given the case**	In accordance with the provisions of the **Companies Act, 2013,** as contained in **Section 128(3),** any director can inspect the books of accounts and other books and papers of the company during business

		hours. The expression 'Books and Papers' has been defined in **Section 2(12)** which includes accounts, deeds, vouchers, writings, documents, minutes and registers maintained on paper or in electronic form. The company is, therefore, required to make available the aforesaid books and papers for inspection by any directors. Such inspection may be done by any type of director-nominee, independent, promoter or whole time. However, according to the proviso to sub**section (3)** of the section, the inspection in respect of any subsidiary of the company shall be done any person authorised in this behalf by a resolution of the Board of Directors.
2	**Conclusion**	**In the present case** Vir, may inspect the books of MRN Ltd. only when he is authorised by the Board of the DJA Ltd. in this context.

Q.7. Board of Directors of Anil Limited has decided not to preserve the books of accounts and other related records of accounts, for more than five years immediately preceding the relevant financial year of 2016-17 due to shortage of space in the office premises. Referring to the provisions of the Companies Act, 2013, examine the validity of the Board's decision. '

(4 marks; 2017 - June)

Answer:

According to **sub-section (5)** of **Section 128** of **the Companies Act, 2013,** the books of accounts, together with vouchers relevant to any -entry in such books are required to be preserved for a period of not less than eight financial years immediately preceding a financial year. Where the company had been in existence for a period less than eight years, the books of account in respect of all the preceding years together with the vouchers relevant to any entry in such books of account shall be kept in good order. The provisions of the **Income-tax Act, 1961** shall also be complied with in this regard. As per proviso to **sub-section (5)** of **Section128,** where an investigation has been ordered in respect of the company under Chapter XIV, the Central Government may direct that the books of account may be kept for such longer period as it may deem fit and give directions to that effect.

The decision taken by the Board of Directors of Anil Limited is not in accordance with the provisions of the law and the company cannot do so.

Q.8. Mr. Ramanujam, one of the Directors in Debari Food Processimi Limited was not satisfied with the performance of the company in financial matters. He requested Mr. Anandaraja, a Chartered Accountant, to inspect the books of accounts of the company on his behalf. Decide, under the provisions of the Companies Act, 2013 whether the said company can refuse to allow Mr. Anandaraja to inspect the books of accounts?

[Modified] (4 marks; 2013-May) [CA Final -I]

Answer:

Provision:

Inspection of Books of Accounts:

Sec. 128(3) of the Companies Act, 2013 provides that the books of account and other books and papers shall be open to inspection by any director at the RO of the company or at such other place in India where the books have been kept during the business hours.

A Director is entitled to inspect the accounts personally or through an Agent provided that -

(a) there is no reasonable objection to the person chosen, and

(b) the Agent undertakes not to use the information obtained by him for any purpose other than the purpose of his principal.

(Vakharia Vs Supreme General Film Exchange Co. Ltd.)

Present Case:

Right of Mr. Ramanujam as a Director

As per provisions and proceeding of the case law mentioned above, Mr. Ramanujam can appoint Mr. Anandraja to go through the books of Accounts. Right of Mr. Ramanujam as a shareholder

As per Sec. 128, no member of a company is entitled to inspect the books of account of the company.

Regulation 89 of Table F reads as under:

(i) The board shall from time to time determine whether and to what extent and at what times and places and under what conditions or regulations the accounts and books of the company or any of them, shall be open to the inspection of members not being director.

(ii) No member (not being a director) shall have any right of inspecting any account or books of the company except as conferred by law or authorised by the Board or by the company in general meeting.

Thus, in case Mr. Ramanujam is a member of the company, he shall be able to inspect the books of account only if he is given such a right by ordinary resolution of the members or if authorized by the board . But even in such case Mr. Ramanujam would have, to exercise the right personally and not through a proxy i.e. he can himself inspect the books but cannot ask Mr. Anandraja to inspect the books on his behalf.

Q.9. ABC Private Limited was incorporated on 15-09-2013 in the State of Maharashtra by a group of Professional Engineers without any knowledge about the maintenance of the books of account. The company has appointed you as the Chief Accounts Officer at New Delhi where the books of account will be maintained. Keeping the provisions of Sec. 128 of the Companies Act, 2013, advise the management on

(i) the nature of books to be maintained

(ii) the period for which the accounts have to be preserved and

(iii) the steps to be taken if the books of accounts are to be kept in New Delhi.

(8 marks; 2014- May) [CA Final -I]

Answer:

(i) The nature of Books to be maintained:

As per Sec. 128(1) every company shall prepare and keep at its RO books of accounts and other relevant books and papers and financial statements for every financial year which give true and fair view of state of affairs of company and its branch.

(ii) The period for which the accounts have to be preserved

As per Sec. 128(5), the Company shall preserve in good order the books of account together with the relevant vouchers. The time period of such preservation shall beta) not less than eight financial years immediately preceding the current year; or

(b) if the company has not been in existence for eight years then for the whole period of its existence.

(iii) Steps to be taken if the books of accounts are to be kept in Delhi. As per Sec. 128(1), the books of accounts shall be kept at the registered office of the company.

However as per 1st proviso to Sec. 128(1) all or any of the books of account may be kept at such other place in India as the BOD may decide.

In such case the company shall within seven days of the decision of the Board file with the Registrar a notice in writing giving the full address of that other place.

So, in this case if the books of accounts are to be kept at New Delhi, then a company should follow the above given procedure.

Q.10. Mr. Bhagvath, recently acquired 76% of the equity shares of M/s Renowned Company Ltd., in the hope of earning good dividend income. Unfortunately the existing Board of Directors have been avoiding declaration of dividend due to alleged inadequacy of profits. Unconvinced, Mr. Bhagvath seeks permission of the Company to allow him to examine the Books of Accounts, which is summarily rejected by the Company. Examine and advise the provisions relating to inspection of Books of Accounts and remedy available.

(4 marks; 2014-Nov) [CA Final -I]

Answer:

Provision

Sec. 128(3) of the Companies Act, 2013 provides that the books of account and other books and papers shall be open to inspection by any director at the RO of the company or at such other place in India where the books have been kept during the business hours.

However, Regulation 89 of Table F reads as under:

(i) The board shall from time to time determine whether and to what extent and at what times and places and under what conditions or regulations the accounts and books of the company or any of them, shall be open to the inspection of members not being director.

(ii) No member (not being a director) shall have any right of inspecting any account or books of the company except as conferred by law or authorised by the Board or by the company in general meeting.

Present Case: Mr. Bhagvath, recently acquired seventy six percent of the equity shares of M/s Renowned Company Ltd., in the hope of earning good dividend income. Unfortunately the existing BOD have been avoiding declaration of dividend due to alleged inadequacy of profits. Unconvinced, Mr. Bhagvath seeks permission of the Company to allow him to examine the Books of Accounts, which is summarily rejected by the Company.

Thus, Mr. Bhagvath as an equity shareholder shall be able to inspect books of accounts only if he is given such a right authorised by AOA, Board Resolution Company resolution in General Meeting.

Q.11. An allegation was levelled against Drone Limited that the funds of the company are being misused. Mr. Ram, one of the directors of the company wants to inspect the books of accounts of the company in order to ascertain whether the allegation was true. But since Mr. Ram does not have the knowledge of accounting, appoints Mr. Joe his friend and a practicing Chartered Accountant to go through the books of accounts of the company on his behalf and report him the true status. The company has challenged the appointment of Mr. Joe to inspect in books of accounts of the company as invalid. Advise Mr. Ram keeping in view the provisions of the Companies Act, 2013. What would be your answer, if Mr. Ram had been a shareholder holding 76% of shares and not a director in Drone Limited? -

(4 marks; 2017- Nov) [CA Final -I]

Answer:

• Under Sec. 128(3) of the Companies Act, 2013, the books of account and other books and papers maintained by the company within India shall be open for inspection at the RO of the company or at such other place in India by any director during business hours, and in the case of financial information, if any, maintained outside the country, copies of such financial information shall be maintained and produced for inspection by any director subject to such conditions as may by prescribed under Rule 4 of Companies (Accounts) Rules, 2014

• The Companies Act, 2013 makes it quite clear that the inspection can be done by a director.

- However, in case the director wishes to get the inspection done by an agent or a representative he must seek the approval of the BOD without which he will not be allowed to do so.
- In Vakharia \/s. Supreme General Film Exchange Co. Ltd., it was held that a director is entitled to take inspection of accounts personally or through an agent provided that there is no reasonable objection to the person chosen and the agent undertakes not to utilize the information obtained by him for any purpose other than the purpose of his principal.
- As the right of inspection is a statutory right given under this Section, a director who is prevented or refused from inspection may enforce his right through Court.
- As such Mr. Ram being the director of Drone Ltd., may appoint Mr. Joe to inspect the books of accounts of the company only with the approval of the BOD.

- Hence, Drone Ltd. can't refuse to allow Mr. Joe to inspect books of accounts if such right of inspection has been approved by the BOD. Further, if Mr. Ram had been a shareholder holding 76% of shares and not a director in Drone Ltd.
- Mr. Ram has no right to carry out an inspection of the books of accounts of the company despite of the fact that he holds 76% of the equity shares of the Drone Ltd. According to Sec. 128(3) and 206 of the Companies Act, 2013, following persons have the right to carry out the inspection of the books of accounts of the company.

(i) Directors of the company (Sec. 128(3) of the Companies Act, 2013).
(ii) Registrar of Companies (Sec. 206 of the Companies Act, 2013)
(iii) Such Officer of Government as may be authorised by the Central Government in this behalf (Sec. 206 of the Companies Act, 2013).
(iv) Such Officers of SEBI as may be authorised by SEBI (Sec. 206 read with Sec. 24 of the Companies Act, 2013).

- Since, Mr. Ram does not fall in any of above mentioned categories, he is not eligible to carry out the inspection.

(Note: According to Regulation 89(ii) of the Table F of the Schedule -! of the Companies Act, 2013, a member shall have right of inspecting any account or books or document of the company only if conferred by law or authorized by the Board or by the company in AGM.)

129. FINANCIAL STATEMENT (14 QUESTIONS)

Notified Date of Section: 01/04/2014

Q.1. The Board of Directors of Sunrise Ltd. want to circulate unaudited accounts before the Annual General Meeting of the Shareholders of the company. Examine the validity of the act of the Board of Directors under the provisions of the Companies Act, 2013.
(3 marks; 2015 - Dec)

Answer:
Section 129 (2) of the Companies Act, 2013 provides that at every annual general meeting of a company, the Board of Directors of the company shall lay financial statements for the financial year. Further Section 134 (7) provides that signed copy of every financial statement, including consolidated financial statement, if any, shall be issued, circulated or published along with a copy each of:

(a) Any notes annexed to or forming part of such financial statement
(b) The Auditor's report; and
(c) The Board's report

It, therefore, follows that unaudited accounts cannot be sent to members or unaudited accounts cannot be filed with the Registrar of Companies. So the act of the Board of Directors of Sunrise Limited is not valid.

Q.2. Write a note on "True and fair view" **(4 marks; 2011 - Dec) [CSEM - II]**

Answer:

1	**True and fair view**	As per 1he provisions of sub-**sections (1) and (2),** every financial statement of the company must give true and fair view of the state of affairs of the company at the end of financial year. True and Fair view in respect of financial statement means- **(a)** financial statements and items contained should comply with accounting standards notified **Under Section 133 of Companies Act, 2013;** **(b)** financial statement shall be in form or forms as provided for different class or classes of companies in Schedule III; **(c)** in case of any insurance or banking company or any company engaged in the generation or supply of electricity or to any other class of company for which a form of financial statement has been specified in or underthe Act governing such class of company, not treated to be

		disclosing a true and fair view of the state of affairs of the company, merely by the reason of the fact that they do not disclose – in the case of an insurance company, any matters which are not required to be disclosed by the **Insurance Act, 1938,** or the **Insurance Regulatory and Development Authority Act, 1999;** in the case of a banking company, any matters which are not required to be disclosed by the **Banking Regulation Act, 1949;** • **in** the case of a company engaged in the generation or supply of electricity, any matters which are not required to be disclosed by the **Electricity Act, 2003;** • **in** the case of a company governed by any other law for the time being in force, any matters which are not required to be disclosed by that law.

Q.3. Write a note on "Approval and signing of the financial statement".
(4 marks; 2013 - Dec)

Answer:

1	**Financial Statement**	The financial statement (including consolidated financial statement) must be approved by the Board of Directors and signed by the directors before they are submitted to the auditors for their report.
2	**In Case of Banking Company**	In case of banking company shall be signed by the person mentioned in clause (a) or (b) of **Sec. 29 (2) of Banking Regulation Act, 1949.**
3	**In Case of Other Company**	Other Companies, financial statement must be signed on behalf of the Board of Directors by not less than two Directors and the Manager or Secretary if any. If the company has a Managing Director he should be one of the signing directors.

Q.4. Discuss the term 'profit and loss account' of a company. What are the matters to be disclosed in the profit and loss account? **(4 marks; 2011 - Dec) [CSEM - II]**

1	**Meaning of Profit and Loss Account**	Profit and loss account is the account by which the directors disclose to the shareholders of the company the result of the actual working of the company. • It serves to give the shareholders an idea of the present capacity of the company in relation, to its capital, and enables them to Judge the administration and management affairs of the company. • Every profit and loss account of a company shall give a true and fair view of the company's profit or loss for the financial year for which it is drawn up.
2	**Special Note**	For this purpose profit and loss account must be drawn in accordance with the requirements of part II of Schedule ill of the **Companies Act, 2013.**

Statement of profit and loss should disclose the followings:

1. Revenue from operators
2. Other income
3. Total revenue (1 + 2)
4. Expenses
5. Profit before exceptional and extra ordinary items and tax (3 - 4)
6. Exceptional items ' .
7. Profit before extraordinary items and tax (5-6)
8. Extra ordinary items
9. Profit before tax (7-8)
10. Tax expense
11. Profit (loss) for the period from continuing operations (9-10)
12. Prof it (loss) from discontinuing operations 1 3. Tax expense of discontinuing operations

14. Profit (loss) from discontinuing operations after tax (12-13) 1 5. Profit (loss)"for the period (11 +14) 1 6. Earnings per equity share (i) basic (ii) diluted.

Q.5. Comment on the Adoption of accounts is an important business to be transacted only at general meetings. **(5 marks; 2012 - Dec) [CSEM - II]**

Answer:

(1) An important business to be transacted at an annual general meeting is adoption of the accounts including:

(a) Financial Statement (including consolidated financial statement)

(b) Director Report and

(c) Auditor Report

(2) The financial statement are required to be placed only at an annual general meeting not at any other general meeting.

(3) In case, if the financial statements are not ready for laying at the annual general meeting, the company may adjourn the said annual general meeting to a subsequent date. This may be done by adopting an appropriate resolution adjourning the said annual general meeting to a specified date or to a date to be specified later.

Q.6. Mention the importance of 'notes on accounts'. Will it convey any meaning to stakeholders? **(4 marks; 2014 - Dec)**

Answer:

1	**Notes on Accounts**	• One of the main objectives of the Financial statements of a company is to communicate effectively its strengths and weaknesses. • The bare figures encompassing the amounts are not sufficient by themselves to depict and explain the true and fair view of the state of affairs of a company. • It has, therefore, become necessary to explain and communicate some of the vital information through 'Notes on Accounts'. By and large the notes on accounts are explanatory. • They elucidate the figures in the accounts and explain their significance. • Sometimes, these notes are clarify to meet the requirements of law. • Whether a particular note is explanatory or clarify will depend on the facts in each case and the manner in which it is stated. Notes on accounts form an integral part of the accounts of a company and contain very interesting and vital information.
2	**Contents of Notes on Accounts**	The notes on accounts are intended to clarify and elucidate the financial position of a company as disclosed in its balance sheet and profit and loss account. Generally the notes on accounts dwell on the following matters: 1. Basis of accounting; 2. Significant accounting policies; 3. Material changes, if any, in the method of accounting; 4. The effect of material changes in the method of accounting on any item in the financial statement in physical terms to the extent ascertainable. Where such amount is not ascertainable, either wholly or in part, the fact should be stated; 5. Method of valuation of fixed assets; 6. Method of valuation of trade and other investments; 7. Method of providing depreciation; 8. Valuation of inventories; 9. Treatment of any income and expenditure on cash basis as against accrual basis; 10. Expenditure in foreign currency account; 11. Foreign exchange conversion;

		12. Any disputed liabilities and claims against the company; 13. Any major litigation pending by or against the company; 14. Method of providing for retirement and terminal benefits; 15. Remuneration paid to managerial personnel and their calculation thereof.

Q.7. Comment on the following:
(a) Consolidation of financial statements is mandatory for all companies including unlisted companies and private companies. **(5 marks; 2017 - June)**

Answer:

The **Companies Act, 2013** has made preparation of consolidated accounts mandatory for all companies including unlisted companies and private companies having one or more subsidiaries or associates or joint ventures.

In accordance with the provisions of the **Companies Act, 2013,** as contained in **Section 129(3),** where a company has one or more subsidiaries or associates or joint ventures, it shall, in addition to its financial statements for the financial year, prepare a consolidated financial statement of the company and of all the subsidiaries or associates or joint ventures in the same form and manner as that of its own which shall also be laid before the annual general meeting of the company along with the laying of its financial statements, a separate statement containing the salient features of the financial statements of its subsidiaries or associate (s) or joint venture (s) in Form AOC -1 (Rule 5).

However, for intermediate holding company, the provisions of **Rule 6 of Companies (Accounts) Rules, 2014** inter alia provide certain conditions, compliance of which ensures exemption from consolidation of accounts to such intermediate holding company. These conditions are:-

1. intimation to all members for not consolidating the accounts.
2. shares being unlisted or not in process of listing on any stock exchanges and filing of consolidated financial statement by the ultimate Indian holding company whose 100% subsidiary is the intermediate holding company.

Amendment made by Companies (Amendment) Act, 2017 Revised Section 129(3)-

"Where a company has one or more subsidiaries or associate companies, it shall, in addition to financial statements provided under sub- section (2), prepare a consolidated financial statement of the company and of all the subsidiaries and associate companies in the same form and manner as that of its own and in accordance with applicable accounting standards, which shall also be laid before the annual general meeting of the company along with the laying of its financial statement under sub-section (2): Provided that the company shall also attach along with its financial statement, a separate statement containing the salient features of the financial statement of its subsidiary or subsidiaries and associate company or companies in such form as may be prescribed:

Provided further that the Central Government may provide for the consolidation of accounts of companies in such manner as may be prescribed."

Q.8. Every financial statement of the company must give true and fair view of the state of affairs of the company at the end of the financial year. **(5 marks; 2019 - June)**

Q.9. Peculiar Ltd., an unlisted company, did not prepare its financial statements for the year ended 31st March, 2016 in conformity with some of the mandatory accounting standards. With reference to the provisions of the Companies Act, 2013, state the responsibilities of the directors and statutory auditors of the company in this regard. **(4 marks; 2016 - Dec)**

Answer:

1.	• In accordance with the provisions of the **Companies Act, 2013** as contained in **Section 129** read with **Section 133** financial statements of a company shall be prepared in compliance with the accounting standards. Section 129(5) states that where the financial statements of the company do not comply with accounting standards, such companies shall disclose in its profit and loss account and the balance sheet-

	(a) the deviation from the accounting standards; (b) the reasons for such deviation; and (c) The financial effects, if any, arising out of such deviation. • The Board of Directors is required **under Section 134 of the Companies Act, 2013** to include, in Board's report, a Director's Responsibility Statement indicating therein that in the preparation of the financial statements, the applicable accounting standards have been followed along with proper explanation relating to material departures. • As per this provision the directors need to ensure that the financial statements are prepared in accordance with the accounting standards. • The statutory auditor of the company has a duty to state if, in his opinion, the financial statements are not in compliance comply with accounting standards.

Q.10. CIF Technosystems Private Limited is proposed to be incorporated in Bhubaneshwar, Orissa underthe Companies Act, 2013. The company will be a holding company of CIF Holding Private Limited, already incorporated in Brazil under the Company Law of Brazil. The company in Brazil follows financial year 1st January to 31st December o' a calendar year. Referring to the provisions of the Companies Act, 2013, state whether the financial year of CIF Technosystem can also be 1st January to 3r' December, in order to make it easier to prepare consolidated financial statements. **(4 marks; 2017 - June)**

Answer:

Section 2(41) of the Companies Act, 2013 has defined the term "financial year". It states that financial year in relation to any company or body corporate, means the period ending on the 31st day of March every year.

The financial year of every company registered under the Companies Act in India has to be from April of a calendar year to March of the next calendar year.

However, proviso to **Section 2(41)** reads that on an application made by a company or body corporate, which is a holding company or a subsidiary or Associated company of a company incorporated outside India and is required to follow a different financial year for consolidation of its accounts outside India, the Central Government may, if it is satisfied, allow any period as its financial year.

As per Companies (Amendment) Ordinance, 2019

Where a company or body corporate, which is a holding company or a subsidiary or associate company of a company incorporated outside India and is required to follow a different financial year for consolidation of its accounts outside India, the Central Government may, on an application made by that company or body corporate in such form and manner as may be prescribed, allow any period as its financial year, whether or not that period is a year-first proviso to **Section 2(41) of Companies Act, 2013** as amended vide the **Companies (Amendment) Ordinance, 2019** w.e.f. 2.11.2018.

Earlier, the powers were with NCLT. Applications pending with NCLT as on 2.11.2018 will contin ue to be dealt by NCLT-second proviso to **Section 2(41) of Companies Act, 2013** as inserted vide the Companies (Amendment) Ordinance, 2019 w.e.f. 2.11.2018.

Provision as existing upto 2.11.2018- On an application made by a company or body corporate, which is a holding company or a subsidiary or associate company of a company incorporated outside India and is required to follow a different financial year for consolidation of its accounts outside India, the NCLT may, if it is satisfied, allow any period as its financial year, whether or not that period is a year [first proviso to **Section 2(41) of Companies Act, 2013** as existing upto 2.11.2018]. [The words in italics were added w.e.f. 9.2.2018].

On the basis of position of law here in above, CIF Technosystems Private Limited proposed to be incorporated under the **Companies Act, 2013** has to have its financial year to end on 31s1 March every calendar year.

However, as it is a holding company of CIF Private Limited, a company in Brazil incorporated outside India, and that company follows its financial year 1st January to 31st December of a calendar year, the Indian company CIF Technosystems Private Limited can apply to Tribunal to allow its financial year to be aligned to end on 31st December for ease of consolidation of financial statement. The Tribunal will decide on the basis of merit in application.

Q.11. Evershine Ltd., whose financial year ended on 31st March, 2010 held its annual general meeting on 30th September, 2010. The meeting transacted all other businesses except the accounts as they were'not ready and adjourned the meeting to 20th December, 2010 for consideration of accounts. The Registrar of Companies issued show cause notice for violation of Sec. 129 of the Companies Act, 2013. Advise.

(5 marks; 2011-May) [CA Final -I]

Answer:

AGM including any adjournment thereof shall be completed within the statutory period specified under Sec. 96 and 129; Company cannot adjourn the AGM beyond the last date on which the AGM is required to be held.

As per Sec. 96 of Act 2013,

Every company except OPC to hold AGM every year

Every company, other than a One Person Company shall hold every year, in addition to any other meeting, a General Meeting as its AGM,

Laying of financial statements [Sec 129(2)]

At every AGM of a company, the BOD of the company shall lay before the company the financial statements for the financial year.

Advise to Evershine Ltd:

The show cause notice for violation of Sec 129 Is valid. This is because, the company held the AGM within six months from the date of closure of the accounts but failed to lay the accounts.

Q.12. What does the term Financial Statements include in relation to a company under the Companies Act, 2013? Which companies need not prepare a cash flow statement?

(4 marks; 2018- Nov)

Answer:

Financial statement is defined under Section 2(40), to include:

(i) Balance Sheet
(ii) Profit and Loss Account or Income and Expenditure Account
(iii) Cash Flow Statement
(iv) Statement of change in equity, if applicable
(v) Any explanatory notes annexed to or forming part of financial Statement.

However, the following company need not to prepare a Cash Flow Statement:

- One person company
- Small company
- Dormant company.

Q.13. XYZ Ltd. while preparing the Financial Statement including consolidated Financial Statement for the financial year ended 31st March, 2010 did not comply with the Accounting Standards. State the consequences that follow in case of Non-compliance.

(8 marks; 2010 - Nov) [CA Final -I]

Answer:

1. Company to disclose deviation from the Accounting Standards. [Sec. 129(5)]

If a company does not comply with the Accounting Standards notified under Sec. 133 in its financial statements, it shall disclose therein:

(i) the deviations from the accounting standards,
(ii) the reason for such deviation, and
(iii) the financial effects, if any, arising out of such deviation.

2. Punishment for contravention of Sec. 128 [Sec. 128(6)]

For wilful contravention of the provisions of Sec. 128, the following persons shall be punishable with imprisonment for a term which may extend to one year or with fine not less than fifty thousand rupees which may extend to five lakhs rupees, or with both:

(i) the managing director
(ii) the whole-time director ifv charge of finance
(iii) the Chief Financial Officer or any other person charged by the Board of Directors with the duty of complyinq with the requirements of Sec. 128.

In the absence of any of the provisions mentioned above, all the persons mentioned shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees, or with both.

Moreover, the BOD is also required under section 134 of the Companies Act, 2013 to include a Directors Responsibility Statement indicating therein that in the preparation of the financial statements the applicable accounting standards had been followed along with proper explanation relating to material departures, if any. If such person (as referred) above fails to take all reasonable steps to secure compliance by the company, as respects any accounts laid before the company in general meeting, with the provisions of this section and with the other requirements of this Act as to the matters to be stated in the accounts, he shall, in respect of each offence, be punishable with imprisonment for a term which may extend to 1 year, or with fine not less than fifty thousand rupees but which may extend to five lakh rupees or with both.

Responsibilities of Auditors:

As per Section 143(3) (e) of the Companies Act, 2013, the statutory auditor's responsibility is to state in his report, whether in his opinion, Financial Statement comply with the accounting standards referred to in Sec. 143 of the Companies Act, 2013.

Q.14. DJA Company Limited, incorporated under the provisions of Companies Act, 2013, has two subsidiaries - AJD Limited and AMR Limited. All the three companies have prepared their financial statements for the year ended 31st March, 2015. Examining the provisions of the Companies Act, 2013, answer the following:

(i) In what manner the subsidiaries - AJD Limited and AMR Limited shall prepare their Financial statements including consolidated financial statement if any?

(ii) What would be your answer in case the DJA Limited - the holding company, is not required to prepare consolidated financial statements under the Indian Accounting Standards?

(iii) What shall be your answer in case one of the subsidiary company's financial statements do not comply with the Accounting Standards?

(iv) To what extent is the Central Government empowered to exempt a company from preparing the financial statements in compliance with the Indian Accounting Standards?

(4 marks; 2015 - Nov) [CA Final -I]

Answer:

(i) According to Sections 129(3) of the Companies (Amendment) Act, 2017, Where a company has one or more subsidiaries or associate companies, it shall, in addition to financial statements provided under sub-section (2), prepare a consolidated financial statement of the company and of all the subsidiaries and associate companies in the same form and manner as that , of its own and in accordance with applicable accounting standards, which shall also be laid before the annual general meeting of the company along with the laying of its financial statement under sub-section (2);

Provided that the company shall also attach along with its financial statement, a separate statement containing the salient features of the financial statement of its subsidiary or subsidiaries and associate company or companies in form AOC-1 as is prescribed under Rule 5 of Companies (Accounts) Rule, 2014

Provided further that the Central Government may provide for the consolidation of accounts of companies in such, manner as is prescribed under Rule 6 of Companies (Accounts) Rule, 2014

(ii) According to Rule 6 of Companies (Accounts) Amendment Rules, 2016, The consolidation of financial statements of the company shall be made in accordance with the provisions of Schedule III of the Act and the applicable accounting standards:

(iii) If one of subsidiaries company's financial statements do not comply with the Accounting Standards, then holding company should include following with its financial statements:

- Changes in treatment with Accounting Standards.
- Reason for those changes.
- Financial impact of such change.

(iv) Central Government may, by notification, exempt any class or classes of companies from preparing the financial statements in compliance with the Indian Accounting Standards, if it considers necessary in the Public interest.

130. RE-OPENING OF ACCOUNTS ON COURT'S OR TRIBUNAL'S ORDERS (2 QUESTIONS)

Notified Date of Section: 01/06/2016

Q.1. The paid-up equity share capital of Strong Foundry Ltd. is Rs. 45 lakh. President (Finance) of the company seeks your advice whether it is possible to re-open its books of account and recast the company's financial statements of the previous year. You being the Secretary of the company, advise the President (Finance) by preparing a note in this regard.

(4 marks; 2016 - June)

Answer:

Re-opening of Accounts on Tribunals's Orders: Section 130 provides for provisions relating to re-opening or re- casting of books of accounts of the company. Accordingly,

(i) A company shall not re-open its books of account and shall not recast its financial statements, unless an application in this regard is made by any one or more of the following:

(a) The Central Government, or
(b) The Income-tax authorities, or
(c) The Securities and Exchange Board of India (SEBI), or
(d) Any other statutory regulatory body or authority or any person concerned, and
(e) An order in this regard is made by a Tribunal of competent jurisdiction or the Tribunal.

(ii) The re- opening and re-casting of financial statements is permitted only for the following reasons:

(a) The relevant earlier accounts were prepared in a fraudulent manner; or
(b) The affairs of the company were mismanaged during the relevant period, casting a doubt on the reliability of financial statements.

(iii) The Tribunal, as the case may be, shall give the notice to:

(a) The Central Government,
(b) The Income-tax authorities,
(c) The Securities and Exchange Board,
(d) any other statutory regulatory body or authority concerned and shall take into consideration the representations, if any, made by Central Government or the income tax authorities, Securities and Exchange Board or the body or authority concerned before passing any order under this section.

(iv) Director's report of the year in which such provisions are invoked, should provide for the reasons or circumstances in which such revisions were warranted.

Further, **Section 131** deals with power of Board to make application to tribunal and obtain approval for voluntary revision of financial statements and Board's Report of any of the preceding three financial years.

Hence, one time revision of financial accounts of the company may be made after obtaining approval of the tribunal subject to applicability and enforceability of **Section 131 of Companies Act, 2013.**

This is for information and-record please.

Amendment made by Companies (Amendment) Act, 2017 Section 130(3): No order shall be made under sub-section (1) in respect of re-opening of books of account relating to a period earlier than eight financial years immediately preceding the current financial year:

Provided that where a direction has been issued by the Central Government under the proviso to sub-section (5) of Section 128 for keeping of books of account for a period longer than eight years, the books of account may be ordered to be re-opened within such longer period.

Q.2. The Income Tax Authorities in the current financial year 2019-20 observed, during the assessment proceedings, a need to re-open the accounts of Chetan Ltd. for the financial year 2008-09 and, therefore, filed an application before the National Company Law Tribunal (NCLT) to issue the order to Chetan Ltd. for re-opening of its accounts and recasting the financial statements for the financial year 2008-09. Examine the validity of the application filed by the Income Tax Authorities to NCLT.
(3 marks; 2019- May)

131. VOLUNTARY REVISION OF FINANCIAL STATEMENTS OR BOARD'S REPORT (1 QUESTIONS)

Notified Date of Section: 01/06/2016

Q.1. The directors of Element Ltd. want to voluntary revise the Financial statements of the company. They have approached you to state to them the provisions of the Companies Act, 2013 regarding voluntary revision of financial statements.

Answer:

1 Preparation of revised financial statement or revised report on the approval of Tribunal: As per Sec. 131(1) of the Companies Act, If it appears to the directors of a company that—

(a) the financial statement of the company; or

(b) the report of the Board, do not comply with the provisions of section 129 or section 134, they may prepare revised financial statement or a revised report in respect of any of the three preceding financial years after obtaining approval of the Tribunal on an application made by the company in Form NCLT-1 and manner as is prescribed under Rule 77 of NCLT Rules, 2016 and a copy of the order passed by the Tribunal shall be filed with the Registrar:

Tribunal to serve the notice: Provided that the Tribunal shall give notice to the Central Government and the Income tax authorities and shall take Into consideration the representations, if any, made by that Government or the authorities before passing any order under this section:

Number of times of revision and recast: Provided further that such revised financial statement or report shall not be prepared or filed more than once in a financial year:

Reason for revision to be disclosed: Provided also that the detailed reasons for revision of such financial statement or report shall also be disclosed in the Board's report in the relevant financial year in which such revision is being made.

2. Limits of revisions: Where copies of the previous financial statement or report have been sent out to members or delivered to the Registrar or laid before the company in general meeting, the revisions must be confined to:

(a) the correction in respect of which the previous financial statement or report do not comply with the provisions of section 129 or section 134; and

(b) the making of any necessary consequential alternation.

3. Framing of rules by the Central Government in relation to revised financial statement or director's report: The Central Government may make rules as to the application of the provisions of this Act in relation 'to revised financial statement or a revised director's report and such rules may, in particular—

(a) make different provisions according to which the previous financial statement or report are replaced or are supplemented by a document indicating the corrections to be made;

(b) make provisions with respect to the functions .of the company's auditor in relation to the revised financial statement or report;

(c) require the directors to take such steps as may be prescribed.

132. CONSTITUTION OF NATIONAL FINANCIAL REPORTING AUTHORITY

133. CENTRAL GOVERNMENT TO PRESCRIBE ACCOUNTING STANDARDS.

Notified Date of Section: 12/09/2013

134. FINANCIAL STATEMENT, BOARD'S REPORT, ETC. (19 QUESTIONS)

Notified Date of Section: 01/04/2014

Q.1. Draft a Directors responsibility statement to be attached in Director's report under The Companies Act, 2013. (5 marks; 2013 - Dec)

Answer:

Director's Responsibility Statement

Your Directors wish to inform that the Audited Accounts containing Financial Statements for the financial year ended 31st March 2013 are in full conformity with requirements of the Act, 2013. Your Directors believe that the Financial Statements reflect fairly the form and substance of transactions carried out during the year and reasonably present the company's financial condition and result of operations.

As stipulated in Section -134 (5) of the Companies Act, 2013, your Directors subscribe to the Director's Responsibility statement and confirm that:

(i) in the presentation of the Annual Accounts, applicable accounting standards have been followed;

(ii) The accounting policies have been consistently applied and reasonable, prudent judgment and estimates are made so as to gie a rue and fair view of the state of your company as at 31st March 2013 and of the profit for the financial year ended 31st March, 2013.

(iii) proper and sufficient care has been taken for the maintenance of adequate accounting records in accordance with the provision of the Companies Act, 2013 for safeguarding the assets of your company and for preventing and detecting frauds and other irregularities;

(iv) the annual accounts of your Company have been prepared on a going concern basis;

(v) The Company's Internal Auditors have conducted periodic audits to provide reasonable assurance that the company's established policies and procedures have been followed.

Q.2. Explain the provisions regarding directors' responsibility statement as covered under the Companies Act, 2013. (5 marks; 2015 - June)

Answer:

Please refer 2013- Dec

Q.3. Explain the particulars required to be contained in Directors Responsibility Statement as per provision of the Companies Act, 2013. (4 marks; 2019 - June)

Q.4. Comment on the following:

The power of directors to approve the financial statements can be delegated to a committee of directors or some of the directors. (5 marks; 2010 - June) [CSEM - II]

Answer:

1	**Section 134**	**Section 134** deals with financial statements as well as board's report. The Board's Report shall be prepared based on the stand alone financial statements of the company and the report shall contain a separate section wherein a report on the performance and financial position of each of the subsidiaries, associates and joint venture companies included in the consolidated financial statement is presented and approved by the Board of directors before they are signed and submitted to auditors for

		their report.
		Note:
		Amendment made by Companies (Amendment) Act, 2017 Revised Section 134(1)-
		'The financial statement, including consolidated financial statement, if any, shall be approved by the Board of Directors before they are signed on behalf of the Board by the chairperson of the company where he is authorised by the Board or by two directors out of **which** one shall be managing director, if any, and the Chief Executive Officer, the Chief Financial Officer and the company secretary of the company, wherever they are appointed, or in the case of One Person Company, only by one director, for submission to the auditor 'for his report thereon." Revised **Section** 134(3)(a)- "(a) the web address, if any, where annual return referred to in sub-section (3) of Section 92 has been placed;" Revised **Section** 134(3)(p)- "(p) in case of a listed company and every other public company having such paid-up share capital as may be prescribed, a statement indicating the manner in which formal annual evaluation of the performance of the Board, its Committees and of individual directors has been made." **Proviso** to Revised **Section** 134(3)- "Provided that where disclosures referred to in this sub-section have been included in the financial statements, such disclosures shall be referred to instead of being repeated in the Board's report: Provided further that where the policy referred to in clause (e) or clause (o) is made available on company's website, if any, it shall be sufficient compliance of the requirements under such clauses if the salient features of the policy and any change therein are specified in brief in the Board's report and the web- address is indicated therein at **which** the complete policy is available.". Section **134(3A)-** "(3A) The Central Government may prescribe an abridged Board's report, for the purpose of compliance with this section by a One Person Company or small company."
2	**Auditor Report**	The auditor's report is to be attached to every financial statement. A report by the Board of directors containing details on the matters specified, including director's responsibility statement, shall be attached to every financial statement laid before company.
3	**Signed on Board Report**	The Board's report and every annexure has to be duly signed. A signed copy of every financial statement shall be circulated, issued or published along with all notes or documents, the auditor's report and Board's report.
4	**Penalty**	The clause also provides for penal provisions for the company and every officer of the company, in case of any contravention.

Q.5. "Financial statements shall be signed only by the Chairperson of the company." Explain.

(4 marks; 2015 - June)

Answer:

1	**Section 134**	According to **Section 134 of the Companies Act, 2013,** the financial statement, including consolidated financial statement, if any, shall be approved by the Board of Directors before they are signed on behalf of the Board at least by the chairperson of the company where he is authorised by the Board or by two directors out of which one shall be Managing Director and the Chief Executive Officer, if he is a Director in the company, the Chief Financial Officer and the Company Secretary of the

		company, wherever they are appointed,' or in the case of a One Person Company, only by one director, for submission to the auditor for his report thereon.
2	**Conclusion**	Therefore the financial statements are to be signed accordingly.

Note:

Amendment made by Companies (Amendment) Act, 2017 Revised Section 134(1)-

'The financial statement, including consolidated financial statement, if any, shall be approved by the Board of Directors before they are signed on behalf of the Board by the chairperson of the company where he is authorised by the Board or by two directors out of which one shall be managing director, if any, and the Chief Executive Officer, the Chief Financial Officer and the company secretary of the company, wherever they are appointed, or in the case of One Person Company, only by one director, for submission to the auditor for his report thereon."

Revised Section 134(3)(a)-

"(a) the web address, if any, where annual return referred to in sub-section (3) of Section 92 has been placed;"

Revised Section 134(3)(p)-

"(p) in case of a listed company and every other public company having such paid-up share capital as may be prescribed, a statement indicating the manner in which formal annual evaluation of the performance of the Board, its Committees and of individual directors has been made."

Proviso to Revised Section 134(3)-

"Provided that where disclosures referred to in this sub-section have been included in the financial statements, such disclosures shall be referred to instead of being repeated in the Board's report: Provided further that where the policy referred to in clause (e) or clause (o) is made available on company's website, if any, it shall be sufficient compliance of the requirements under such clauses if the salient features of the policy and any change therein are specified in brief in the Board's report and the web- address is indicated therein at which the complete policy is available."

Section 134(3A)-

"(3A) The Central Government may prescribe an abridged Board's report, for the purpose of compliance with this section by a One Person Company or small company."

Q.6. The Board of directors of Grow More Ltd., a public company, has duly delegated its power to approve the financial statements of the company for the year 2011 -12 to a committee of directors. The said committee considered the financial statements and approved the same before the accounts were handed over to the statutory auditor of the company. Will you accept such approval of financial statements?

(5 marks; 2012 - June) [CSEM - II]

Answer:

1	**Analysis of the Statement**	According to **Section 134 of Companies Act, 2013** the power of the directors to approve the Financial Statements account cannot be delegated to a committee of a directors or some other directors. The approval of financial statements which are to be ultimately placed before the shareholders of the company is not to be treated as a routine or part of day-to-day work. Therefore, the Board of directors must themselves consider the financial statements and approve them before the accounts are handed over to the statutory auditor of the company. **Amendment made by Companies (Amendment) Act, 2017** The financial statement, including consolidated financial statement, if any, shall be approved by the Board of Directors before they are signed on behalf of the Board by the chairperson of the company where he is authorised by the Board or by two directors out of which one shall be managing director, if any, and the Chief Executive Officer, the Chief Financial Officer and the company secretary of the company, wherever they are appointed, or in the case of One Person Company, only by one

		director, for submission to the auditor for his report thereon."
2	**Conclusion**	Hence, such approval can not be accepted. **In the above case,** the financial statements of Grow More Ltd. should have been approved by the Board of directors and can not be delegated to committee.

Q.7. Adorable Ltd., incorporated under the Companies Act, 2013 has on its Board, 5 Directors and a Managing Director. The company has also appointed a Company Secretary. The financial statements of the company, viz., balance sheet and statement of profit and loss for the year ended 31st March, 2015, were authenticated under signatures of one director and the Company Secretary.

Referring to the provisions of the Companies Act, 2013, examine the validity of authentication. What shall be your answer in case the company in question is a 'one person company'? **(4 marks; 2015 - Dec)**

Answer:

1	**Analysis of the Present Case**	**In the given case** the financial statements have been signed by one director and the Company Secretary, which Is in violation of the above provisions. However if the director so signing is the Chairperson of the company, this would be a valid manner. If the director so signing is not the Chairperson, the financial statement should have been signed by the managing director and another director and in addition by a Chief Financial Officer if any. Hence, authentication **in the given case** is not valid.
2	**Conclusion**	In case of One Person Company's the section' provides that the financial statements shall be signed only by one director. Hence in case the company is a One Person Company the authentication stands valid.
3	**Reference**	As per **Section 134 of the Companies Act, 2013,** The financial statement, including consolidated" financial statement, if any, shall be approved by the Board of Directors before they are signed on behalf of the Board by the chairperson of the company where he is authorised by the Board or by two directors out of which one shall be managing director, if any, and the Chief Executive Officer, the Chief Financial Officer and the company secretary of the company, wherever they are appointed, or in the case of One Person Company, only by one director, for submission to the auditor for his report thereon."

Q.8. Write a note on Directors' responsibility statement **(4 marks; 2013 - Dec)**

Answer:

1.	**Provisions of Section 134 of Companies Act, 2013**	**Section 134(5)** referred to in clause (c) **Section 134(3) of Companies Act, 2013** shall state that— (a) in the preparation of the financial statements, the applicable accounting standards had been followed along with proper explanation relating to material departures; (b) the directors had selected such accounting policies and applied them consistently and made judgments and estimates that are reasonable and prudent so as to give a true and fair view of the state of affairs of the company at the end of the financial year and of the profit and loss of the company for that period; (c) the directors had taken proper and sufficient care for the maintenance of adequate accounting records in accordance with the provisions of this Act for safeguarding the assets of the company and for preventing and detecting fraud and other irregularities; (d) the directors had prepared the financial statements on a going concern basis; and (e) The directors, in the case of a listed company, had laid down internal financial controls to be followed by the company and that such internal financial controls are adequate and were operating effectively.

Q.9. The Directors' Report of Ayush Ltd. for the financial year ended 31st March, 2012 has been dated 15th May, 2012, whereas the Auditors' Report for the same period is dated 16th May, 2012. Is this in order? Explain. (4 marks; 2013 - June) [CSEM - II]

Answer:

1.	**Date of Directors' Report and Auditors' report**	Ideally, the date of the Director's Report should be later than the date of Auditors' Report. However, both the dates i.e. the date of the Directors' Report and that of the Auditors' Report could be the same.
2.	**In case of Reservation, Qualification or Adverse Remarks by the Auditors**	If there is any reservation, qualification or adverse remark/comments has been given by the Auditor in the Auditors' Report, then the Board is required to give in its report the fullest information and explanations on the adverse remarks given by the Auditor pursuant to **Section 134(4) of Companies Act, 2013,** If the date of the Auditors' Report is subsequent to that of the Directors' Report, then it would not be possible for the Board to comply with the above requirement.
3.	**Conclusion**	In light of the above, **in the present case,** the dating of the Directors' Report and Auditors Report is not in order.

Q.10. Narrate briefly the importance of Corporate Governance Report and also state who can certify such report (4 marks; 2014 - Dec)

Answer:

1.	**Companies that Required to submit Quarterly CGR**	The listed entity shall submit a quarterly compliance report on corporate governance in the format as specified by SEBI from time to time to the recognized stock exchange(s) within fifteen days from close of the quarter.
2.	**Disclosures**	The CGR has undergone drastic change requiring the following information to be submitted to stock exchange: (a) Composition of Board (b) Names of the Directors, Category, PAN No, Date of appointment, tenure, no. of Directorships/memberships/chairmanships in committees meetings. (c) Composition of Audit Committee (mandatory) and other committees (optional). (d) Dates of Board meetings and committee meetings. (e) Whether prior approval of audit committee/shareholders for related party transactions has been taken, if applicable. (f) Whether RPT's entered pursuant to omnibus approval have been reviewed by the Audit Committee. (g) Certain affirmations that the composition of Board, committees, their roles and responsibilities, their meetings were in accordance with the regulations.
3.	**Who will certify the CGR**	Report shall be signed either by Compliance Officer or by Chief Executive Officer.

Q.11. The Board of directors of Charming Ltd. seek your advice on the matters to be included in the directors' responsibility statement forming part of the company's annual report to shareholders. As the Company Secretary of Charming Ltd., advise the Board. (4 marks; 2015 - June)

Answer:

Provisions of Section 134 of Companies	**Section 134(5) referred to in clause (c) Section**	
	134(3) shall state that:	
	(a)	in the preparation of the financial statements, the applicable accounting

Act, 2013		standards had been followed along with proper explanation relating to material departures;
	(b)	the directors had selected such accounting policies and applied them consistently and made judgments and estimates that are reasonable and prudent so as to give a true and fair view of the state of affairs of the company at the end of the financial year and of the profit and loss of the company for that period;
	(c)	the directors had taken proper and sufficient care for the maintenance of adequate accounting records in accordance with the provisions of this Act for safeguarding the assets of the company and for preventing and detecting fraud and other irregularities;
	(d)	the directors had prepared the financial statements on a going concern basis; and
	(e)	The directors, in the case of a listed company, and laid down internal financial controls to be followed by the company and that such internal financial controls are adequate and were operating effectively.
	(f)	The directors had devised proper systems to ensure compliance with the provisions of all applicable laws and that such systems were adequate and operating effectively.
	Note: **Amendment made by Companies (Amendment) Act, 2017** **Revised Section 134(1)-** "The financial statement, including consolidated financial statement, if any, shall be approved by the Board of Directors before they are signed on behalf of the Board by the chairperson of the company where he is authorised by the Board or by two directors out of which one shall be managing director, if any, and the Chief Executive Officer, the Chief Financial Officer and the company secretary of the company, wherever they are appointed, or in the case of One Person Company, only by one director, for submission to the auditor for his report thereon." **Revised Section 134(3)(a)-** "(a) the web address, if any, where annual return referred to in sub-Section (3) of Section 92 has been placed;" **Revised Section 134(3)(p)-** "(p) in case of a listed company and every other public company having such paid-up share capital as may be prescribed, a statement indicating the manner in which formal annual evaluation of the performance of the Board, its Committees and of individual directors has been made." **Proviso to Revised Section 134(3)-** "Provided that where disclosures referred to in this sub-section have been included in the financial statements, such disclosures shall be referred to instead of being repeated in the Board's report: Provided further that where the policy referred to in clause (e) or clause (o) is made available on company's website, if any, it shall be sufficient compliance of the requirements under such clauses if the salient features of the policy and any change therein are specified in brief in the Board's report and the web-address is indicated therein at which the complete policy is available." **Section 134(3A)-** "(3A) The Central Government may prescribe an abridged Board's report, for the purpose of compliance with this section by a One Person Company or small company."	

Q.12. Comment on "Every company is required to disclose the details of vigil mechanism in the Board Report". **(5 marks; 2018 - Dec)**

Answer:

According to Section 177(9) of Companies Act, 2013, read with Rule 7 of Companies (Meetings of Board and its Powers) Rules, 2014 the following companies are required to establish a igil mechanism for their directors and employees to report their genuine concerns or grievances.
(a) Every listed company;
(b) The Companies which accept deposits from the public;
(c) The Companies which have borrowed money from banks and public financial institutions in excess of fifty crore rupees.
Further the. sub-section (10) provides that the details of establishment of such mechanism shall be disclosed by the company on its website, if any, and in the Board's report.

Q.13. Priya, a nominee director on the Board of Aroma Ltd., a listed company, informed the Board of directors during a Board meeting that the next annual report of the company shall contain a 'Management Discussion and Analysis Report'. You being the Company Secretary have been asked by the Board to prepare the said report. State the matters you would include in the report. (4 marks; 2016 - Dec)

Answer:
A Management Discussion and Analysis Report (MDAR) should form part of the Annual Report to the shareholders. This Management Discussion and Analysis should include discussion on the following matters within the limits set by the company's competitive position:
1. Industry structure and developments.
2. Opportunities and Threats.
3. Segment-wise or product-wise performance.
4. Outlook.
5. Risks and concerns.
6. Internal control systems and their adequacy.
7. Discussion on financial performance with respect to operational performance.
8. Material developments in Human Resources / Industrial Relations front, including number of people employed.

Q.14. Phosphate Ltd. has suffered a major loss of Rs. 100 crore in May, 2018 on the dealing of commodity exchange. The annual accounts and Board's report for the year 2017-18 are under finalization. The Chief Financial Officer (CFO) of the company does not want to disclose this loss in the Board's report for year 2017-18 because this loss does not pertain to said financial year, is the view of CFO correct?.The Board of Directors seeks your advice in this matter. (4 marks; 2018 - June)

Answer:
According to **Section 134(3)(k)** all material changes and commitments, if any, affecting the financial position of the company which have occurred between the end of the financial year of the company to which the financial statements relate and the date of the report should form part of the Board's Report.
The Director's Report shall, therefore, contain material changes .pertaining to post-financial statement events impacting the operations and performance of the Company. Thus, in present case view of Chief Financial Officer is incorrect. Loss of ? 100 Crore incurred during May, 2018, i.e. post financial year, shall be included in the Board's Report for the year 2017-18.

Q.15. As required under the provisions of the Companies Act, 2013, a company incorporated under the Act has to include in the Report of Board of Directors a 'Directors Responsibility Statement'. Directors of the company seek your advise about the matters to be included in the statement. Advise. (8 marks; 2010 - Nov) [CA Final -I]

Or

Q.16. State any four contents of a Directors Responsibility Statement as required under Section 134 of the Companies Act, 2013. (4 marks; 2018-May)

Answer:

As per Sec. 134 of the Companies Act, 2013, the Financial Statement of the company including consolidated Financial Statement if any shall be accompanied by the following document:

1. The auditors' report. [Sec. 134(2)]
2. The Board's report including the web address if any, where annual return referred to in Sec. 92(3) has been placed, the member of meetings of the Board and Director's responsibility statement. [Sec. 134(3)]

As per Sec. 134(5) of the Companies Act, 2013, The Directors' Responsibility Statement shall state that:

1. In the preparation of the annual accounts, the applicable accounting standards had been followed along with proper explanation relating to material departures;
2. The directors had selected such accounting policies and applied them consistently and made judgments and estimates that are reasonable and prudent so as to give a true and fair view of the state of affairs of the company at the end of the financial year and of the profit and loss of the company for that period;
3. The directors had taken proper and sufficient care for the maintenance of adequate accounting records in accordance with the provisions of this Act for safeguarding the assets of the company and for preventing and detecting fraud and other irregularities.
4. The directors had prepared the annual accounts on a going concern basis; and
5. The directors, in the case of a fisted company, had laid down internal financial controls to be followed by the company and that such internal financial controls are adequate and were operating effectively. Explanation - For the purposes of this clause, the term "internal financial controls" means the policies and procedures adopted by the company for ensuring the orderly and efficient conduct of its business, including adherence to company's policies, the safeguarding of its assets, the prevention and detection of frauds and errors, the accuracy and completeness of the accounting records, and the timely preparation of reliable financial information.
6. The directors had devised proper systems to ensure compliance with the provisions of all applicable laws and that such systems were adequate and operating effectively.

Q.17. Answer the following:

(a) Examine the validity of the following with reference to the provisions of the Companies Act, 2013:

(i) The Financial Statements of TXN Ltd. for the year ended 31st March, 2009 was signed by one of its Directors and the Secretary. **(5 marks; 2009-May) [CA Final -I]**

Answer:

Provision:

(i) As per Sec. 134(1) of the Companies Amendment Act, 2017, the

Financial Statement, including consolidated financial statement, if any, shall be approved by the BOD before they are signed on behalf of the Board at least by

- the Chairperson of the company where he is authorised by the Board or
- by two directors out of which one shall be managing director if any and
- the Chief Executive Officer,
- the Chief Financial Officer and
- the Company Secretary of the company, wherever they are appointed.

Present case:

The Financial Statements of TXN Ltd. for the year ended 31st March, 2009 was signed by one of its Directors and the Secretary.

Taking consideration of the above provisions of the Companies Act, 2013, signing of the accounts only by one Director and Secretary does not fulfill the requirements of Law.

Q.18. The Board of Directors of Vishwakarma Electronics Limited consists of Mr. Ghanshyam, Mr. Hyder (Directors) and Mr. indersen (Managing Director). The company has also employed a full time Secretary.

The Financial Statement including consolidated financial statement if any the company were signed by Mr. Ghanshyam and Mr. Hyder. Examine whether the authentication of financial statements of the company was in accordance with the provisions of the Companies Act, 2013 ? **(5 marks; 2011 - Nov) [CA Final -I]**

Answer:

Provision:

Please refer2009 May

Present case:

In the instant case, the company has three Directors namely Mr. Ghanshyam, Mr. Hyder and Mr. Indersen who is also the Managing Director. The company has also employed a full time secretary but has no manager. Thus the Financial Statement including consolidated financial statement if any should be signed by:

(a) the Secretary

(b) the Managing Director, Mr. Indersen

(c) either of the Directors, Mr Ghanshyam or Mr. Hyder.

However, in the present case the Financial Statement was signed by Mr. Ghanshyam and Mr. Hyder only. As such the provisions under sec. 134 has not been followed. Hence, the Financial Statement including consolidated financial statement if any are not valid.

Q.19. ABC Limited has on its Board, four Directors viz. W, X, Y and Z. In addition, the company has Mr. D as the Managing Director. The company also has a full time Company Secretary, Mr. Wise, on its rolls. The financial statements of the company- Financial statements including consolidated financial statement if any the Board's Report for the year ended 31st March, 2015 were authenticated by two of the directors, Mr. X and Y under their signatures.

Referring to the provisions of the Companies Act, 2013:

(i) Examine the validity of the authentication of the Financial statements including consolidated financial statement if any and the Board's Report.

(ii) What would be your answer in case the company is a One Person Company (OPC) and has only one Director, who has authenticated the Financial statements including consolidated financial statement if any the Board's Report?

(4 marks; 2015-Nov) [CA Final -I]

Answer:

(i) Provision:

Please refer 2009 – May

Present case:

The Financial statements including consolidated financial statement if any and the Board's Report for the year ended 31st March, 2015 were authenticated by two of the directors, Mr. X and Y under their signatures.

Thus, provision u/s 134 has not been followed hence authentication of the Financial Statement including consolidated Financial Statement if any is not valid.

(ii) OPC has only one Director. Thus, the authentication of the Financial statements including consolidated financial statement if any and Board's Report is valid if one director has signed the same.

135. CORPORATE SOCIAL RESPONSIBILITY (18 QUESTIONS)

Notified Date of Section: 01/04/2014

Q.1. What is the minimum contribution the companies are required to make towards CSR as per Companies Act, 2013? (8 marks; 2017 - June)

Answer:

Required minimum contribution of the Companies towards CSR:

(a) The Board of every company shall ensure that the company spends, in every financial year, at least two per cent of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its CSR Policy.

(b) The company shall give preference to the local area and areas around it where it operates, for spending the amount earmarked for CSR activities.

(c) If the company fails to spend such amount, the Board shall, in its report, specify the reasons for not spending the amount.

(d) Companies may build CSR capacities of their own personnel as well as those of their implementing agencies through Institutions with established track records of at least three financial years. However, such expenditure shall not exceed five percent of total CSR expenditure of the company in one financial year.

Q.2. Write notes on the "Corporate social responsibility" (4 marks; 2011 - June)

Answer:

Rule 8 of the **Companies (Corporate Social Responsibility Policy) Rules 2014,** Corporate social responsibility refer to the sustained economic growth in the current decades. We still continue to face major challenges on the human side in India - The problems such as:

(a) Poverty
(b) Illiteracy
(c) Malnutrition etc.

Have resulted in a large section of the population remaining as un-included from the main stream.

The CSR policy should invariably cover-

(a) Care for all stake holders,
(b) Ethical functioning
(c) Respects for human rights
(d) Respect for environment and
(e) activities for social and inclusive development

At present the MCA is looking forward to more and more business communities coming forward and adopting the CSR voluntary guidelines issued by it.

Q.3. Write note on the "Corporate social responsibility" (4 marks; 2016-June)

Answer:

1	**Concept of CSR**	CSR has many interpretations but can be understood to be a concept imposing a liability on the Company to contribute to the society (whether towards environmental causes, educational promotion, social causes etc.) along with the reinforced duty to conduct the business in an ethical manner. It is also known as corporate conscience, corporate citizenship, social performance or sustainable business/responsible business.
2	**Application of Provision**	**1.** Companies having net worth of 500 crores or more or 2. Turnover of 1,000 crores or more or 3. Net profit of 5 crores or more.
3	**Note:** As per the provisions of **Section 135 of the Act,** one of the three criteria has to be satisfied to attract Section 135. Therefore, if a company satisfies the criterion of turnover, although it does not satisfy the criterion of net profit, it is required to comply with the provisions of Section 135 and the Companies (CSR Policy) Rules, 2014.	
4	**Contribution**	The Companies on which **Section 135** applies are required to contribute 2% of average profits of preceding three years towards CSR activities. **Amendment made by Companies (Amendment) Act, 2017**

		Revised **Section 135(1)-** "Every company having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during **the immediately preceding financial year** shall constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors, out of which at least one director shall be an independent director. Provided that where a company is not required to appoint an independent director under sub- Section (4) of Section 149, it shall have in its Corporate Social Responsibility Committee two or more directors." **Revised Section 135(3)(a)-** "(a) formulate and recommend to the Board, a Corporate Social Responsibility Policy which shall indicate the activities to be undertaken by the company **in areas or subject, specified in Schedule VII."** **Revised Explanation to Section 135(5)** "For the purposes of this section "net profit" shall not include such sums as may be prescribed, and shall be calculated in accordance with the provisions of Section 198."
5	**Constitution of CSR Committee**	(a) Every company to which Section 135 is applicable, shall constitute a Corporate Social Responsibility Committee of the Board (CSR Committee) (b) The CSR Committee shall consist of 3 or more directors. (c) Out of the 3 directors, at least 1 director shall be an independent director. (d) An unlisted public company or a private company which is not required to appoint an independent director (as per Section 149 of the Companies Act, 2013), shall have its CSR Committee without any independent director. (e) A private company having only 2 directors on its Board, shall constitute its CSR Committee with 2 directors only. (f) In case of a foreign Company, the CSR Committee shall comprise of at two persons of which one person shall be a person resident in India authorized to accept on behalf of the foreign company service of notices and other documents, and the other person shall be nominated by the foreign company.
6	**Disclosures in Board's Report**	The Board's report shall contain 1. The composition of the CSR Committee; 2. The contents of CSR Policy; and 3. The reasons for not spending the amount of 2% in pursuance of its CSR Policy (in case the company fails to spend such amount).
7	**Activities not Amounting to CSR**	As per Rule 4 and Rule 6 of the Companies (Corporate Social Responsibility Policy) Rules, 2014, following shall not amount to CSR Activities for the purpose of Section 135. (a) The CSR projects or programs or activities undertaken outside India. (b) The CSR projects or Programs or activities that benefit only the employees of the company and their families. (c) Contribution of any amount, directly or indirectly, to any political party under Section 182 of the Companies Act, 2013. (d) Any activity undertaken in pursuance of normal course of business of a company.
8	**Display of CSR Policy on the website**	As per Rule 9 of the Companies (Corporate Social. Responsibility Policy) Rules, 2014 and Rule 6 of the Companies (Accounts)

		Rules, 2014, the CSR Policy and its contents shall be displayed on the company's website, if any, as per the particulars specified in the Annexure to the Companies (Corporate Social Responsibility Policy) Rules, 2014.

Q.4. Explain the following pair of terms to bring out their distinctions: 'Corporate Governance' and 'corporate social responsibility'. (4 marks; 2011 - Dec)

Answer:

Corporate Governance: Corporate Governance in simple terms means running of the company by its Board of Directors in an open and honest manner. Corporate Governance is about ethics in business. It is about transparency, openness and fair play in all aspects of business operations.

(a) This lays down the framework for creating long term trust between the company and external providers of capital.

(b) It improves strategic thinking at the top by inducting independent directors who bring a wealth of experience and host of new ideas.

(c) It rationalise the management and monitoring of risk that a corporation faces globally.

(d) It limits the liability of top management and directors, by carefully articulating the decision making process.

Corporate Social Responsibility: Corporate social responsibility is a tool used by business and industry to align operations with social and environmental values. CSR, is generally viewed as the voluntary commitment and action undertaken by a corporation, over and above compliance to existing legal requirements, to behave in ethical manner to address both its own, competitive interest and wider interests of society. .

(a) Concern for the quality of life including life at work.

(b) Concern for the physical environmental.

(c) Fair reward for effort and enterprise.

(d) Interest and involvement in activities of the wider community.

(e) Compliance with laws and established customs of the community.

Q.5. The Companies Act, 2013 has introduced several provisions which would change the way Indian corporate do business and one such provision is spending on corporate social responsibility (CSR) activities which has assumed considerable importance. Discuss the provisions governing CSR as provided in the Companies Act, 2013and rules made thereunder. (4 marks; 2015 - June)

Answer:

The provisions of Corporate Social Responsibility are dealt under **Section** 135 read with the **Companies (Corporate Social Responsibility Policy) Rules, 2014** and clarifications issued by the Ministry from time to time. Some of the important provisions are as under:

- As per **Section 135** of the **Companies Act, 2013,** every company having net worth of Rs. **500** crores or more, or turnover of Rs. **1,000** crores or more or a net profit of Rs. 5 crores or more during the immediately preceding financial year shall constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors out of which at least one director shall be an independent director. There need not be any independent director on the CSR Committee if the Company is unlisted Public Company or a Private Company.
- In case of Private Company CSR. Committee can be formed with two members.
- CSR Committee shall formulate and recommend Corporate Social Responsibility Policy which shall indicate the activity or activities to be undertaken by the company as specified in Schedule VII and also recommend the amount of expenditure to be incurred on CSR activities.
- The Board of every company shall ensure that the company spends in every financial year at least **2%** of the average net profit of the company made during the three immediately preceding financial years in pursuance of its CSR policy.
- Net Profit of a company for the purposes of **Section 135** of the **Companies Act, 2013** does not include the profit arising from any overseas branch of the company and the

dividends received from other companies in India which are complying with **Section 135** of the **Companies Act, 2013.**

- Where the company fails to spend such amount, the Board shall in its report specify the reasons for not spending the amount. The approach is to comply or explain.
- The company shall give preference to local areas where it operates, for spending amount earmarked for CSR activities.
- The CSR activities shall be undertaken by the company, as per its stated CSR Policy, as projects or programs or activities (either new or ongoing), excluding activities undertaken in pursuance of its normal course of business.
- The Board of a company may decide to undertake its CSR activities approved by the CSR committee, through a registered trust or a registered society or a company established by the company or its holding or subsidiary or associate company under section **8** of the Act or otherwise. –
- The CSR projects or programs or activities undertaken in India only shall amount to CSR expenditure.
- The CSR projects or programs or activities that benefit only the employees of the company and their families shall not be considered as CSR activities in accordance with **Section 135** of the Act. Contribution of any amount directly or indirectly to any political party under **section 182** of the Act, shall not be considered as CSR activity. In case the company has failed to spend the two percent of the average net profit of the last three financial years or any part thereof, the company shall provide the reasons for not spending the amount in its Board report.
- The reporting on Corporate Social Responsibility is to be made with the Registrar in e-form **AOC-4.**
- The CSR Policy of the company is required to be displayed on Company's website.
- The term CSR is not defined under the Act but **Schedule VII** of the **Companies Act, 2013** requires that the CSR policy created by the CSR Committee must involve atleast one of the focus areas as mentioned in that schedule.
- The CSR activities should be according to the stated CSR policy, as projects or programs or activities (either new or ongoing).
- The CSR activities may be decided by the Board to be undertaken through a registered trust or a registered society or a company established by the company or its holding or subsidiary or associate company, provided that:
- if such trust, society or company is not established by the company or its holding or subsidiary or associate company, it shall have an established track record of three years in undertaking similar programs or projects;
- The company has specified the project or programs to be undertaken through these entities, the modalities of utilization of funds on such projects and programs and the monitoring and reporting mechanism.
- A company may also collaborate with other company but the reports of such projects shall be separately made as per the rules.
- CSR projects or programs or activities undertaken in India shall amount to CSR expenditure.
- CSR projects that benefits only the families of the employees shall not be considered as CSR activities.
- Companies can either conduct CSR activities by mobilizing their own personnel or through institutions having a track record of at least three years but such expenditure must exceed **5%** of total CSR expenditure in one financial year.
- Contribution made to the any political party shall not be considered as CSR activity.

Q.6. Referring to the provisions of the Companies Act, 2013 relating to 'corporate social responsibility' (CSR), answer the following:

(i) Which activities would not qualify as CSR?

(ii) Whether the average net profit criterion for CSR is before tax or after tax?

(4 marks; 2016 - Dec)

Answer:

1.	**Activities which would not be classifies as CSR**	• The CSR projects or programs or activities that benefit only the employees of the company and their families. • One-off events such as marathons/ awards/charitable contribution/ advertisement/sponsorships of TV programmes etc. • Expenses incurred by companies for the fulfillment of any other **Act/Statute of regulations** (such as **Labour Laws, Land Acquisition Act, 2013, Apprentice Act, 1961** etc.) • Contribution of any amount directly or indirectly to any political party. • Activities undertaken by the company in pursuance of its normal course of business. • The project or programmes or activities undertaken outside India.
2.	**Computation of Net Profit**	Computation of Net Profit for **Section 135** is as per **Section 198** of **the Companies Act, 2013** which is primarily profits before tax.

Q.7. Any expenditure incurred for the benefit of the society will be considered as expenditure in pursuance of corporate social responsibility policy. Comment with reference to the provisions of the Companies Act, 2013. (3 marks; 2018 - Dec)

Answer:

As per Section 135 of Companies Act, 2013 provides that a company falling under specifies criteria shall put in place a Corporate Social Responsibility Policy specify the activities to be undertaken by the company in areas or subject, specified in Schedule VII of Companies Act, 2013. It is further provided that the Board of Directors of every company shall make sure that the activities as are included in Corporate Social Responsibility Policy of the-company are accept by the company.

The expenditure incurred for the benefit of society shall be considered as expenditure in pursuance to Section 135 of Companies Act, 201 3, only if the same falls under Corporate Social Responsibility Policy of the Company.

Q.8. Explain whether the Corporate Social Responsibility (CSR) Committee is entrusted with any specific functions under the Companies Act, 2013? (3 marks; 2019 - June)

Q.9. Brave Ltd. is listed at Bombay Stock Exchange and has a net worth of over Rs. 600 crore. The company has constituted a corporate social responsibility (CSR) committee with Jay and Vijay as its members. Both Jay and Vijay are directors of the company, Jay being an independent director.

Explaining the provisions of the Companies Act, 2013 relating to 'corporate social responsibility', examine whether the company has complied with the provisions of the Act in this regard. (4 marks; 2015 - June)

Answer:

1.	**Corporate Social Responsibility**	One of the key changes in the **Companies Act, 2013** is the introduction of a Corporate Social Responsibility section making India the first country to mandate CSR through a statutory provision.
2.	**Rules based on 'Comply or Explain'**	While CSR is not mandatory for companies, the rules are in line with the 'Comply or Explain' principle with penalties applicable only if an explanation is not offered.
3-	**Provisions in brief**	The provisions of the Section may be summarized as under:

		1. Companies Covered under the Provisions	The Section applies to the following classes of companies during any financial year: (i) Companies having Net Worth of rupees five hundred crore or more; (ii) Companies having turnover of rupees one thousand crore or more; (iii) Companies having Net Profit of rupees five crore or more.
		2. **CSR Committee.**	The companies specified above shall constitute a Corporate Social Responsibility Committee (CSR Committee) of the Board.
		3. **No of Directors in CSR Committee**	The CSR Committee shall consist of three or more Directors, out of which at least one Director shall be an Independent Director.
		4. **CSR Policy**	After taking into account the recommendations of the CSR Committee, the Board shall approve the CSR Policy for the company.
		5. **Disclosure in Board's Report**	The contents of the Policy shall be disclosed in the Board's report.
		6. **Disclosure in Official Website**	It shall also be placed on the Company's website, if any, in a manner to be prescribed by the Central Government.
		7. **CSR Activities Specified in Schedule VII**	The Board shall ensure that the activities as are included in the CSR Policy (from the activities as specified in Schedule VII) are undertaken by the Company.

Note: Since the company in question has a net worth of Rs. 600 crore which-is more than the required sum of Rs. 500 crore, the company has to comply" with the provisions of the Companies Act, 2013, presently, company has only two directors, accordingly there is a need to reconstitute the CSR Committee of Brave Ltd.

Amendment made by Companies (Amendment) Act, 2017 Revised Section 135(1)-

"Every company having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore **or** more during **the immediately preceding financial year** shall constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors, out of which at least one director, shall be an independent director.

Provided that where a company is not required to appoint an independent director under sub-section **(4)** of Section 149, it shall have in its Corporate Social Responsibility Committee two or more directors." **Revised Section 135(3)(a)-**

"(a) formulate and recommend to the Board, a Corporate Social Responsibility Policy which shall indicate the activities to be undertaken by the company in **areas or subject, specified in Schedule VII." Revised Explanation to Section 135(5)**

"For the purposes of this section "net profit" shall not include such sums as may be prescribed, and shall be calculated in accordance with the provisions of Section **198**."

Q.10. Corporate Social Responsibility (CSR) provisions are applicable to Microskill Ltd. The company finalised the project under its CSR initiatives which require funds beyond the man dated 2% of average net profit of the company for last three financial years. Will

such excess expense, when incurred, be counted in subsequent financial years as a part of CSR expenditure? Advice. **(4 marks; 2015- Dec)**

Answer:

In terms of **Section 1 35(5)**of the **Companies Act, 2013,** the Board of every company, to which **Section 135** is applicable shall ensure that the company spends in every financial-year, at least **2%** of the average net profits of the company made during the three preceding year.

There is no provision for carry forward or excess expenditure to the next year(s). The words used in the section are 'at least'. Therefore, any expenditure over **2%** could be considered as "voluntary higher spending".

Q.11. Fortune Ltd. had below financial details during the last three financial years:

(Rs. In Crores)

Year	Net Worth	Turnover	Net Profit
2016-17	100.00	490.00	5.50
2015-16	95.00	500.00	4.50
2014-15	80.00	380.00	2.00

Discuss the compliance requirements for the Company on Corporate Social Responsibility. Whether Company requires to spend amount on CSR Activities, and what are the consequences if the Company fails to spend any amount? **(5 marks; 2017 - June)**

Answer:

Section 135(1) of the Companies Act, 2013 provides that every company having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during the immediately preceding financial year shall constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors, out of which at least one director shall be an independent director. **Section 135(3)** requires that the Committee shall formulate and recommend to the Board, a CSR Policy which shall indicate the activities to be undertaken by the company as specified in **Schedule VII.** The Committee shall further recommend the amount of expenditure to be incurred on CSR activities and monitor the Policy from time to time.

As. per Section 135(5) of the Act, the Board shall ensure that the company spends, in every financial year, at least 2% of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its CSR Policy.

Accordingly, Fortune Ltd. whose net profits during the current year exceeds rupees five crore is required to comply with the requirements of Section 135 ' and form a CSR Committee as explained above and spend an amount of rupees eight lakh (being 2% of the average net profits of rupees four crore). However, the company shall seek to give preference to the local area and areas around it where it operates for spending the aforesaid amount. However, if Fortune Ltd. fails to spend such amount, the Board shall, in its report made u/s 134(3)(o), specify the reasons for not spending the amount.

Q.12. From the following information in respect of two companies viz. ZYX Limited and CBA Private limited, compute the amount the companies are required to spend on account of Corporate Social Responsibility (CSR):

Financial Year	ZYZ Ltd. Net Profit/(Loss)	CBA Private Ltd. Net Profit/(Loss)
2014-15	Not incorporated	-4
2015-16	6	-1
2016-17	18	6

(4 marks; 2017 - June)

Answer:

Section 135(1) read with **Section 135(5) of the Companies Act, 2013**

provides that every company having net worth of rupees 500 crore or more, or turnover of rupees 1,000 crore or more or a net profit or rupees 5 crore or more during any financial year shall ensure that the company spends, in every financial year, at least 2% of the average net profits of the company made during the three immediately, preceding financial years.

In the **given case,** in case of ZYX Limited, the net profit for financial year 2016-17 is Rs. 18 crore. The average net profit for preceding 3 financial years is Rs. (0+6+18) crore/3 = Rs. 24 crore/3 = Rs. 8 crore. **It** is to be noted that though the company was not incorporated in the financial year 2014-15, yet that year is to be considered for calculation of average net profit. Accordingly, the company has to spend 2% of Rs. 8 crore, i.e., Rs. 0:16 crore towards CSR activities.

In case of CBA Private Limited, the net profit for financial year 2016-17 is Rs. 6 crore. The average net profit for preceding 3 financial year is Rs. [(-4)+ (-1)+6] crore/3 = 1 crore/3 Rs. 33.33 lakh. It is to be observed that though the company suffered losses in 2 years 2014-15 and 2015-16, yet those 2 years are to be considered for calculation of average net profit.. Accordingly, the company has to spend 2% of Rs. 33.33 lakh, i.e., Rs. 0.67 lakh towards CSR activities.

Q.13. RS Ltd. has incurred Rs. 5 lakh for the fulfillment of Labour Law, Land Acquisition Act and Food Safety and Standards Act in the month of May, 2018. The company has accounted for this Rs. 5 lakh as Corporate Social Responsibility (CSR) expenditure. Explaining the provisions of the-Companies Act, 2013 discuss whether the company has rightly accounted for the amount in CSR. (4 marks; 2018 - June)

Answer:

According to the Provisions of Section 135 of the Companies Act, 2013 and rules and clarifications thereunder, expenses incurred by companies for the fulfillment of any Act/Statute of regulations (such as Labour Laws, Land Acquisition Act etc.) would not count as CSR expenditure under the Companies Act, 2013.

In accordance with the aforementioned clarification, expenditure of Rs. 5 lacs relating to fulfillment of requirement under Labour Law, Land Acquisition Act and Food Safety and Standard Act by RS Ltd., will **not** be treated as CSR expenditure.

Q.14. Explain the concept of 'CSR' (Corporate Social Responsibility) as introduced by the Companies Act, 2013. Examining the provisions of the Act, answer the following:

(i) Which companies are required to constitute a CSR Committee?

(ii) Which companies are excluded from the requirements of the provisions of the Act in relation to CSR Committee?

(iii) What is the minimum contribution the companies are required to make towards CSR?

(8 marks; 2014-Nov) [CA Final -I]

Answer:

(i) Companies required to constitute a CSR committee.

As per Sec. 135(1) of the Companies (Amendment) Act, 2017 every company having.

- net worth of five hundred crore rupees or more or
- turnover of one thousand .crore rupees or more or
- a net profit of five crore rupees or more
- during the immediately preceding financial year shall constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors, out of which at least one shall be an independent director.

"Provided that where a company is not required to appoint an independent director under sec 149(4), it shall have in its Corporate Social Responsibility Committee two or more directors."

CSR applies to every company including its holding or subsidiary and a foreign company as per Sec. 2(42) having its Branch Office or Project Office in India, which fulfills the above criteria.

(ii) Exclusion of Companies

The companies which do not have net worth, turnover or net profit as per Sec. 135(i) mentioned above are excluded from the requirements of the provisions of the Act in relation to CSR Committee.

(iii) Minimum contribution towards CSR

The Board of every company [as per (i) above] shall ensure that the company spends at least two percent of the Average Net Profits of the company made during the three immediately

preceding financial years in pursuance of its CSR policy for spending the amount earmarked for CSR policy activities. For this Sec., average net profit shall be calculated in accordance with provisions of Sec. 198.

Q.15. Super Real Estate Limited, a listed company has made the following profits, the profits

Financial year	Amount (Rs. in crores)
2011 -12	20
2012-13	40
2013-14	30
2014-15	70
2015 -16	50

(i) Calculate the amount that the company has to spend towards CSR.
(ii) Give the composition of the CSR committee of a listed and unlisted company.
(iii) Will the company suffer penalties if they fail to provide for or incur expenditure for CSR?
(iv) List only two activities that are expressly prohibited from being considered as CSR activities. **(8 marks) [CA Final -I]**

Answer:

The provisions relating to CSR is contained in Sec. 135 of the Companies Act, 2013.

(i) As per Sec. 135, the company which require to constitute CSR Committee and company to which Sec. 135 applies shall require to spend at least two percent of the average net profits of the company made during three immediately preceding financial years towards CSR.

In this case, Super Real Estate Limited's past three years profits are 2013-14 Rs. thirty crores, 2014-15 Rs. seventy crores, and 2015-16 Rs. fifty crores. The average of above three year profit is ($\frac{30+70+50}{3}$) is Rs. fifty crores and two percent of Rs. fifty crores is Rs. one crore.

So that Super Real Estate Ltd. has to spend one crore rupees towards CSR.

(ii) As per Sec. 135, CSR committee shall consist of three or more directors. Out of the three directors, atleast one director shall be an independent director.

An unlisted public company or a private company which is not required to appoint an independent director shall have its CSR Committee without any independent director. A private company having only two directors shall constitute its CSR committee with two such directors.

(iii) As such Sec. 135 does not provide for any penal provision for failing to provide for or incur expenditure for CSR. But as per Sec. 134 if company fails to incur for CSR then it shall provide reasons for not spending the amount of two percent in pursuance of its CSR policy in

its Board's report. The company shall disclose such reason in its report. As no quantum of punishment is given under Sec. 135, Sec. 450 of the Companies Act, 2013 says that, the company and every officer of the company or any other person who is in default or contravenes in compliances with Sec. 135 shall be punishable with fine which may extend to ten thousand rupees. In case of continuation of contravention with further fine extending to one thousand rupees for every day after the first during which the contravention continues.

(iv) As per Rule 4 to 7 of the Companies (Corporate Social Responsibility Policy) Rules, 2014, following shall not amount to CSR activities for the purpose of Sec. 135;

(a) The CSR projects or programs or activities undertaken outside India.

(b) The CSR projects or programs or activities that benefit only the employees of the company and their families.

(c) Contribution of any amount, directly or indirectly to any political pa^y under g_{ec} -|g2 of the Companies Act, 2013.

(d) Any activities undertaken in pursuance of normal course of business of a company.

Q.16. Shoki Internl Ltd. has a network of six branches scattered all over the world out of which two are in India. The net-worth of the company is Rs. 650 crores. Since the net profits of the company were in downward trends, Mr. Nikunj a retired General Manager of a Bank was appointed by the company to analyse the financial health of the company. Among the other points having been reported by Mr. Nikunj, the CEO of the company seeks your advice, particularly on the application of the provisions of CSR under the Companies Act, 2013, based on the following:

(i) The Net profit of the company in the financial year 2012-13 was Rs. 18 crore which was contributed by the branches located in India and outside in the ratio of 35: 65.

(ii) Since 2013-14 onwards, all the branches located in India have not earned any profit.

(iii) The Financial Statements for the year 2015-16 revealed that there was net profit of Rs. 7 crore to the company and the total expenses on travelling abroad were Rs. 2.5 crore.

(iv) The company has borrowed loan at a very high rate of interest which needs to be swapped with low financing cost.

(v) During the year 2016-17, the company has so far spent CSR expenses to the tune of 1.10 percent of the average net profits of the company made during the three preceding immediately financial years which in his view need special attention.

(4 marks; 2017-May) [CA Final -I]

Answer:

The definition of net profits under Rule 2(f) of the Companies (CSR Policy) Rules, means the net profit of a company as per its Financial Statement prepared in accordance with the applicable provisions of the Act, but does not include the following namely:

(a) Any profit arising from any overseas branch or branch of the company, whether operated as a separate company or otherwise; and

(b) Any dividend received from other companies in India which are covered and complying with the provisions of Section 135 of the Act.

Present case:

As per point no. (ii) reported by Mr. Nikunj, all the branches located in India have not earned any profit since 2013-14 onward, meaning thereby all the net profits being earned by the Company pertains to the overseas branches. As provided in the definition of net profit, under the CSR Rules, it does not include the net profit earned by the overseas branch(s); therefore, the provisions of CSR for incurring expenses during the Financial Year 2016-17 are not applicable.

in view of the above, it is clear that though the company has spent 1.10 per cent of the average net profits of the company made during the three preceding immediately financial years, which is not statutorily required for the company to spend and as such there is no violation of the provisions of the Companies Act.

Q.17. Rera Ltd. a company incorporated under the Companies Act, 2013 having turnover of Rs. 100 crore, net profit Rs. 3 crore, accumulated loss of Rs. 50 crore and securities premium Rs. 300 crore as per the audited accounts of the company for the Financial Year 2016-17.

The CFO of the company informed the directors of the company that the Corporate Social Responsibility (CSR) committee is required to be constituted as per the Companies Act, 2013. The directors seek your advice as a professional regarding the criteria required to constitute CSR committee and whether it is applicable to Rera Ltd. or not.

(6 marks; 2018-May)

Answer:

Criteria required to constitute CSR Committee:

As per Sec. 135(1) of the Companies (Amendment) Act, 2017, every company having:

- net worth of five hundred crore or more
- turnover of one thousands crore rupees or more

- a net profit of five crore rupees or more
- during the immediately preceding financial year

Shall constitute a CSR Committee of the Board consisting of three or more directors out of which at least one director shall be an independent director. Provided that where a company is not required to appoint an independent director under Sec. 149(4), it shall name in its CSR Committee two or more directors.

Present Case:

Rera Ltd. is having a turnover of one hundred crore rupees, net profit of three crore rupees, accumulated loss of rupees fifty crore and securities premium of rupees three hundred crores as per the audited accounts of the company for the financial year 2016-17.

Thus, the company is not required to form a CSR Committee as it does not fulfil the criteria mentioned under Sec. 135(1) of the Companies (Amendment) Act, 2017.

Q.18. Mary Ltd is a listed company having turnover of Rs. 1,200 crores during the financial year 2016-17. The CSR committee of the Board formulated and recommended a CSR project which was approved by the Board. The company finalised the project under its CSR initiatives which require funds @ 5 % of average net profit of the company for last three financial years. Will such excess expense be counted in subsequent financial years as a part of CSR expenditure? Advise the company.

Answer:

In terms of Sec. 135(5) of the Companies Amendment Act, 2019, the Board of every company to which Sec. 135 is applicable, shall ensure that the company spends, in every Financial year at least two percent of average net profits of the company made during the three immediately preceding financial years, "or where the company has not completed the period of three financial years since its incorporation, during such immediately preceding financial years," in pursuance of its CSR policy. There is no provision for carry forward of excess expenditure to the next year(s). The words used in the section are 'at least'. Therefore, any expenditure over two percent would be considered as voluntary higher spending. Hence, such excess expense will not be counted in subsequent financial years as a part of CSR expenditure.

136. RIGHT OF MEMBER TO COPIES OF AUDITED FINANCIAL STATEMENT (3 QUESTIONS)

Notified Date of Section: 01/04/2014

Q.1. Audited Accounts of a public company are not available. Examine the possibility of filing unaudited accounts with the Registrar of companies with reference to the relevant provisions of the Companies Act, 2013. (5 marks; 2008-Nov) [CA Final -I)

Answer:

Provisions:

As per Sec. 134 of Companies Amendment Act, 2017, the Financial Statement including consolidated Financial Statement if any of the company shall be accompanied by the following document:

(i) The auditors' report.

(ii) The Board's report including the web address, if any, where annual return referred to in sub section (3) of Sec. 92 has been placed, number of meetings of the board and Director's responsibility statement.

And as per Sec. 136 of the Companies Act, 2013, the company shall send a copy of aforesaid documents to the members and other persons entitled to receive the financial statement, and as per Sec. 137 of the Companies Act, 2013, the company shall file with the Registrar one copy of the aforesaid documents.

Present Case: In view of the above stated provisions, there is specific requirement that auditor's report must be attached with financial statement i.e. balance sheet and profit and loss account. Thus, where the accounts are not audited or audit report is not attached to the balance sheet, it would result in contravention of these Sections.

The Institute of Chartered Accountants of India has also opined that in view of the requirements of Section 134, the unaudited balance sheet and profit and loss account cannot be filed with the Registrar [ICAI Compendium of Opinions, Vol. Ill],

Thus, in the present case, the unaudited accounts cannot.be filed with the Registrar.

Q.2. Bengaluru Limited is a listed company with a net worth of Rs. 95 lakhs and turnover of Rs. 11.6 crores as on 31st March, 2016. The company wants to circulate the financial statements in electronic mode. Referring to the provisions of the Companies Act, 2013, advise the company whether it can do so. **(4 marks; 2016- Nov) [CA Final -I]**

Answer:

Manner of circulation of Financial Statements in certain cases

- As per Rule 11 of the Companies (Accounts) Rules, 2014, in case of all listed companies and such public companies which have a net worth of more than one crore rupees and turnover of more than ten crore rupees, the financial statements may be sent:

(i) by electronic mode to such members whose shareholding is in dematerialized format and whose email ids are registered with Depository for communication purposes;

(ii) where Shareholding is held otherwise than by dematerialized format, to such members who have positively consented in writing for receiving by electronic mode; and

(iii) by despatch of physical copies through any recognised mode of delivery as specified under Sec. 20 of the Act, in ail other cases.

- A listed company shall also place its financial statements including consolidated financial statements, if any, and all other documents required to be attached thereto, on its website, which is maintained by or on behalf of the company.

Present Case:

In the present case, Bengaluru Limited is a listed company, it can circulate the financial statements in electronic mode.

Q.3. The Government of India is holding 51% of the paid-up equity share capital of Sun Ltd. The Audited financial statements of Sun Ltd. for the financial year 2017-18 were placed at its annual general meeting held on 31st August, 2018. However, pending the comments of the Comptroller and Auditor General of India (CAG) on the said accounts the meeting was adjourned without adoption of the accounts. On receipt of CAG comments on the accounts, the adjourned annual general meeting was held on 15th October, 2018 whereat the accounts were adopted. Thereafter, Sun Ltd. filed its financial statements relevant to the financial year 2017-18 with the Registrar of Companies on 12m November, 2018. Examine, with reference to the applicable provisions of the Companies Act, 2013, whether Sun Ltd. has complied with the statutory requirement regarding filing of accounts with the Registrar?

(4 marks; 2019-May)

137. COPY OF FINANCIAL STATEMENT TO BE FILED WITH REGISTRAR (13 QUESTIONS)

Notified Date of Section: 01/04/2014

Q.1. Explain the law laid down under the Companies Act, 2013 in respect of filing of Annual Financial Statements with Registrar of Companies (ROC) in the following two situations who is liable for the default.

(1) Where financial statements of the Company are filed with the R.O.C. after 11 months from the due date?

(2) Where financial statements are not at all filed by the Company with R.O.C?
(2 + 2 = 4 marks; 2016 - Dec)

Answer:

Under Section 403 of the Companies Act, 2013 any document may be filed within 270 days from the date by which it should have been filed under the Act. Any such document be also filed after 270 days on payment of fee and additional fee as may be prescribed, and the company and its officers who are-in-default shall be liable for the penalty or punishment provided under the Act.

Accordingly, in the above case, the financial statement has been filed after 270 days. Thus, the company may file the same on payment of fee and additional fee after 11 months. The company and its officers may approach ROC for compounding the offence, to avoid any prosecution by ROC for such failure or default.

Under section 137 (3) of the Companies Act, 2013, if a company fails to file the financial statement, the company and the Managing Director and the Chief Financial Officer, if any, and in their absence, any other director who is charged by the Board with the responsibility of complying with the extent provisions, and in the absence of any such director, all the directors of the company, shall be punishable.

Penalty for non-compliance of provisions relating to filing of financial statement

Copy of financial statements (including consolidated financial statement in case of holding company), shall be filed with Registrar of Companies within 30 days from the date when the accounts where duly adopted at the Annual General Meeting of the company. All documents which are required to be annexed or attached to the financial statement must be filed. The documents are required to be filed with filing fees - Section 137(1) of Companies Act, 2013.

If financial statements are not filed by due date, company shall be liable to a penalty of Rs. 1,000 per day for every day during which the default continues, but shall not be more than Rs. 10 lakhs. In addition. MD and CEO (and in their absence all directors) shall be liable to a penalty of one lakh rupees and in case of continuing failure, with further penalty of one hundred rupees for each day after the first during which such failure continues, subject to a maximum of five lakh rupees - Section 137(3) of Companies Act, 2013 amended vide the companies (Amendment) Ordinance, 2019 w.e.f. 2.11.2018.

Till 2.11.2018, the section provided for fine in case of company and fine or imprisonment in case of MD and CEO which could be imposed only by Court. Now, penalty can be imposed by RoC or RD who is authorized for this purpose.

Even earlier, the offence was compoundable. However, procedure of compounding had to be complied with. Now, directly penalty can be imposed after issuing Show Cause Notice.

Q.2. A director of the company along with another director was prosecuted for their failure to file annual return, financial statements and audited balance sheet required to be laid before the AGM. The directors filed petition before the Tribunal to quash the prosecution initiated by the Registrar of Companies. As a Company Secretary in Practice, advise in the matter. **(4 marks; 2013 - Dec)**

Answer: T

- **Section 137** requires every company to file the financial statements including consolidated financial statement together with Form AOC- 4 with the Registrar within 30 days from the day on which the annual general meeting held and adopted the financial statements with such fees or additional fee as specified in Companies (Registration Offices and Fees) Rules, 2014.
- If the financial statements are not adopted at the annual general meeting or adjourned annual general meeting, such unadopted financial statements along with the required documents be filed with the Regirtrar with in thirty days of the date of annual general meeting. The Registrar shall take them in his record as provisional, until the adoption at annual general meeting.
- The One Person Company shall file the copy of financial statements duly adopted by its members within a period of one hundred and eighty days from the closure of financial year.

- The company shall also attach the accounts of subsidiaries incorporated outside India and which have not established their place of business in India with the financial statements.
- The class of companies as may be notified by the Central Government from time to time, shall mandatorily file their financial statement in Extensible Business Reporting Language (XBRL) format and the Central Government may specify the manner of such filing under such notification for such class of companies [Rule 12(2).]
- If annual general meeting has not been held, the financial statement duly signed along with the statement of facts and reasons for not holding the annual general meeting shall be filed with the Registrar within thirty days of the last days before which the annual general meeting should have been held.
- If company fails to comply with the requirement of submission of financial statement before Registrar, the company shall be punishable with fine of one thousand rupees for every day during which failure continues subject to maximum of rupees ten lakh.
- The managing director and CFO if any, and, in the absence of such managing director or CFO, any other director who is charged by the Board with the responsibility of complying with the provisions of this section, in the absence of such director, all directors of the company shall be punishable with imprisonment for a term which may extend upto six months or with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees or with both.

Q.3. Write notes on XBRL (4 marks; 2014 - June)

Extensible Business Reporting Language (XBRL) is a language for the electronic communication of business and financial data revolutionizing business reporting around the world. It provides major benefits in the preparation, analysis and communication of business information. It offers cost savings, greater efficiency and improved accuracy and reliability to all those involved in supplying or using financial data. The Ministry of Corporate Affairs has mandated for selected class of companies to file their Balance Sheet and Profit and Loss Account and other documents as required under **Section 137** of **Companies Act, 2013** with the Registrar of Companies in XBRL (Extensible Business Reporting Language) mode and by using the XBRL taxonomy.

Q.4. Write notes on XBRL filing. (4 marks; 2015 - June)

Answer:

The applicability of e-form AOC-4 XBRL on classes of companies has been amended.

Filing of financial statements with Registrar.- The following class of companies shall file their financial statements and other documents under section 137 of the Act with the Registrar in e-form AOC-4 XBRL as per Annexure-I:

(i) Companies listed with stock exchanges in India and their Indian subsidiaries;
(ii) Companies having paid up capital of five crore rupees or above;
(iii) Companies having turnover of one hundred crore rupees or above;
(iv) All companies which are required to prepare their financial statements in accordance with Companies (Indian Accounting Standards) Rules, 2015:

Provided that the companies preparing their financial statements under the **Companies (Accounting Standards) Rules, 2006** shall file the statements using the Taxonomy provided in Annexure-ll and companies preparing their financial statements under **Companies (Indian Accounting Standards) Rules, 2015,** shall file the statements using the Taxonomy provided in Annexure-ll A:

Provided further that non-banking financial companies, housing finance companies and companies engaged in the business of banking and insurance sector are exempted from filing of financial statements under these rules.

Key benefits of XBRL filing are as under:

Relevant data has tags and selective information can be fetched for specific purposes by various government and regulatory agencies. It is in conformity with Global Reporting Standards, which helps in improved data mining and relevant information search.

Q.5. Distinguish between XBRL tags and XBRL taxonomies. (4 marks; 2018 - June)

Answer:
In XBRL, information is not treated as a static block of text or set of numbers. Instead, information is broken down into unique items of data (e.g. total liabilities -100). These data items are then assigned mark-up tags that make them computer-readable. For example, the tag<Liabilities>100</Liabilities> enables a computer to understand that the item is liabilities, and it has a value of 100.
Computers can treat information that has been tagged using XBRL intelligently'; they can recognize, process, storo, exchange and analyze it automatically using software.
Because XBRL tags are formed in a universally-accepted way, they can be read and processed by any computer that has XBRL software XBRL tags are defined and organized using categorization schemes called taxonomies.
XBRL Taxonomies:
Different countries use different accounting standards. Reporting under each standard reflects differing definitions. The XBRL language uses different dictionaries, known as 'taxonomies', to define the specific tags used for each standard. Different dictionaries may be defined for different purposes and types of reporting. Taxonomies are the computer-readable 'dictionaries' of XBRL. Taxonomies provide definitions for XBRL tags, they provide information about the tags, and they organize the tags so that they have a meaningful structure.
As a result, taxonomies enable computers with XBRL software to:

- Understand what the tag is (e.g. whether it is a monetary item, a percentage or text); In tagging Section, "N" refers to navigation, "A" refers to attaching the disclosures "T" refers to text entry etc.
- what characteristics the tag has (e.g. if it has a negative value);
- Its relationship to other items (e.g. if it is part of a calculation).

Taxonomies differ according to reporting purposes, the type of information being reported and reporting presentation requirements.

Q.6. "XBRL offers major benefits at all stages of business reporting and analysis". Discuss. (4 marks; 2014 - June)

Answer:

1	**Benefits of XBRL**	XBRL offers major benefits at all stages of business reporting and analysis. The benefits are seen in automation, cost saving, faster, more reliable and more accurate handling of data, improved analysis and in better quality of information and decision making. 1.It saves costs and improves efficiency in handling business and financial information. 2. It is extensible and flexible which can adapt any changes according to the requirements. 3. It enables producers and consumers of financial data to switch resources away from costly manual processes, typically involving time-consuming comparison, assembly and re-entry of data. 4. The users of financial data are able to make more effort on analysis.

Q.7. Mention the classes of companies which are mandated by the Ministry of Corporate Affairs to file their financial statements in extensible Business Reporting Language (XBRL) mode with its key benefits. State exceptions, if any. (4 marks; 2015 - Dec)
Answer:
Please refer 2015 - June

Q.8. Filing of financial statements in XBRL mode and by using XBRL taxonomy is mandatory to certain companies. Discuss, referring to the provisions of the Companies Act,.2013. (3 marks; 2018 - Dec)

Answer:

As per Rule 3 of the Companies (Filling of Documents and Forms in Extensive Business Reporting Language) Rules, 2018 mandates the following select class of companies mentioned below to file financial statements in XBRL (extensible Business Reporting Language) mode and by using the XBRL taxonomy:

(i) All companies listed with any Stock Exchange(s) in India and their Indian subsidiaries; or
(ii) All companies having paid-up capital of Rupees five crore and above;
(iii) All companies having turnover of Rupees one hundred crore and above; or
(iv) All companies who were required to file their financial statements for FY 2010-11, using XBRL mode.

But, the companies in banking, insurance, power sector, non-banking financial companies and housing finance companies are exempted from XBRL filing till further orders.

Q.9. Prudent General Insurance Company Ltd. is engaged in the general insurance business. The company is not listed in any stock exchange in India but is a subsidiary of Reliable General Insurance Company Ltd., listed at Bombay Stock Exchange. The turnover of Prudent General Insurance Company Ltd. is Rs. 330 crore. Examining the provisions of the Companies Act, 2013, state whether the company Is required to file XBRL enabled balance sheet.

(4 marks; 2016 - June)

Answer:

1	**XBRL Filing**	The Ministry of Corporate Affairs has mandated the following select class of companies mentioned below to file financial statements in XBRL (Extensible Business Reporting Language) mode and by using the XBRL taxonomy: (i) all companies listed with any Stock Exchange(s) in India and their Indian subsidiaries; or (ii) all companies having paid-up share capital of Rupees five crore and above; or (iii) all companies having turnover of Rupees one hundred crore and above; or (iv) all companies who were required to file their financial statements for FY 2010-11, using XBRL mode. However, banking companies, insurance companies, power companies and Non-Banking Financial Companies (NBFCs) are exempted from XBRL filing till further orders.
2	**Conclusion**	In present case Prudent General Insurance Company Ltd. is engaged in general insurance business, thus XBRL filing is not applicable to the company.

Q.10. In relation to filing of financial statements of a company in XBRL mode and by using the XBRL taxonomy, decide whether the following companies are required to file the financial statements in the said mode:

(i) Grand Ltd., the subsidiary company of Tiny Ltd. which is listed at Kolkata Stock Exchange.

(ii) Prime Ltd., a company which has paid-up share capital of Rs. 100 crore.

(iii) Crafty Ltd., a company which has a turnover of Rs. 400 crore.

(iv) Comfort Ltd., a non-banking financial company. **(4 marks; 2016 - June)**

Answer:

XBRL Filing: The Ministry of Corporate Affairs has mandated the following select class of companies mentioned below to file financial statements in XBRL (Extensible Business Reporting Language) mode and by using the XBRL taxonomy:

(i) All companies listed with any Stock Exchange(s) in India and their Indian subsidiaries; or
(ii) All companies having paid-up share capital of rupees five crore and above; or
(iii) All companies having turnover of rupees one hundred crore and above; or

(iv) All companies **who** were required to file their financial statements for FY **2010-11,** using XBRL mode.

However, banking companies, insurance companies, power companies and Non-Banking Financial Companies are exempted from XBRL filing till further orders.

(i) Yes, Company is required to file financial statements through XBRL mode.

(ii) Yes, Company is required to file financial statements through XBRL mode.

(iii) Since in this case the turnover is more than Rs. **100** crore, the company is required to file the financial statements through XBRL mode.

(iv) This company is exempted from filing the financial statements through XBRL mode.

Q.11. Annual General Meeting of a Company has been concluded on 30th April, 2008. Now, the company is required to submit/file its Annual Return and Annual Accounts with Register of Companies. You are required to state the procedure for such submission/filing.

(4 marks; 2008 - May) [CA Final -I]

Answer:

Annual Return [As per Sec. 92(1) of Companies Amendment Act, 2017]

1. Every company shall prepare a return (hereinafter referred to as the annual return) in the prescribed Form No. MGT.7 containing the particulars as they stood on the close of the financial year regarding -

(a) its RO, principal business activities, particular of its holding, subsidiary and associate companies;

(b) its shares, debentures and other securities and shareholding pattern;

(c) its members and debentureholders along with changes therein since the close of the previous financial year;

(d) its promoters, directors, key managerial personnel along with changes therein since the close of the previous financial year;

(e) meetings of members or a class thereof, Board and its various committees along with attendance details;

(f) remuneration of directors and key managerial personnel;

(g) penalty or punishment imposed on the company, its directors or officers and details of compounding of offences and appeals made against such penalty or punishment;

(h) matters relating to certification of compliances, disclosures as may be prescribed;

(i) details, as may be prescribed, in respect of shares held by or on behalf of the Foreign Institutional Investors and

(j) such other matters as may be prescribed, and signed by a director and the company secretary and where there is no company secretary by a company secretary in practice.

2. The annual return, filed by a listed company or, by a company having such paid-up capital and turnover as may be prescribed, shall be certified by a Company Secretary in practice in the prescribed form, stating that the annual return discloses the facts correctly and 'adequately and that the company has complied with all the provisions of this Act.

3. Every company shall place a copy of the annual return on the website of the company if any and the web link of such annual return shall be disclosed in the Board's report.

Note: As per Rule 11 of Companies (Management & Administration Rules 2014),

Annual Return:

(1) Every company shall prepare its annual return in Form No. MGT. 7.

(2) The annual return, filed by a listed company or a company having paid- up share capital of ten crore rupees or more or turnover of fifty crore rupees or more, shall be certified by a Company Secretary in practice and the certificate shall be in Form No. MGT.8.

4. An extract of the Annual Return to be attached should be in Form No. MGT-9 [Rule 12(1)] the Board's report.

Procedure:

(i) As per Sec 92(4), every company shall file with the Registrar a copy of the annual return, within sixty days from the date on which the annual general meeting is held or where no annual general meeting is held in any year within sixty 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 AGM, with such fees or additional fees as may be prescribed, under Rule 12 of Companies (Registration Officer and Fees) Rule 2014.

(ii) Further as per Sec 92(5), if a company fails to file its annual return under sub-Sec. (4), before the expiry of the period specified 48 therein the company shall be punishable with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months or with-fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees, or with both. [Sec. 92(5)]

Filing of Annual Account [As per Companies Act, 2013]

1. Filing of Financial Statements including Consolidated Financial Statements it any duly adopted at AGM [Sec. 137(1)]

A copy of the financial statement including consolidated financial statements, if any, alongwith all the documents required to be annexed or attached thereto, duly adopted at the AGM shall be filed with the Registrar within thirty days of the date of annual general meeting in such manner and with such fees or additional fees as is prescribed under Companies (Registration Offices and Fees) Rules, 2014.

As per Rule 3 of the Companies (Filing of Documents and forms in Extensible Business Reporting Language) Rules, 2015 vide Notification dated 9th September, 2015, following class of companies shall file their financial statement and other documents under this section with the registrar in e-form AOC-4 XBRL given in Annexure I for the financial years commencing on or after 1st April, 2014. using the XBRL taxonomy, namely-

(i) All companies listed with any stock exchange(s) in India and their Indian subsidiaries, or
(ii) All companies having paid up capital of rupees five crore or above, or
(iii) All companies having turnover of rupees hundred crore or above, or
(iv) All companies which were hitherto covered under the Companies (Filing of Documents and Forms in Extensible Business Reporting Language) Rules, 2011:

Again as per Amended Rule 3 vide Notification dated 4th April 2016, the following companies are exempted from XBRL filing -

Banking, Insurance power sector, NBFC and Housing Finance Company.

2. Filing of unadopted Financial Statements [1st Proviso to Sec. 137(1)]

Where the financial statement is not adopted at AGM, company shall file such unadopted financial statement alongwith the required documents within thirty days of the date of AGM which will be treated by the Registrar as provisional till the financial statement is filed with him after adoption at the adjourned annual general meeting.

3. Filing of Financial Statements adopted at adjourned AGM [2nd Proviso to Sec. 137(1)]

Company shall file the financial statement adopted in the adjourned AGM within thirty days of the date of such adjourned AGM. in such manner and with such fees or additional fees as is prescribed under Companies (Registration Offices and Fees) Rules, 2014.

4. Filing of Financial Statement by OPC [3rd Proviso to Sec. 137(1)]

A One Person Company shall file a copy of the financial statement duly adopted by its member, alongwith the documents required to be annexed or attached to such financial statement within one hundred eighty days from the closure of the financial year.

5. Filing of accounts of foreign subsidiaries [4th Proviso to Sec. 137(1)]

Company shall file alongwith its financial statements, accounts of its subsidiary or subsidiaries which have been incorporated outside India and which have not established their place of business in India.

It has also been clarified vide General Circular No. 11/2015 dated 21st July 2015 that in case of foreign company which is not required to get its accounts audited as per the legal requirements prevalent in the country of its incorporation and which does not get such accounts audited, the holding or parent Indian may place or file such unaudited accounts to comply with requirements of Section 136(1) and 137(1) as applicable. Further, the format of accounts of foreign subsidiaries should be, as far as possible, in accordance with requirements under the Companies Act, 2013. In case this is not possible, a statement indicating the reasons for deviation may be placed/filed along with such accounts.

6. Where AGM not held for any year [Sec. 137(2)]

Where the AGM of a company for any year has not been held, to file the financial statements along with the documents required to be attached under Sec. 137(1) duly signed alongwith the statement of facts and reasons for not holding the annual general meeting, such filing to be done within thirty days of the last date before which the AGM should have been held in such manner and with such fees or additional fees as is prescribed under Companies (Registration Offices and Fees) Rules, 2014.

Note:

As per Companies (Accounts) Second Amendment Rules, 2015, Rule 4A: The financial statements shall be in the form specified in Schedule III to the act and comply with Accounting Standards or Ind AS as applicable.

Rule12: Every company shall file the financial statements with ROC together with Form AOC- 4 and the consolidated Financial Statement if any with AOC- 4 CFS.

Q.12. Explain the law laid down under the Companies Act, 2013 in respect of filing of annual financial statements with Registrar of companies in the following two situations who is liable for the default.

(i) Where financial statements of the company are filed with the ROC after 10 months from its due date;

(ii) Where financial statements are not at all filed by thé company with the ROC?

(4 marks; 2016-May) [CA Final -I]

Answer:

Provision:

(i) Any document, required to be submitted, filed, registered or recorded, or fact or information required or authorised to be registered under this Act, shall be submitted, filed, registered or recorded within the time specified in the relevant provision on payment of such fee as is prescribed under Table A, Companies (Registration Offices and Fees) Rules, 2014.

Provided that any document, fact or information may be submitted, filed, registered or recorded, after the time specified in relevant provision for such submission, filing, registering or recording, within a period of two hundred and seventy days from the date by which it should have been submitted, filed registered or recorded, as the case may be, on payment of such additional fee as is prescribed under Table B of Companies (Registration Offices and Fees) Rules, 2014. Present case: In the present case, the financial statement has been filed after two hundred and seventy days. Thus, the company may file the same on payment of fee and additional fee after ten months. The company and its officers may approach ROC for compounding the offence, to avoid any prosecution by ROC for such failure or default.

(ii) As per Sec. 137(3) of the Companies (Amendment) Act, 2017, 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 one thousand rupees for every day during which the failure continues but which shall not be more than ten lakh rupees, 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 complying

with the provisions of this section and in the absence of any such director, all the directors of the company.

Q.13. A Housing Finance Ltd. is a housing finance company having a paid up Share Capital of Rs. 11 crores and a turnover of Rs. 145 crores during the Financial Year 2017-18. Explain with reference to the relevant provisions and rules, whether it is necessary for A Housing Finance Ltd. to file its financial statements in XBRL mode. (3 marks; 2018-Nov)

Answer:

Provision: As per Rule 3 of the Companies (Filing of Documents and forms in Extensible Business Reporting Language) Rules, 2015 vide Notification dated 9th September, 2015, following class of companies shall file their financial statement and other documents under this section with the registrar in e-form AOC-4 XBRL given in Annexure I for the financial years commencing on or after 1st April, 2014 using the XBRL taxonomy, namely-

(i) All companies listed with any stock exchange(s) in India and their Indian subsidiaries, or

(ii) All companies having paid up capital of rupees five crore or above, or

(iii) All companies having turnover of rupees hundred crore or above, or

(iv) All companies which were hitherto covered under the Companies (Filing of Documents and Forms in Extensible Business Reporting

Language) Rules, 2011:

Again as per Amended Rule 3 vide Notification dated 4th April 2016, the following companies are exempted from XBRL filing -

Banking, Insurance power sector, NBFC and Housing Finance Company.

Present Case:

A Housing finance Ltd., being a housing finance company is not required to file its financial statement in XBRL mode.

138. INTERNAL AUDIT (4 QUESTIONS)

Notified Date of Section: 01/04/2014

Q.1. Interior Pvt. Ltd. is a manufacturing company having turnover of Rs. 210 crore but having maximum outstanding loan from public financial institution of Rs. 90 crore only during the preceding financial year. You are required to state whether the company .is liable for internal audit as per the provisions of the Companies Act, 2013. (5 marks; 2017 - Dec)

Answer:

The following class of companies shall be required to appoint an internal auditor which may be either an individual or a partnership firm or a body corporate [As amended vide notification no. G.S.R. 742(E) dated 27th July, 2016], namely:

(a) Every listed company.

(b) Every unlisted public company having:

(1) Paid up share capital of Rs. 50 crore or more during the preceding financial year, or

(2) Turnover of Rs. 200 crore or more during the preceding financial year, or .

(3) Outstanding loans or borrowings from banks or public financial institutions exceeding Rs. 100 crore or more at any point of time during the preceding financial year, or

(4) Outstanding deposits of Rs. 25 crore or more at any point of time during the preceding financial year, and

(c) Every private company having:

(1) Turnover of Rs. 200 crore or more during the preceding financial year, or

(2) Outstanding loans or borrowings from banks or public financial institutions exceeding Rs. 100 crore or more at any point of time during the preceding financial year.

Hence, since the turnover of the company exceeds Rs. 200 crore, it is liable for internal audit.

Q.2. Answer the following by explaining the provisions of the Companies Act, 2013 relating to 'internal audit':
(i) Whether a private company is mandatorily required to appoint an internal auditor?
(ii) Who may be appointed as an internal auditor? Whether a Practicing Company Secretary (PCS) can be appointed as an internal auditor? (2 marks each; 2015 - June)

Answer:

1	**Section 138**	**Section 138 of the Companies Act, 2013** provides that such class or classes of companies as may be prescribed shall be required to appoint an internal auditor, who shall either be a Chartered Accountant or a Cost Accountant, or such other professional as may be decided by the Board of Directors to conduct internal audit of the functions and activities of the company.
2	**Every Private Company' Having**	1. Turnover of two hundred crore rupees or more during the preceding financial year; or 2. Outstanding loans or borrowings from banks or public financial institutions exceeding one hundred crore rupees or more at any point of time during the preceding financial year.
3	**Conclusion**	(i) Therefore, a private company falling under any of the above criteria shall have to appoint an internal auditor. - . (ii) The company's Board is free to appoint any practicing chartered accountant or cost accountant or any other professional to whom it deems fit to be appointed as an internal auditor. Accordingly, where the Board decides a Practicing Company Secretary may be appointed as an internal auditor.

Q.3. PQR Limited is an unlisted Public company having paid up share capital of Rs. 80 crores during the preceding financial year 2014-15. The turnover of the company was Rs. 110 crores for the same period. Referring to the provisions of the Companies Act, 2013, answer the following:
(i) Is it mandatory for the above company to appoint an internal auditor for the financial year 2015-16?
(ii) What are the qualifications of the internal Auditor? (6 marks; 2015-May) [CA Final -I]

Answer:

(t) Provision:

Class of companies required to appoint Internal Auditor:

Sec 138 of the Companies Act, 2013 and the Companies (Accounts) Rules, 2014 prescribes the class of companies required to appoint Internal Auditor.

According to Rule 13, following class of companies shall be required to appoint an internal auditor or a firm of internal auditors.

1. Every listed company;
2. Every unlisted public company having:

- Paid up share capital of fifty crore rupees or more during the preceding financial year or
- Turnover of two hundred crore rupees or more during the preceding financial year or
- Outstanding loans or borrowings from banks or public financial institutions exceeding hundred crore rupees or more at any point of time during the preceding financial year or
- Outstanding deposits of twenty five crore rupees or more at any point of time during the preceding financial year shall be required to appoint an internal auditor.

Present Case:

Appointment of Internal auditor is mandatory for PQR Limited for the financial year 2015-16 as it is an unlisted public company having paid up share capital of eighty crores rupees during the preceding financial year 2015-16.

(ii) Qualifications of the Internal Auditor

Internal auditor shall be a Chartered Accountant or a Cost Accountant or such other professional as may be decided by Board. Statutory auditor cannot act as internal auditor.

Q.4. PMK Ltd. having a paid up capital of Rs. 65 crore during the preceding financial year has appointed Mr. Z a Chartered Accountant, as CFO of the Company, who is appointed as Key Managerial Personnel under Section 203 of the Companies Act, 2013. The financial position of the company was not good. In the meanwhile, the CEO was given to understand that the company is statutorily required to appoint Internal Auditor and as such the Board had authorized the CEO to appoint a person who must be a Chartered Accountant. CEO wanted to know the followings:

(i) What are the requirement for appointment of the Internal Auditor by the Company?

(ii) Since the financial position of the company was not good, can the company decide to give additional duties of Internal Auditor to Mr. Z to comply with the provision of the Act. Critically analyse the decision of the company. (4 marks; 2017-May) [CA Final -I]

Answer:

Provision:

(i) Sec. 138 of the Companies Act, 2013 and Rule 13 of the Companies (Accounts) Rules, 2014 prescribes the class of companies required to appoint Internal Auditor.

According to it following class of companies shall be required to appoint an internal auditor or a firm of internal auditors.

1. Every listed company;
2. Every unlisted public company having:

(a) Paid-up share capital of fifty crore rupees or more during the preceding financial year; or

(b) Turnover of two hundred crore rupees or more during preceding financial year; or

(c) Outstanding loans or borrowings from banks or public financial institutions exceeding hundred crore rupees or more at any point of time during the preceding financial year; or

(d) Outstanding deposits of twenty five crore rupees or more at any point of time during the preceding financial year; and

3. Every private company having:

(a) Turnover of two hundred crore rupees or more during the preceding financial year; or

(b) Outstanding loans or borrowings from banks or public financial institutions exceeding hundred crore or more at any point of time preceding financial year.

(ii) Provision:

Rule 13 of the Companies (Accounts) Rules, 2014 states that an Internal Auditor may or may not be an employee of the company. Present Case: Additional duties of Internal Audit to Mr. Z PMK Ltd. appointed Mr. Z, a Chartered Accountant as CFO of the company. He is KMP under the Companies Act, 2013. As the financial position of the company was not good, so it decided to give additional duties of internal audit to Mr. Z. This assigning of additional duties by the company to Mr. Z is valid act as per the explanation provided in Rule 13 of the Companies (Accounts) Rules, 2014 that the internal auditor

may or may not be an employee of the company. So, accordingly, company may decide to give the additional duties of internal auditor to Mr. Z and can appoint Mr. Z as an internal auditor of PMK Ltd.

AUDIT AND AUDITORS

139. APPOINTMENT OF AUDITORS (14 QUESTIONS)

Notified Date of Section: 01/04/2014

Q.1. Comment on the following:
(a) Appointment and rotation of statutory auditor is mandatory for one person company and small company. **(5 marks; 2018 - June)**

Answer:
As per Section 139(1) of the Companies Act, 2013 inter alia provides that every company shall, at the first annual general meeting, appoint an individual or a firm as an auditor who shall hold office from the conclusion of that meeting till the conclusion of its sixth annual general meeting and thereafter till conclusion of every sixth meeting.
The Companies Act, 2013 has introduced the system of rotation, of auditors under Section 139. As per Rule 5 of the Companies (Audit and Auditors) Rules, 2014, rotation of auditors is applicable to:

- All listed companies;
- All unlisted public companies having paid up share capital of Rs. 10 crore or more;

All private limited companies having paid up share capital of Rs. 20 crore or more;
All companies having paid up share capital of below threshold limit mentioned in (a) and (b) above, but having public borrowings from financial institutions, banks or public deposits of Rs. 50 crore or more. In view of the above it is clear that appointment is applicable on all the Companies including one person companies and small companies, however, the provisions of rotation of auditors shall not apply to one person companies and small companies.

Q.2. Perfect Pvt. Ltd. wishes to appoint its Secretary, Satish, as an internal auditor. Referring to the provisions of the Companies Act, 2013 advise the company.
(4 marks; 2018 - June)

Answer:
According to Section 138(1) of the Companies Act, 2013 read with the Rule 13 of the Companies (Accounts) Rules, 2014, following persons may be appointed as an internal auditor of the company:
(a)A Chartered Accountant or;
(b)A Cost Accountant or;
(c)Such other professional as may be decided by the Board to conduct internal audit of the functions and activities of the Company.
Further, Rule 13 of the Companies (Accounts) Rules, 2014 inter alia provides that the internal auditor may or may not be an employee of the Company. Mr. Satish being the Secretary of Perfect Ltd. may be appointed as an internal auditor of the company only if so decided by the Board to conduct internal audit of the functions and activities of the Company.

Q.3. Novel LLP, Trademark and Patent Attorneys, have been successfully running their business for the last five years. They have fixed assets* in the form of intangibles (software) worth Rs. 75 lakh in their balance sheet. Advise as to whether their accounts are to be audited. **(4 marks; 2016 - Dec)**

Answer:

1.	**Section 34(4) of the Limited Liability Act, 2008**	According to **Section 34(4)** of **the Limited Liability Act, 2008** provides that the accounts of a LLP shall be audited in accordance with such rules as may be prescribed. According to **Rule 24** of **LLP Rules, 2009** a LLP whose turnover does not exceed in any financial year Rs.**40** lakh or whose contribution (whether tangible or non-tangible) does not exceed Rs. 25 lakh is not required to get its accounts audited.
2.	**Conclusion**	The audit of LLP may be done by a Chartered Accountant in Practice only.

		An auditor or auditors, of a limited liability partnership shall be appointed for each financial year of the LLP for auditing its accounts.
3.	**[Rule 24(10)].**	Considering the contribution in the, form of fixed assets (software) amounting to Rs. 75 lakhs Nove.l LLP Trademark and Patent Attorney are required to get the accounts audited.

Q.4. Ram is a practising Chartered Accountant and partner of two audit firms namely PYMG and YE. In the immediately preceding financial year, PYMG has completed its two terms of five consecutive years in Gayatri Pvt. Ltd. having paid-up share capital of Rs. 60 crore. Now Gayatri Pvt. Ltd. is considering appointing YE firm as its statutory auditors. Can Gayatri Pvt. Ltd. appoint YE firm as its auditors?

What will be your answer in the following cases?

(i) If appointing company is a one person company;

(ii) If appointing company is a small company. **(5 marks; 2018 - Dec)**

Answer:

Under section 139 of the Companies Act, 2013 read with Rule 5 of Companies (Audit and Auditors) Rules, 2014, the following companies are required to appoint and rotate auditors:

(a)All listed companies;

(b)All unlisted public companies having paid up share capital of rupees ten crore or more;

(c)All private limited companies having paid up share capital of rupees fifty crore or more;

(d) All companies having paid up share capital of below threshold limit mentioned in (a) and (b) above, but having public borrowings from financial institutions, banks or public deposits of rupees fifty crores or more.

- An individual auditor who has completed his term as auditor for more than one term of five consecutive years and an audit firm who has completed the term as auditor for more than two terms of five consecutive years shall not be re-appointed as an auditor of the company.

It is further provided that as on the date of appointment no audit firm having a common partner or partners to the other audit firm, whose tenure has expired in a company immediately preceding the financial year, shall be appointed as auditor of the same company for a period of five years. **Accordingly in the above case,** the company is required to appoint and rotate the auditors on completion of the tenure. Thus Gayatri Ltd. Cannot appoint YE audit firm as auditor of the company.

(a)In case the appointee company is a One Person Company, rotation of auditor does not apply and hence the appointing company can appoint YE audit firm as auditor.

(b)In case the appointee company is a Small Company, rotation of auditor does not apply and therefore the appointing company can appoint YE audit firm as auditor.

Q. 5 In respect of a Government company within the meaning of Sec. 2(45) of the Companies Act, 2013, state the provisions of the Act in respect of the following:

(A) The first authority to appoint the first auditor of a Government company and the period within which the appointment should be made?

(B) Who is the next authority to appoint the first auditor if there is a failure on the part of the first authority to appoint and within what period?

(C) Who is next authority to appoint the first auditor even if there is a failure on the part of the second authority to appoint and within what period? (3 marks; 2017-Nov)

Answer:

(A) In respect of Government Company within meaning of Sec. 2(45)of the Companies Act, 2013, first auditor of the Government Company shall be appointed in following manner as per Section 139(7).

The first auditor shall be appointed by the Comptroller and Auditor General of India (CAG) within sixty days from the date of registration of the company.

(B) In case the CAG does not appoint first auditor within the said period, the BOD of the company shall appoint such auditor within the next thirty days.

(C) Further, in case of failure of the BOD to appoint such auditor within the next thirty days, it shall inform the members of the company who shall appoint such auditor with the sixty days at an EGM, who shall hold office till the conclusion of the first AGM.

Q. 6 Mewar Instrumentations Limited is a subsidiary of a Government company. - The comptroller and Auditor General of India appointed Sobman & Company to conduct a supplementary audit of Mewar Instrumentations Limited. Discuss, under the provisions of the Companies Act, 2013 whether the Comptroller and Auditor General's power to authorise such audit for the said subsidiary company is in order? (5 marks; 2010-May)

Answer:

Provision

Sec. 2(45) of the Companies Act, 2013, defines a Government Company as any company in which, not less than fifty-one percent of the paid-up share capital is held by the CG or by any SG and partly by the CG and partly by one or more SG. It also includes a company, which is a subsidiary of a Government company as thus defined.

According to Sec. 139(5) the auditor of a Government Company shall be appointed by CAG within a period of one hundred and eight days from the commencement of the financial year who shall hold office till the conclusion of AGM.

Present Case:

Mewar Instrumentation Ltd. is a subsidiary of a Government Company. Hence, the provision of Sec. 139 of Act, 2013, is applicable on Mewar Instrumentation Ltd. As such CAG's power to authorise audit is valid.

Q.7 Explain briefly the provisions of Sec. 177 of the Companies Act, 2013 regarding constitution of "Audit Committee". MNC Ltd. constituted an audit committee as required by the said Act. Thè committee in its report dated 30th April 2012 has pointed out various irregularities in the financial transactions entered into by the company. The management of the company does not agree with the contents of the audit committee report. Explain the action that can be taken in this regard. (8 marks; 2012-May) [CA Final -I]

Answer:

Companies required to constitute Audit Committee [Sec. 177(1) of the Companies (Amendment) Act, 2017]

The following companies shall constitute an Audit Committee of the Board:

(a) Every listed public company

(b) Such other class or classes of Companies, as Is prescribed under Rule 6 of Companies (Meetings of Board and Its powers) Rules, 2014.

Rule 6 of the Companies (Meetings of Board and its Powers) Rules, 2014 have prescribed the following classes of companies that shall constitute Audit Committee:

(a) All public companies with a paid up capital of ten crore rupees or more;

(b) All public companies having turnover of hundred crore rupees or more;

(c) All public companies, having in aggregate, outstanding loans or borrowings or debentures or deposits exceeding fifty crore rupees or more.

Audit Committee - Composition - Independent and financially literate [Sec. 177(2)]

The Audit Committee shall consist of:

(a) A minimum of three directors.

(b) Independent directors forming a majority.

Provided Majority of the members of an audit committee including the Chairperson shall have ability to read and understand the financial statement.

Reconstitution of existing Audit Committee [Sec. 177(3)]

The Audit Committee of a Company existing immediately before the commencement of this Act, shall be reconstituted within one year of such commencement in accordance with Sec. 177(2).

Course of action in case of differing with the content of the audit committee report:

(i) As per Sec. 177, a recommendations of the Audit Committee on any matter relating to financial management, including the audit report, shall be binding on the Board.

(ii) If the Board does not accept the recommendations of the Audit Committee it shall record the reasons therefore and communicate such reasons to the shareholders. [Sec. 177(8)]

(iii) The Chairman of the Audit Committee shall attend the Annual General Meeting(s) of the company to provide any clarifications on matters relating to Audit.

Q. 8 In respect of a Government company within the meaning of Sec. 2 (45) of the Companies Act, 2013, state the provisions of the Act in respect of the following:

(A) The first authority to appoint the first auditor of a Government company and the period within which the appointment should be made?

(B) Who is the next authority to appoint the first auditor if there is a failure on the part of the first authority to appoint and within what period?

(C) Who is next authority to appoint the first auditor even if there is a failure on the part of the second authority to appoint and within what period? (3 marks; 2017-Nov) [CA Final -I]

Answer:

(A) In respect of Government Company within meaning of Sec. 2(45) of the Companies Act, 2013, first auditor of the Government Company shall be appointed in following manner as per Section 139(7).

The first auditor shall be appointed by the Comptroller and Auditor General of India (CAG) within sixty days from the date of registration of the company.

(B) In case the CAG does not appoint first auditor within the said period, the BOD of the company shall appoint such auditor within the next thirty days.

(C) Further, in case of failure of the BOD to appoint such auditor within the next thirty days, it shall inform the members of the company who shall appoint such auditor with the sixty days at an EGM, who shall hold office till the conclusion of the first AGM.

Q. 9 Prakash Carriers Limited appointed.Mr. Raman as its auditor in the Annual General Meeting held on 30lh September, 2009. Initially, he accepted the appointment. But he resigned from his office on 31st October, 2009 for personal reasons. The Board of Directors seeks your advice for filling up the vacancy by appointment of Mr. Albert as auditor. Advise.

Also suggest the procedure to be adopted in case Mr. Albert is proposed to be removed from his office before the expiry of his term. (5 marks; 2009-Nov) [CA Final -I]

Answer:

Filling Casual Vacancy

Casual vacancy in the office of auditor in case of company other than Government Company

As per Sec. 139(8) of the Companies Act, 2013 in the case of a company, other than a company whose accounts are subject to audit by an auditor appointed by the CAG, any casual vacancy in the office of an auditor shall be filled by the BOD of the Company within thirty days.

However, the appointment of an auditor in the casual vacancy caused by the resignation of an auditor shall also be approved by the company in general meeting convened within three months of the recommendation of the Board and he shall hold the office till the conclusion of the next AGM.

Q. 10 On recommendation of the Board of Directors of DJA Company Limited, Mr. R is appointed at the company's Annual General Meeting held on 1st October, 2014 as the company's auditor for a period of 10 years. A resolution to this effect was passed unanimously with no vote against the resolution. Explaining the provisions of the Companies Act, 2013 relating to the appointment and re-appointment of auditors:

(i) Examine the validity of the above resolution.

(ii) What shall be your answer in case an audit firm Messrs R & Associate is appointed as the company's auditor? (5 marks; 2014-Nov) [CA Final -I]

Answer:

Provision:

As per Sec. 139(2) of the Companies Act, 2013, no Listed Company or a company belonging to such class/classes of company as may be prescribed, under Rule 5 of the Companies (Audit and Auditors) Rules, 2014, shall appoint/re-appoint:

(a) An individual as auditor for more than one term of five consecutive years and

(b) Any audit firm as auditor for more than two terms of five consecutive years,.

Provided that an individual and an audit firm will not be able to be reappointed after completion of five consecutive years and ten consecutive years from the completion of his terms.

Present Case:

(i) Thus, in the light of the above section, the resolution passed at the AGM, even though passed unanimously with no vote against it, shall not be valid as an individual auditor can only be appointed for a term of five consecutive years and cannot be re-appointed for the five years of completion of his term.

(ii) However, in case an audit firm messrs. R & Associates is appointed as the company's auditor, the resolution shall be valid as an audit firm can be appointed as auditor for two terms of five consecutive years.

Q. 11 Rupa Limited, a listed company appointed M/s. VG & ASSOCIATES an audit firm as Company's auditor in the Annual General Meeting held on 30-09-2017. Explain the provisions of the Companies Act, 2013 relating to the appointment or reappointment of an auditor in relation, to tbs tenurs Of an auditor. (3 marks; 2018-May)

Answer:

Provision relating to the appointment or re-appointment of an auditor in relation to the tenure of an auditor

As per Sec. 139(2) of the Companies Act, 2013, no Listed Company or a company belonging to such class/classes of company as may be prescribed, under Rule 5 of the Companies (Audit and Auditors) Rules, 2014, shall appoint/re-appoint:

(a) An individual as auditor for more than one term of five consecutive years and

(b) Any audit firm as auditor for more than two terms of five consecutive years,

Provided that an individual and an audit firm will not be able to be reappointed after completion of five consecutive years and ten consecutive years from the completion of his terms.

Present Case: In terms of the above provisions, Rupa Limited, which is a listed company, can appoint M/S VG & ASSOCIATES an audit firm, for a term of 5 years, i.e. from the conclusion of the AGM held on 30.09.2017 to the conclusion of the AGM to be held in the year 2022. Now, in terms of Section 139(2), since M/S VG & ASSOCIATES is an audit firm, it can be reappointed as auditor for one more term of five years, i.e., upto the conclusion of the AGM to be held in 2027.

Q. 12 PKC Ltd., wants to appoint Mr. Praveen Kumar, a practicing Chartered Accountant as the statutory auditor of the company and asked the proposed auditor to give a certificate in this regard. What are the contents of the certificate to be issued in accordance with the Companies (Audit & Auditors Rules, 2014)? (3 marks; 2018-May)

Answer:

Content Certificate by Auditor:

The Companies (Audit and Auditors) Rules, 2014 provides the content of the Certificate. According to this, the auditor appointed shall submit a certificate that —

(A) the individual or the firm, as the case may be, is eligible for appointment and is not disqualified for appointment under the Act, the Charactered Accountants Act, 1949 and the rules or regulations made thereunder;
(B) The proposed appointment is as per the term provided under the Act;
(C) The proposed appointment is within the limits laid down by or under the authority of the Act;
(D) The list of proceedings against the auditor or audit firm or any partner of the audit firm pending with respect to professional matters of conduct, as disclosed in the certificate, is true and correct.

Q. 13 CA. M is a partner in SM & Company (Chartered Accountants) and ML & Company (Chartered Accountants). SM & Company are statutory auditors of M/s. Global Ltd. (listed) for past seven years as on 1-04-2018. Advice under relevant provisions of the Companies Act, 2013:
(1) For how many more years SM & Company can continue as statutory auditors of M/s. Global Ltd. (listed)?
(2) Can ML & Company be appointed as statutory auditor of M/s. Global Ltd. during cooling off period for SM & Company? (4 marks; 2018-Nov)

Answer:

1. Sec. 139(2) provides that listed companies and other prescribed class or classes of companies (except one person companies and small companies) shall not appoint or reappoint:

(1) An individual as auditor for more than one term of five consecutive years: and
(2) An audit firm as auditor for more than two terms of five consecutive years.

Present Case:

In this case, SM & Company are statutory auditors of M/s. Global Ltd. (listed) for past seven years.

As M/s. Global Ltd. is listed company so above provisions of section 139(2) shall be applicable to it. SM & Co. Is an audit firm so it cannot be appointed as auditor for more than two terms of five consecutive years?

i.e. 1 term of 5 years, two term equals to 10 years. SM & Company is holding position as statutory auditor for past seven years as on 01/04/2018, it can continue as statutory auditors of M/s. Global Ltd. for 3 more years.

2. Sec. 139(2) also provides provisions relating to cooling off period. As per this section:

An audit firm which has completed its term (i.e. two terms of five consecutive years) shall not be eligible for re-appointment as auditor in the same company for five years from the completion of such term.

Further, as on the date of appointment no audit firm having a common partner or partners to the other audit firm, whose tenure has expired in a company immediately preceding the financial year, shall be appointed as auditor of the same company for a period of five years.

Present Case:

CA. M is a partner in SM & Company and ML & Company. SM & Co. is auditor of the Global Ltd. During cooling off period after expiry of the term of SM & Company, Global limited wants to appoint ML & Co. as its statutory auditor. As per above provisions, M/s. Global Ltd. cannot appoint ML & Company as its statutory auditor as CAM is a common partner between ML & company and SM & Company.

This prohibition is only for 5 years i.e. upto year 2026. After 5 years, M/s. Global Ltd., is free to appoint ML & Co. as its statutory auditors.

Q. 14 Lemon & Company, Chartered Accountants a Limited Liability Partnership firm with CA. L, CA. M and CA. N as partners, is the statutory auditor of a listed company M/s Big Limited for past 6 years as on 01.04.2014.

CA.M is also a partner in other Chartered Accountant firm Dew & Company, Chartered Accountants. Advise under the provisions of the Companies Act, 2013:

(1) Upto how many years can Lemon & Company continue as statutory auditors of M/s Big Limited?

(2) What shall be the cooling-off period for Lemon & Company with respect to M/s Big Limited?

(3) Can Dew & Company; be appointed as statutory auditors of M/s Big Limited and it's another listed subsidiary M/s Dark Limited during such cooling-off period?

(4) Can Lemon & Company be appointed as internal auditors of M/s Big Limited and it's another listed subsidiary M/s Dark Limited, during such cooling-off period?

Answer:

According to Section 139 (2) of the Companies Act, 2013,

(i) Listed companies and other prescribed class or classes of companies (except one person companies and small companies) shall not appoint or re-appoint an audit firm as auditor for more than two terms of 5 consecutive years.

(ii) An audit firm which has completed its term (i.e. two terms of five consecutive years) shall not be eligible for re- appointment as auditor in the same company for five years from the completion of such term.

(iii) Further, as on the date of appointment no audit firm having a common partner or partners to the other audit firm, whose tenure has expired in a company immediately preceding the financial year, shall be appointed as an auditor of the same company for a period of five years.

(iv) For the purpose of the rotation of auditors, in case of an auditor (whether an individual or audit firm), the period for which the individual or the firm has held office as auditor prior to the commencement of the Act shall be taken into account for calculating the period of 5 consecutive years or 10 consecutive years, as the case may be.

Applying the above provisions,

(1) Lemon & Company can continue as statutory auditors of M/s Big Limited for 4 more years from 1.4.2014, i.e. they can continue in office only till 31.3.2018.

(2) The cooling- off period shall be of 5 years.

(3) Dew & Company cannot be appointed as a statutory auditor of M/s Big Limited during the cooling - off period of Lemon & Company, as CA. M is the common partner in both Lemon & Company and Dew & Company. Flowever, Dew & Company can be appointed as a statutory auditor of M/s Dark Limited (a listed subsidiary of M/s Big Limited), during the cooling - off period.

(4) As per Section 138 (1) of the Companies Act, 2013, every listed company and other prescribed class of companies, shall be required to appoint an internal auditor, who shall either be a chartered accountant or a cost accountant, or such other professional (which may be either an individual or a partnership firm or a body corporate) as may be decided by the Board to conduct internal audit of the functions and activities of the company.

Accordingly, M/s Lemon & Company can be appointed as an internal auditors of M/s Big Limited and in its subsidiary M/S Dark Limited (a listed company). The provision of cooling off period as given under Section 139 of the Companies Act, 2013, shall not be applicable on the Internal auditors.

140. REMOVAL, RESIGNATION OF AUDITOR AND GIVING OF SPECIAL NOTICE (5 QUESTIONS)

Notified Date of Section: 01/04/2014

Q.1. State briefly the power of Tribunal in case Auditor acted in a Fraudulent Manner.
(4 marks; 2018 - Dec)

Answer:

Power of Tribunal in case Auditor acted in a Fraudulent Manner:

1.As per sub-Section (5) of the Section 140 of the Companies Act, 2013, the Tribunal either suo moto or on an application made to it by the Central Government or by any person concerned, if it is satisfied that the -auditor of a company has, whether directly or indirectly, acted in a fraudulent manner or abetted or colluded in any fraud by or in relation to, the company or its directors or officers, it may, by order, direct the company to change its auditors.

2.Although, if the application is made by the Central Government and the Tribunal is satisfied that any change of the auditor is required, it shall within fifteen days of .receipt of such application, make an order that he shall not function as an auditor and the Central Government may appoint another auditor in his place.

3.It may be noted that an auditor, whether individual or firm, against whom final order has been passed by the Tribunal under this section shall not be eligible to be appointed as an auditor of any company for a period of five years from the date of passing of the order and the auditor shall also be liable for action under Section 447 of the said Act.

4.It is hereby clarified that the case of a firm, the liability shall be of the firm and that of every partner or partners who acted in a fraudulent manner or abetted or colluded in any fraud by, or in relation to the company or its director or officers.

Q.2. Manohar, the auditor of Belle Ltd. appointed by the company in its last general meeting has resigned from the office of auditor of the company for some personal reasons. Referring to the provisions of the Companies Act-, 2013, answers the following:
(i)Who is the competent authority to accept and approve the resignation?
(ii)State the manner in which the vacancy caused by Manohar's resignation shall be filled in
(4 marks; 2015 - Dec)

Answer:

1	**Section 140(2)**	The auditor of the company shall submit the resignation to the Board of Director. **Section 140(2)** provides that the auditor who has resigned from the company shall file within a period of thirty days from the date of resignation, a statement in ADT-3 with the company and the Registrar, indicating the reasons and other facts as may be relevant with regard to his resignation. **As per Companies (Amendment) Ordinance, 2019** An auditor may resign on his own. If he resigns, he (i.e. auditor) is required to file a statement with RoC. If he was appointed by C and G, he should file such statement to C and AG also, giving reasons - **Section 140(2) of Companies Act, 2013.** The statement should be filed by auditor to RoC in formADT.3. If the auditor does not comply with the provisions of Section 140(2), 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 maximum of five lakh rupees - Section 140(3) of Companies Act, 2013 amended vide the Companies (Amendment) Ordinance, 2019 w.e.f. 2.11.2018.
2	**Section 139(8)**	In terms of **Section 139(8) (i)** vacancy caused due to the resignation of Manohar shall be filled in the following manner: (a) The Board of the company shall fill the casual vacancy in the office of auditor within 30 days. (b) Such appointment should also be approved by the company in general meeting convened within 3 months of the recommendation of the Board and

		auditor shall hold the office till the conclusion, of the next annual general meeting. (c) Appointment of auditors to fill casual vacancy shall be made after taking into account the recommendation of the audit committee where the company is required to constitute such a committee.

Q.3. Members of ZA Ltd. holding less than 1% of total voting power want the company to give a special notice to move a resolution for appointment of an auditor other than retiring auditor. Explain whether members have complied with relevant provisions of the Companies Act, 2013 in making their request. (3 marks; 2018-Nov)

Answer:

Sec.140(4) of the Companies Act, 2013, provides provisions for appointing auditor other than the Retiring Auditor. As per this section special notice shall be required for a resolution at an annual general meeting appointing as auditor a person other than a retiring auditor, or providing expressly that a retiring auditor shall not be re-appointed. Section 115 of the Companies Act, 2013 states that where any provision of this Act specifically requires or Articles of Association of a company so require that a special notice is required for passing any resolution, then the notice of the intention to move such resolution shall be given to the company by such number of members holding not less than 1% of the total voting power, or holding shares on which such aggregate sum not exceeding Rs. 5,00,000 has been paid-up. To such a case, the company shall give its members notice of the resolution in the manner as prescribed in Rule 22 of the Companies (Management & Administration) Rules, 2014.

Present Case:

There is non-compliance of requirement of Section 115 as stated above i.e. the notice of the intention to move such resolution as to appointment of auditor other than retiring auditor was given by members of ZA Ltd., holding less than 1 % of the total voting power.

Q.4. Pick-up the correct answer from the following and give reason's:

(b) Resolution requiring special notice is required

(1) For appointment of a person other than the retiring auditor as auditor at the Annual General Meeting

(2) For removing a Director before the expiry of the period of his office

(3) For both (1) and (2)

(4) For None of the above. (1 mark; 2008 - May)

Answer:

Option 3:

For both (1) and (2) above

According to Sec. 140 of the Companies Act, 2013, Special notice shall be required for a resolution at an annual general meeting appointing as auditor a person other than a retiring auditor, or providing expressly that a retiring auditor shall not be re-appointed and According to Sec. 169 a company may, by ordinary resolution, remove a director before the expiry of his period of office. But Special notice shall be required of any resolution to remove a director under this Sec., or to appoint somebody instead of a director so removed at the meeting at which he is removed.

Q.5. A is the Auditor of B and Co. Ltd. Board of Directors decided to remove A on certain grounds. Please indicate what procedure is to be followed to remove A? Advise the Board (5 marks; 2010-Nov) [CA Final -I]

Answer:

Removal of Auditor before expiry of term

According to Sec. 140(1) of Companies Act, 2013, an auditor may be removed from his office before expiry of his term

- Only by a special resolution of the company

- After obtaining previous approval of Regional Director in that behalf
- In the manner prescribed under Rule 7 of Companies (Audit and Auditors Rules, 2014).

Rule 7 of Companies (Audit & Auditors) Rules, 2014

1. The application to Regional Director shall be made in Form ADT-2 along with fees as mentioned under companies (Registration Offices and Ffees) Rules, 2014.
2. The application shall be made within 'hirty days of resolution passed by the board.
3. The company shall hold the general meeting within sixty days of receipt of approval of the Regional Director for passing the special resolution.

Note:

1. Before taking any action u/s 140(1), the auditor shall be given a reasonable opportunity of being heard.
2. As per Rule 8, when an auditor has resigned from the company, he shall file a statement in Form ADT-3.

141.ELIGIBILITY, QUALIFICATIONS AND DISQUALIFICATIONS OF AUDITORS (10 QUESTIONS)

Notified Date of Section: 01/04/2014

Q.1. M/s RST and Co., a firm of Chartered Accountants, comprising of three partners R, S and T are Statutory Auditors of 50 companies as per details given below:

(i)Small Companies —10

(ii) Private Companies having paid-up share capital of less than Rs. 100 Crores — 20

(iii) Private Companies having paid-up share capital of more than Rs. 100. Crores -15

(iv) Public Companies — 5

Mr. R signs the Balance Sheet of 10 Small Companies and 10 Private Companies having paid-up share capital of less than Rs. 100 Crores. Mr. S signs the Balance Sheet of 10 Private Companies having paid-up share capital of less than Rs. 100 Crores and 5 Private Companies having paid-up share capital of more than Rs. 100 Crores. Mr. T signs the Balance Sheet of 10 Private Companies having paid-up share capital of more than Rs. 100 Crores and 5 Public Companies.

What is the maximum number of audits that the firm as a whole can accept and what is the maximum number of audits each individual partner can accept? (6 marks; 2019 - June)

Q.2. Write a note on "Qualifications and disqualifications of auditors". (4 marks; 2014 - June)

Answer:

1	**Qualifications of Auditor**	**Section 141 (1) and (2) of the Act prescribed the following qualifications of auditor which areas under:** (i)Only a Chartered Accountant (individual) or a firm where majority of partners practicing in India are Chartered Accountants can be appointed as auditor. (ii)Where a firm including a limited liability partnership (LLP) is appointed as an auditor of a company, only the partners who are chartered accountants shall be authorized to act and sign on behalf of the firm.
2	**Disqualifications of Auditor**	**Section 141 (3) of the Act read with Rule 10 prescribed the following persons shall not be eligible for appointment as an auditor of a company, namely:** (i)'A body corporate, except LLP; (ii)An officer or employee of the company; (iii)Any partner/employee of officer or employee of company; (iv)A person who himself or his relative/partner is holding any security or interest in the company, or any company which is its holding, subsidiary, associate; (v)A person whose relative is holding security or interest not

		exceeding Rs. one lac face value in companies as mentioned above. Provided that this condition be also applicable in the case of a company not having share capital or other securities, wherever relevant. Provided further that **in**the event of acquiring any security or interest by a relative, above the threshold limit i.e.? one lac, the corrective action **to** maintain the limits (rupees one lac) shall be taken by the auditor within 60 days of such acquisition or interest; (vi)A person who **or** whose relative or partner is indebted to the company **or** its subsidiary **or** its holding or associate company **or** a subsidiary of such holding company, in excess of rupees five lakh shall not be eligible for appointment; (vii)A person who or whose relative or partner has given a guarantee or provided any security in connection with the indebtedness of any third person to the company, **or** its subsidiary, or its holding **or** associate company or a subsidiary of such holding company, in excess of-one lakh rupees shall not be eligible for appointment; (viii)A person or a firm who, whether directly **or** indirectly, has "business relationship" with the company, or its subsidiary, **or** its holding **or** associate company;

Q.3. Sanjay, a Chartered Accountant, is the financial controller of Sonik Industries (Pvt.) Ltd. for the last five years. The company now wants to appoint him as the statutory auditor of the company. Examining the provisions of the Companies Act, 2013, advise whether the company can appoint Sanjay as its statutory auditor.

(4 marks; 2016 - June)

Answer:

1	**Section 141(3) (b)**	According to **Section 141(3)(b) of the Companies Act, 2013** an officer or employee of the company is not eligible to be appointed as statutory auditor of a company.
2	**Conclusion**	**In the present case** Mr. Sanjay is working as financial controller of Sonik Industries (Pvt.) Ltd., and hence not eligible to be appointed as statutory auditor of the company.

Q.4. Ram is a chartered accountant in practice. His proprietary concern has been appointed as the statutory auditor of a private limited company. Subsequently, it came to light that Mrs. Ram has been holding less than 1% shares of that private limited company. Examine the legal validity of the appointment of statutory auditor.

(4 marks; 2017 - Dec)

Answer:

Pursuant to **Section 141**, a person who himself, or his relative or partner is holding any security of or interest in the company or its subsidiary, or of its holding or associate company or a subsidiary of such holding company is not eligible for appointment of auditor of the company. Provided that the relative may hold security or interest in the company of face value not exceeding Rs. 1,000or such sum as may be prescribed under the Companies (Audit and Auditors) Rules, 2014.

As per Rule 10 of the Companies (Audit and Auditors) Rules, 2014, a relative of an auditor may hold securities in the company of face value not exceeding Rs. 1 lakh.

In accordance with provisions stated above, Mrs. Ram may hold shares of the value not exceeding Rs. 1 lakh to render Mr. Ram eligible for appointment as the auditor.

Since the question is silent on the value of the 1 % shares of the company, the conclusion regarding the appointment of Ram may be drawn as under: If the holdings of Mrs. Ram exceed Rs. 1 lakh based on aforesaid provision of law Mr. Ram cannot be appointed as auditor.

However, if Mrs. Ram holding is less than Rs. 1 lakh Mr. Ram can be appointed as auditor.

Q.5. Examine the validity of the following appointments with reference to the provisions of the Companies Act, 2013:

Yashodharman Granites Limited reappointed Suresh & Company, a firm of Chartered Accountants, as auditors of the company at the Annual General Meeting held on 30th September, 2011. The wife of one of the partners of Suresh & Company acquired large number of equity shares in Yashodharman Granites Limited on 5th October. 2011. But Suresh & Company continue to function as statutory auditors of the company.

(8 marks; 2012 - Nov) [CA Final -I]

Answer:

Disqualification of an Auditor

As per Sec. 141 (3) (d) of the Companies Act, 2013, a person is not eligible to be an auditor who, or his relative or partner is holding any security of or interest in the company or its subsidiary or of its holding or associate company or a subsidiary of such holding company provided that a relative may hold security or interest in the company of face value not exceeding one lakh rupees as prescribed under Rule 10(1) of Company (Audit and Auditors) Rules, 2014.

Vacation of office of an Auditor

As per Sec. 141(4) of the Companies Act, 2013, a person appointed as an auditor of a company shall vacate such office if he incurs any of the disqualifications specified in Sec. 141(3).

Such vacancy shall be deemed to be a casual vacancy in the office of the auditor.

Present Case: The equity shares of Yashodharman Granites Limited are held by the wife of one of the partners of Suresh and Company. Hence, as per Sec. 141 (3) (a) Suresh and Company stand disqualified and shall have to vacate office as per Sec, 141(4).

Also the institute of Chartered Accountants of India has issued Council General Guidelines, 2008. Any contravention of these Guidelines shall amount to professional misconduct within the meaning of clause (1) of part (II) of Schedule (II) to the Chartered Accountants Act, 1949.

As per Chapter (IV) (Opinion on financial statements when there is substantial interest) of these Guidelines, a Chartered Accountant, shall not express his opinion on financial statements of any business or enterprise in which one or more persons who are his 'relatives' have, either by themselves or in conjunction with such Chartered Accountant, a substantial interest in the said business or enterprise. 'Relative' means the husband, wife, brother or sister or any lineal ascendant or descendant. 'Substantial interest' means shares carrying not less than twenty percent of voting power.

In the given case, wife of one of the partners of Suresh and Company has acquired large number of equity shares. 'Wife' is covered in the definition of relative. However, it has not been made clear as to whether the wife of the partner has acquired twenty percent or more equity shares or less than twenty percent equity shares. If the shares held by wife of one of the partners is twenty percent or more, the firm 'Suresh and Company shall have to vacate office of auditor.

Q.6. Examine the validity of the following with reference to the provisions of the Companies Act, 2013:

(ii) Mr. Prakash, a Chartered Accountant in full time practice was appointed as the auditor of ABC Ltd., a company which is a subsidiary of DGH Ltd. and DGH Ltd. has another subsidiary called PKM Ltd. Mr. Prakash had taken a loan of Rs. 6,00,000 from PKM Ltd. and the loan is outstanding as on the date of his appointment.as auditor of ABC Ltd.

(5 marks; 2009-May) [CA Final -I]

Answer:

Disqualification for appointment as an Auditor

According to Sec. 141 (3) (d)(ii) of the Companies Act, 2013, and Rule 10(2) of Companies (Audit and Auditors) Rules, 2014, a person who is indebted to a company or its subsidiary, or its holding or associate company or subsidiary of such holding company or associate company of such holding company for an amount exceeding five lakhs rupees is disqualified for appointment as an Auditor,

Present Case:

Mr. Prakash is disqualified for appointment as an auditor in PKM Ltd. Since he is indebted to PKM Ltd. for a sum exceeding five lakhs rupees. Consequently, he is also disqualified for appointment as an auditor in the holding company of PKM Ltd. (viz. DGH Ltd.) and a subsidiary company of its holding company (viz. ABC Ltd.)

Therefore, the appointment of Mr. Prakash as an auditor of ABC Ltd. is not valid.

Q.7. Mr. Dheeraj, a Chartered Accountant in practice is liable (indebted) to M/s Voice Data Ltd. (a company engaged in telecommunications) for a sum of Rs. 2,00,000 and a sum of Rs. 3,00,000 to Apollo Hospitals Ltd. For the treatment of his parents. Mrs. Rhea (wife of Mr. Dheeraj) is also liable (indebted) for a sum of Rs. 3,00,000 to M/s Aircel Ltd. (the subsidiary of M/s Voice Data Ltd.). Mr. Dheeraj is proposed to be appointed as the statutory auditor of M/s. Voice Data Ltd, M/s Aircel Ltd. and Apollo Hospitals Ltd. for the current financial year 2017-18. Decide as per the provisions of the Companies Act, 2013, whether the proposed appointments are legally valid.

(4 Marks; 2017-Nov) [CA Final - I]

Answer:

Provision:

- As per Sec. 141(3)(d)(ii) of the Companies Act, 2013, a person, who or his relative or his partner Is indebted in excess of five lakhs rupees to the company, or its subsidiary company, or its holding company, or a subsidiary of such holding company, or associate company is disqualified to be appointed as an auditor of a company.
- As per Sec. 141(4) of the Companies Act, 2013, any person who is disqualified under Sec. 141 (3), shall not be eligible for appointment in a company and if such qualification occurs after his appointment he shall have to vacate his office. Such a vacation shall be deemed to be a casual vacancy in the office of the auditor.

Present Case:

- In given case, Mr. Dheeraj is proposed to be appointed as the statutory auditor of M/s. Voice Data Ltd., M/s. Aircel Ltd. and Apollo Hospitals Ltd. Mr. Dheeraj is indebted to company directly or indirectly as follows':

— Mr. Dheeraj Is indebted to M/s. Voice Data Ltd. for a sum of two lakh rupees,

— Mr. Dheeraj is indebted to Apollo Hospitals Ltd. for a sum of three lakh rupees,

— Mrs. Rhea, (wife of Mr. Dheeraj) is indebted to M/s. Aircel Ltd. (the subsidiary of M/s. Voice Data Ltd.) for a sum of three lakh rupees.

- For the purpose of M/s. Voice Data Ltd., Mr. Dheeraj Is Indebted to two lakh rupees and his wife is indebted to M/s. Aircel Ltd. for a sum of three lakh rupees which is subsidiary of M/s. Voice Data Ltd. So, as per the Companies Act, 2013 wife and husband are called relatives for each other, so here Mr. Dheeraj together with his wife Mrs. Rhea is indebted for an amount of five lakhs rupees to M/s. Voice Data Ltd. and along with its subsidiary.

Thus total in debtness dose not exceed five lakh rupees. As such Mr. Dheeraj is eligible and not disqualified to be appointed as auditor in both the company.

- For the purpose of Apollo Hospitals Ltd., Mr. Dheeraj is indebted to company for a sum of three lakh rupees and also Apollo Hospitals Ltd. is not in any holdings, subsidiaries or associate relationship with M/s. Voice Data Ltd. and M/s. Aircel Ltd. So, Mr. Dheeraj is not disqualified to be appointed as auditor of Apollo Ltd. As limit is of five lakh rupees is checked for each company without any holding, subsidiary or associate relationship separately for each company.
- So Here, Mr. Dheeraj can validly appointed as auditor of all three companies i.e. M/s. Voice Data Ltd., M/s. Aircel Ltd. and Apollo Hospitals Ltd.

Q.8. Mr. Ram brother of CA. Shyam, a practicing chartered accountant, acquired securities of M/s. Cool Ltd. having market value of Rs. 1,20,000 (face value Rs. 95,000). State whether CA. Shyam is qualified to be appointed as a statutory auditor of M/s. Cool Ltd. **(2 marks; 2018-Nov)**

Answer:

Provision:

As per Section 141(3)(d)(i) an auditor is disqualified to be appointed as an auditor if he, or his relative or his partner holding any security of or interest in the company, or its subsidiary, or of its, holding or associate company or a subsidiary of such holding company. Further as per proviso to this section, the relative of the auditor may hold the securities or interest in the company of face value not exceeding of Rs. 1,00,000.

Present Case:

In the present case, Mr. Ram, brother of CA Shyam, an auditor is having securities of Rs. 95,000 face value in M/s. Cool Ltd., which is as per requirement of proviso to Section 141 (3)(d)(i), Therefore, CA Shyam will not be disqualified to be appointed as an auditor of Cool Ltd.

Q.9. Amar, a partner in the firm of Ms. Asha & Co. Chartered Accountants, is the secretary of chand Ltd. can Amar or Asha & Co. be appointed as company Auditor?

Answer:

As per Sec. 141(3)(b), Amar being an officer of the company is disqualified. Also Mr. Asha & Co. is disqualified as per Sec. 141(3)(a) of the Companies Act, 2013.

Q.10. Mrs. Sita, wife of CA. 'Arjun' the statutory auditor of Stellar Builders Limited, acquired shares in the company for a face value of Rs. 75,000 on 15th March, 2018. CA. 'Arjun', issued his audit report on 25th April, 2018. Examine the validity of this transaction under the Companies Act, 2013. Would your answer be different if face value of the shares have been Rs. 1,50,000 (market value Rs. 95,000)?

Answer:

Provision:

As per Section 141(3)(d)(i) of the Companies Act, 2013, a person who, or his relative or partner is holding any security of or interest in the company or its subsidiary, or of its holding or associate company or a subsidiary of such holding company, shall not be appointed as an auditor of the company. However, Rule 10 of the Companies (Audit and Auditors) Rules, 2014, states that a relative of an auditor may hold securities in the company of face value not exceeding rupees one lakh.

Present Case:

In the given case Mrs. Sita, wife of CA. Arjun acquired shares in Stellar Builders Limited, in which he was a statutory auditor on 15th March, 2018. Since, the securities held by Mrs. Sita is within the prescribed limit of Rs. 1 lakh, such a transaction is valid.

Yes, the answer will be different in case where the face value of acquired shares is Rs. 1,50,000. Then in that case:

(i) Corrective action to maintain the limit specified (i.e., 1 lac) shall be taken by the auditor within 60 days of such acquisition, or

(ii) Auditor has to vacate his office.

142. REMUNERATION OF AUDITORS (1 QUESTION)

Notified Date of Section: 01/04/2014

Q.1. The liability of audit fees has been outstanding since fast two years. This year after completion of audit, the auditor informs to the secretary of the company over phone to bring the cheque of all the three years and take delivery of the audit report. Discuss briefly the above statement in the context of the right of the auditor to receive remuneration. **(4 marks; 2013 - Dec)**

Answer:

Section 142 of the Companies Act, 2013deals with fixation of remuneration of an auditor. However, the Act is silent on the mode of recovery of remuneration by an auditor. Normally speaking, an auditor has right to receive his remuneration after completing his work, that is, submission of the audit report.

As per Research Committee of the Institute of Chartered Accountants of India, the auditor may also recover his fees on progressive basis.

In the instant case, perhaps, the auditor has linked the delivery of audit report only on audit fees being received since the payment has been outstanding for last two years.

But as a matter of professional ethics, it would not be proper on the part of the auditor and moreover he would not be performing his duties under the Companies Act, 2013, if he insists that he would deliver the audit report only after receiving his due fees from the company, ,

As such, it would be better on the part of the auditor to enforce his right to receive remuneration through Court of Law only after submitting his audit report.

143. POWERS AND DUTIES OF AUDITORS AND AUDITING STANDARDS (10 QUESTIONS)

Notified Date of Section: 01/04/2014

Q.1. Q Limited has defaulted repayments of dues to a financial institution during the financial year 2013-14 and the same remained outstanding as at March 31, 2014. However, the company settled the total outstanding dues including interest in April, 2014 subsequent to the year end and before completion of the audit. Discuss how you would deal with this matter as per Schedule III to the Companies Act, 2013.

(3 marks; 2015 - June)

Answer:

Reporting requirement as per Schedule III to the Companies Act, 2013: As per the general instructions for preparation of Balance Sheet, provided under Schedule III to the Companies Act, 2013, terms of repayment of term loans and other loans is required to be disclosed in the notes to accounts. It also requires specifying the period and amount of continuing default as on the balance sheet date in repayment of loans and interest, separately in each case.

In the given case, Q Ltd. has defaulted in repayments of dues to a financial institution during the financial year 2013-14 which remain outstanding as at March 31, 2014. However, the company has settled the total outstanding dues including interest in April, 2014 but, the dues were outstanding as at March 31,2014. Therefore, it needs to be reported in the notes to accounts.

Q.2. The auditors of a company refuses to make their report on the annual accounts of a company before it is signed, on behalf of the Board of Directors. Advise the company.

(4 marks; 2017 - June)

Answer:

- The auditor is right. Theoretically, accounts are presented to auditors only after they are approved by the Board and signed by authorized persons. The auditor is only expected to submit his report on the accounts presented to him for audit after conducting an examination of the necessary documents, analyzing relevant information and test checking accounting records in order to be able to form an opinion of the financial statements presented to him. In practice, the checking of accounts is already completed before accounts are approved by the Board.
- Auditor informally approves the d raft account with notes etc., before the accounts are approved by the Board. However, auditor signs the accounts only after these are approved by Board and signed by persons authorized by Board of the company.

Q.3. Telco Ltd. had the following items under the head 'Reserves and Surplus' in the Balance Sheet as on 31st March, 2015.

	Amount Rs. in Lakhs
Capital Reserve	70
Security Premium Reserve	80
General Reserve	70

The company had an accumulated loss of Rs. 240 Lakhs on the same date, which it has disclosed under the head 'Statement of Profit and Loss' as an asset in its Balance Sheet. Comment on accuracy of this treatment in line with schedule III to the Companies Act, 2013.

(4 marks; 2015 - June)

Answer:

Debit balance of statement of profit & loss (after all allocations and appropriations) shall be shown as a negative figure under the head 'surplus'. Similarly, the balance of 'reserve & surplus', after adjusting balance of surplus, shall be shown under the head 'Reserve & Surplus' even if the resulting figure is in negative. [As per Note 6(B) part 1 of Schedule III of the Companies Act, 2013.]

In this case, the debit balance of profit & loss i.e Rs. 240 lakhs exceeds the total of all reserve i.e Rs. 220 lakhs.

Therefore, balance of 'Reserve & Surplus' after adjusting debit balance of profit & loss is negative by 120 lakhs, which should be disclosed on the face of the Balance Sheet as the sub heading 'Reserve & Surplus' under the Heading 'Shareholders fund'.

Thus, treatment done by the company is incorrect.

Q.4. Mr. Faithful is an auditor of Daga Ltd. While auditing the accounts of the Daga Ltd. for 2016-17, he finds manipulation of funds around Rs. 2 crore committed by the officers of the company against the Daga Ltd. Examine in the light of the Companies Act, 2013 the way frauds are required to be reported by Mr. Faithful and the duty of the Daga Ltd. in relation to reporting of such frauds. **(7 marks; 2018 - Dec)**

Answer:

Reporting of frauds by auditor and other matters : As per Section 139 read with rule 13 of the Companies (Audit and Auditors) Rules, 2014, if an auditor of a company, in the course of the performance of his duties as auditor, has reason to believe that an offence of fraud, which involves or is expected to involve individually an amount of rupees one crore or above, is being or has been committed against the company by its officer or employees, the auditor shall report the matter to the Central Government.

The auditor shall report the matter to the Central Government as given below:

1. **The auditor shall report the matter to the Board or the Audit Committee**, as the case may be, immediately but not later than two days of his knowledge of the fraud, seeking their reply or observations within forty-five days;
2. On receipt of such reply or observations, the auditor shall forward his report and the reply or observations of the Board or the Audit Committee along with his comments (on such reply or observations of the Board or the Audit Committee) to the Central Government within fifteen days from the date of receipt of such reply or observations;
3. In case the auditor fails to get any reply or observations from the board or the Audit Committee within the stipulated period of forty-five days, he shall forward his report to the Central Government along with a note containing the details of his report that was earlier forwarded to the Board or the Audit Committee for which he has not received any reply or observations;
4. The report shall be sent to the Secretary, Ministry of Corporate Affairs in a sealed cover by Registered Post with Acknowledgment Due or by Speed Post followed by an email in confirmation of the same;
5. The report shall be on the letter-head of the auditor containing postal address, email address and contact telephone number or mobile number and be signed by the auditor with his seal and shall indicate his Membership Number; and
6. The report shall be in the form of a statement as specified in Form ADT-4.

Particular of each of the fraud reported to the Audit Committee or the Board during the year shall be disclosed in the Board's Report by the company:

(a) Nature of Fraud with description;
(b) Approximate Amount involved;
(c) Parties involved, if remedial action not taken; and
(d) Remedial actions taken.

Q.5. An auditor of a company signed the financial statement including Financial Statement and schedules/notes and furnished the auditors report on the same date on which the reports were signed by the directors on behalf of the Board. One of the directors raised objection stating that the audit can not be completed and certified in a day. Do you agree with the "director and if not, why? (4 marks; 2012 - Dec) [CSEM - II]

Answer:

1	**Section 143(1)**	**Section 143(1) of the Companies Act, 2013** provides that the auditors having right to access at all times to the: (a) Financial Statement (including financial statement) (b) Vouchers and (c) Every other documents declared by this Act. Which amply suggests that they do not have to remain idle at any time after their appointment, subject to the convenience of the company, he may actually commence the checking up of balance sheet, profit and loss accounts, vouchers etc. which will save time for the auditors in the preparation of their report in due course. If the auditor signs the financial statement on the same date on which the directors have approved it, it may not be inferred from the circumstances that the auditor has not performed about efficiently.
2	**Conclusion**	Hence: Objection of director is not valid.

Q. 6 Agriculture Instruments Limited is a subsidiary of Hindustan Agro Limited a Government company. The Comptroller and Auditor General of India (C & AG) appointed Yes & Co, a firm of Chartered Accountants to conduct a supplementary audit of Agriculture Instruments Limited. Discuss under the provisions of the Companies Act, 2013 whether the C & AG's power to authorize such audit for the said subsidiary company is in order. (3 marks; 2017-Nov)

Answer:

(i) Supplementary Audit

As per Sec. 143(6), the Comptroller and Auditor General of India shall within sixty days from the date of receipt of the audit report have a right to:

(1) Conduct a supplementary audit of the financial statement of the company by such persons or person as he may authorize in his behalf,

(2) Comment upon or supplement such audit report.

This above clause shall be applicable to a Government Company and also to a subsidiary of a government company.

Present Case:

In this case, C&AG, appoints, Yes & Co. for supplementary audit of Agriculture Instruments Ltd. which is a subsidiary of Hindustan Agro Ltd., a Government Company. So as per above clause C&AG has right and power to authorize such audit for the said subsidiary company and is within the order as per Sec. 136.

Q. 7 The statutory auditors of Ghosunda Refinery Limited, did not verify the correctness of the particulars furnished in the Board's Report. Explain the legal position relating to verification of these particulars by the auditors of the said Company.

(8 marks; 2013-May) [CA Final -I]

Answer:

Verification of particulars by the auditors of the said company:

As per Sec. 143(2) of the Companies Act, 2013, the auditor shall report to the members on the following:

(i) On the accounts examined by him.

(ii) On every financial statements which are required by or under this act to be laid before company in general meeting.

As per Sec. 143 of the Companies Act, 2013 the auditor is required to report only on those documents which are part of or annexed to the Financial Statement including consolidated Financial Statement if any the subject matter of the auditor's report is the books of account and the financial statements including notes thereon and not the Board's Report which as per Sec. 134 is attached to balance sheet.

Thresholds and Manner of Reporting Under Guidance Note on Reporting on fraud under Sec. 143(12) of Companies Act, 2013 (Revised
2016):

The Companies (Audit and Auditors) Amendment Rules, 2015 issued by the Ministry of Corporate Affairs, on 14th December, 2015, amended Rule 13 of the Companies (Audit and Auditors) Rules, 2014. The amended Rule 13 has introduced the thresholds for the purpose of reporting on frauds and a differential reporting responsibilities of the statutory auditor with respect to the fraud/s above or below the notified threshold.

As per the amended Rule 13 in the aforesaid Amendment Rules, if an auditor of a company, in the course of performance of his duties as statutory auditor, has reason to believe that an offence of fraud, which involves or is expected to involve individually an amount of rupees one crore or above, is being or has been committed against the company by its officers or employees, the auditor shall report the matter to the Central Government.

The amended Rule 13 Provides the following manner of reporting to the Central Government.

1. The auditor shall report to the Board or the Audit Committee, as the case may be, immediately but not later than two days of his knowledge of the fraud, seeking their reply or observations within forty-five days;
2. On receipt of such reply or observations the auditor shall forward his report and the reply or observations of the Board or the Audit Committee along with his comments (on such reply or observations of the Board or the Audit Committee) to the Central Government within fifteen days from the date of receipt of such reply or observations;
3. In case the auditor fails to get any reply or observations from the Board or the Audit Committee within the stipulated period of forty-five days, he shall forward his report to the Central Government along with a note containing the details of his report that was earlier forwarded to the Board or the Audit Committee for which he has not received any reply or observations;
4. The report shall be sent to the Secretary, Ministry of Corporate Affairs in a sealed cover by Registered Post with Acknowledgment Due or by Speed post followed by an e-mail in confirmation of the same.
5. The report shall be on the letter-head of the auditor containing postal address, e-mail address and contract telephone number or mobile number and be signed by the auditor with his seal and shall indicate his Membership Number; and
6. The report shall be in the form of a statement as specified in Form ADT-4. In case of a fraud involving lesser than rupees one crore, the auditor shall report the matter to Audit Committee constituted under section 177 or to the Board immediately but not later than

two days of his knowledge of the fraud and he shall report the matter specifying the following:

(i) Nature of fraud with description;
(ii) Approximate amount involved; and
(iii) Parties involved.

The following details of each of the fraud reported to the Audit Committee or the Board under sub-rule (3) during the year shall be disclosed in the Board's Report:

(i) Nature of Fraud with description;
(ii) Approximate Amount involved;
(iii) Parties involved, if remedial action not taken; and
(iv) Remedial action taken.

Q. 8 List out three matters on which an Auditor of a company has to express his views and comments in his report as per the Companies (Audit and Auditors) Rules, 2014.

(4 marks; 2015-May) [CA Final -I]

Answer:

Rule 11 of the Companies (Audit and Auditors) Amendment Rules, 2017 provides that the auditor's report shall also include his views and comments on the following matters, namely:

1. Whether the company has disclosed the impact, if any, of pending litigations of its financial position in its financial statement;
2. Whether the company has made provision, as required under any law or accounting standards, for material foreseeable losses, if any, on long term contracts including derivative contracts;
3. Whether there has been any delay in transferring amounts, required to be transferred, to the Investor. Education and Protection Fund by the company.
4. Whether the company had provided requisite disclosures in its financial statements as to holdings as well as dealings in Specified Bank Notes during the period from 8,h November, 2016 to 30th December, 2016 and if so, whether these are in accordance with the books of account maintained by the company.

Note:

Reporting of frauds by auditor and other matters under Rule 13 of Audit and Auditors Amendment Rules, 2015 If an auditor of a company, in the course of the performance of his duties as statutory auditor, has reason to believe that an offence of fraud, which involves or is expected to involve individually an amount of rupees one crore or above, is being or has been committed against the company by its officers or employees, the auditor shall report the matter to the Central Government.

Q. 9 The auditors of PQR Ltd. accepted the Certificate of the Manager, a person of acknowledged competence and high reputation, as to the value of the stock in trade. The stock was grossly overstated for several years in the balance sheets of the company. As a result of this over valuation dividends were paid out of capital. The Auditors did not examine the books of account very minutely. If they had done so and compared the amount of stock at the beginning of the year with the purchases and sales during the year, they would have noticed the over valuation. The company subsequently went into liquidation and the auditors were sued to make good the loss caused by the wrongful payment of dividends relying on the balance sheets figures. Based on the above facts, you are required to decide with reference to the provisions of the Companies Act, 2013 and the decided case laws, the following issues:

(i) Whether auditors of the company will be liable for the loss caused to the company by the wrongful payment of dividends based on the Balance Sheets duly audited by the Auditors.

(ii) What are the statutory duties of the Auditors in this regard?

(7 marks; 2007 - Nov) [CA Final -I]

OR

The auditor of Organic Foods Ltd. accepted the Certificate from Mr. Rohan who is the manager, a person of knowledge, competence and high reputation, as to the value of the stock in trade. The valuation of stock referred to above was found to be grossly overstated for several years in the financial statement including consolidated of the company. As a result of the over valuation, dividends were paid out of capital. The Auditor did not examine the books of account very minutely. If they had done so and compared the amount of stock at the beginning of the year, with the purchases and sales during the year, they would have noticed the over valuation. The company subsequently went into liquidation and the auditors were sued to make good the loss caused by the wrongful payment of dividends based on the Financial Statement figures. Based on the above facts, you a.re required to decide, with reference to the provisions of the Companies Act, 2013 and the decided case laws, the following issues:

(i) Whether the Auditors of the company will be liable for the loss caused to the company by the wrongful payment of dividends based on the financial statement including consolidated financial statements duly audited by the Auditors.

(ii) What are the statutory duties of the Auditors in this regard?

(8 marks; 2015-Nov) [CA Final -I]

Answer:

Sec. 143 of the Companies Act, 2013 provides that the main duty of the auditor is to make a report to the members of the company on the accounts examined by him and the financial statement including consolidated financial statement if any of the company and on every document which is annexed to the financial statement including consolidated financial statement if any laid before the company in general meeting. The auditor owes a duty to the members to state whether the accounts give a true and fair view of the affairs of the company at the end of the financial year and of the Statement of Profit and Loss Account of the year.

According to AASI:

"Basic Principles Governing an Audit'[1], an auditor should exercise due skill and care in conducting ah audit moreover, in case of any suspicious circumstances, the auditor should seek additional evidences. Stock in trade is a material item appearing in the financial statements. Applying the provisions of AASI with respect to valuation of stock, an auditor is duty bound to ensure that the company has an efficient system for recording the sale, purchase, storage, consumption and disposal of stock and raw materials. As per SA 500 - “Audit Evidence:

It is the duty of the auditor to obtain sufficient appropriate audit evidence before forming any conclusions.

As per SA 580 -Written "Representations":

The auditor should obtain representations from management, where ever considered appropriate. However, representations by management cannot be a substitute for other audit evidence that the auditor could reasonably expect to be available. If a representation by management is contradicted by other evidence, the auditor should examine the circumstances and when necessary, reconsider the reliability of other representations made by management.

Failure to verify the books of accounts by the auditor amounts to negligence since it amounts to failure to exercise reasonable care and skill in the performance of duties of an auditor.

An auditor has no right to rely upon others where physical verification is possible. The auditor should not blindly rely on the certificate or representations of management as regards the matters which are capable of direct verification by him from books of accounts and vouchers. Valuation of stock is a material item, for which corroborative evidences must be obtained. In the given case, the auditor has not scrutinized the books of accounts and so he has been grossly negligent. Thus, an auditor who approves of whatever is stated to him by the management of the company, does not discharge his duty of exercising reasonable skill and care [Ref:- Controller of Insurance vs. H.C Das] An auditor is duty bound to verify the assets himself and cannot rely on verification done by persons appointed by the company. The auditor is not

entitled to assume that the directors, Officers and employees of the company would have done their work correctly, and so dispense with verifying them [Ref: - Fox and sons vs. Morris Grant and Co.]

Statutory duties of Auditors are:

1. To ensure that the company has an efficient system for recording the purchase, sale, storage consumption and disposal of stock and raw material.
2. To verify books of accounts.
3. To reconsider the reliability of certificate of valuation of stock submitted by the manager of the company.

Note:

Thresholds and Manner of Reporting Under Guidance Note on Reporting on fraud under Sec. 143(12) of Companies Act, 2013 (Revised 2016)

The Companies (Audit and Auditors) Amendment Rules, 2015 issued by the Ministry of Corporate Affairs, on 14'h December 2015, amended Rule 13 of the Companies (Audit and Auditors) Rules, 2014. The amended Rule 13 has introduced the thresholds for the purpose of reporting on frauds and a differential reporting responsibilities of the statutory auditor with respect to the fraud/s above or below the notified threshold.

As per the amended Rule 13 in the aforesaid Amendment Rules, if an auditor of a company, in the course of performance of his duties as statutory auditor, has reason to believe that an offence of fraud, which involves or is expected to involve Individually an amount of rupees one crore or above, is being or has been committed against the company by its officers or employees, the auditor shall report the matter to the Central Government.

The amended Rule 13 provides the following manner of reporting to the Central Government.

1. The auditor shall report to the Board or the Audit Committee, as the case may be, immediately but not later than two days of his knowledge of the fraud, seeking their reply or observations within forty-five days;
2. On receipt of such reply or observations the auditor shall forward his report and the reply or observations of the Board or the Audit Committee along with his comments (on such reply or observations of the Board or the Audit Committee) to the Central Government within fifteen days from the date of receipt of such reply or observations;
3. In case the auditor fails to get any reply or obseivations from the Board or the Audit Committee within the stipulated period of forty-five days, he shall forward his report to the Central Government along with a note containing the details of his report that was earlier forwarded to the Board or the Audit Committee for which he has not received any reply or observations;
4. The report shall be sent to the Secretary, Ministry of Corporate Affairs in a sealed cover by Registered Post with Acknowledgment Due or by Speed post followed by an e-mail in confirmation of the same.
5. The report shall be on the letter-head of the auditor containing postal address, e-mail address and contract telephone number or mobile number and be signed by the auditor with his seal and shall indicate his Membership Number; and
6. The report shall be in the form of a statement as specified in Form ADT-4.

In case of a fraud involving lesser than rupees one crore, the auditor shall report the matter to Audit Committee constituted under section 177 or to the Board immediately but not later than two days of his knowledge of the fraud and he shall report the matter specifying the following:

(i) Nature of fraud with description;
(ii) Approximate amount involved; and
(iii) Parties involved.

The following details of each of the fraud reported to the Audit Committee or the Board under sub-rule (3) during the year shall be disclosed in the Board's Report:-

(i) Nature of Fraud with description;
(ii) Approximate Amount involved;

(iii) Parties involved, if remedial action not taken; and
(iv) Remedial action taken.

Q. 10 The Board of Directors of A Ltd. requested its Statutory Auditor to accept the assignment of designing and implementation of suitable financial information system to strengthen the internal control mechanism of the Company. How will you approach to this proposal, as an Statutory Auditor of A Ltd., taking into account the consequences, if any, of accepting this proposal? (3 marks; 2019-May)

144. AUDITOR NOT TO RENDER CERTAIN SERVICES (3 QUESTIONS)

Notified Date of Section: 01/04/2014

Q.1. X Ltd. appointed CA Innocent as a statutory auditor for the company for the current financial year. Further the company offered him the services of actuarial, investment advisory and investment banking which was also approved by the Board of Directors. Comment. (5 marks; 2018 - June)

Answer:

An auditor appointed under this Act shall provide to the company only such other services as are approved by the Board of Directors or the audit committee, as the case may be, but which shall not include any of the following services (whether such services are rendered directly or indirectly to the company or its holding company or subsidiary company, namely:—

(a) Accounting and book keeping services;
(b) Internal audit;
(c) Design and implementation of any financial information system;
(d) Actuarial services;
(e) Investment advisory services;
(f) Investment banking services;
(g) Rendering of outsourced financial services;
(h) Management services; and
(i) Any other kind of services as may be prescribed:

Further Section 141 (3)(i) of the Companies Act, 2013 also disqualify a person for appointment as an auditor of a company who is engaged as on the date of appointment in consulting and specialized services as provided in Section 144.

In the given case, CA Innocent was appointed as an auditor of X Ltd. He was offered additional services of actuarial, investment advisory and investment banking which was also approved by the Board of Directors. The auditor is advised not to accept the services as these services are specifically notified in the services not to be rendered by him as an auditor as per Section 144 of the Act.

Q.2. Comment on the following:
(a)A statutory auditor of a private limited company is restricted to take up any other assignment in the companies. (5 marks each; 2017 - June)

Answer:

An auditor appointed under this Act shall provide to the company only such other services as are approved by the Board of Directors or the audit committee, as the case may be, (of the company concerned) but which shall not include any of the following services (whether such services are rendered directly or indirectly to the company or its holding company or subsidiary company, namely:

(a)Accounting and book keeping services
(b)Internal audit
(c)Design and implementation of any financial information system
(d)Actuarial services
(e)Investment advisory services
(f)Investment banking service
(g)Rendering of outsourced financial services
(h)Management services and

(i)Any other kind of services as may be prescribed.

Q.3. Vijay is an auditor of XYZ Ltd. a listed public company having paid-up share capital of Rs. 10 crore. Advise him as to whether he can render the following services, keeping in mind, the relevant provisions of Companies Act, 2013?

(i) Vijay wants to conduct internal audit of XYZ Ltd. He also wishes to provide actuarial services to XYZ Ltd.

(ii) Vijay wishes to "design and implement one financial system" and offer management services to ABC Ltd. the holding company of XYZ Ltd.

(iii) What will be your answer in the above two cases if services are provided to POP. Ltd. a subsidiary company of XYZ Ltd.? (5 marks; 2019 - June)

145. AUDITOR TO SIGN AUDIT REPORTS, ETC.

Notified Date of Section: 01/04/2014

146. AUDITORS TO ATTEND GENERAL MEETING (2 QUESTIONS)

Notified Date of Section: 01/04/2014

Q.1. The Board of Directors of a company have filed a complaint with the Institute of Chartered Accountants of India against their Statutory Auditors for their failing to attend the Annual General Meeting of the Shareholders in which audited accounts were considered. Comment. (5 marks; 2017 - Dec)

Answer:

As per Section 146 of the Companies Act, 2013 it is the duty of statutory auditor to attend the AGM of the company either himself or throughhis representative.

In case the statutory auditor did not attend the AGM nor seek leave of absence from the board members, he shall have to provide a valid justification for the same, and the company has the option to not reappoint him in the next AGM.

Q.2. Assume yourself as Company Secretary in practice and secretarial auditor of Rama Ltd. which is having its annual general meeting scheduled on 17th August, 2018 at its registered office in Mumbai. On 16th August, 2018 you have a business meeting fixed at Kochi and return flight to Mumbai in the evening of 16th August, 2018. But due to bad weather conditions all flights departing from Kochi are declared cancelled. Discuss the alternatives available to you with regard, to the annual general meeting of Rama Ltd. (4 marks; 2018 - Dec)

Answer:

Under section 146 of the Companies Act, 2013 the auditor shall, unless otherwise exempted by the company, attend either by himself or through his authorised representative, who shall also be qualified to be an auditor, any general meeting and shall have right to be heard at such meeting on any part of the business which concerns him as the auditor. In the given case, provision of Section 146 is applicable and authorized representative may be sent to attend the general meeting of the company.

147. PUNISHMENT FOR CONTRAVENTION

Notified Date of Section: 01/04/2014

148. CENTRAL GOVERNMENT TO SPECIFY AUDIT OF ITEMS OF COST IN RESPECT OF CERTAIN COMPANIES (1 QUESTION)

Notified Date of Section: 01/04/2014

Q.1. Write a short note on 'appointment of cost auditor'.(4 marks; 2012 - June) [CSEM- II]

Answer:

1	**Appointment of Cost Auditor by Board [Section 148(3)]**	Cost audit shall be conducted by a Cost Accountant **in** practice. Only a Cost Accountant in practice or a firm of Cost Accountants in practice can be appointed as a cost auditor. The Cost Auditor shall be appointed by the Board. The Cost audit shall be in addition to the audit conducted under section 143. The auditor appointed under section 139 shall not be appointed as the Cost Auditor. • The remuneration of the Cost Auditor shall be determined by the members in such manner as may be prescribed. • The company shall given all assistance and facilities to the cost auditor.
2	**Procedure for Appointment and Fixation of remuneration of the Cost Auditor (Rule** 14)	**The company is required to constitute an audit committee** • The Board shall appoint the cost auditor on the recommendations of the Audit Committee. • The Audit Committee shall recommend the remuneration of the cost auditor. • The remuneration of the cost auditor shall be considered and approved by the Board and ratified subsequently by the members.
3	**The Company is not required to constitute an audit committee**	• The Board shall appoint the cost auditor. • The remuneration of the cost auditor shall be fixed by the Board and ratified subsequently by the members.
4	**Compliance with Cost Auditing Standards**	• The cost Auditor shall comply with the cost auditing standards. • Cost auditing standards' mean such standards as are issued by the Institute of Cost and Works Accountants of India, with the approval of the Central Government.
5	**Disqualifications, rights and duties of cost auditor**	The qualifications, disqualifications, rights, duties and obligations applicable to auditors under sections 141 and 143 shall, so far as may be applicable, apply to the cost auditor.
6	**Cost Audit Report**	• The cost auditors shall submit his report to the Board of Directors. • Within 30 days of receipt of cost audit report, the company shall furnish to the Central Government (a) A copy of the cost audit report; and (b) Along with full information and explanation on every reservation or qualification contained in the cost audit report. • The Central Government may call for such further information and explanation as it may deem fit. • The company shall furnish such further information and explanation within such time as may be specified by the Central Government. • Every cost auditor, who conducts an audit of the cost records of a company, shall submit the cost audit report along with his or its reservations or qualifications or observations or suggestion, if any in **FORM CRS**-3.

APPOINTMENT AND QUALIFICATIONS OF DIRECTORS

149. COMPANY TO HAVE BOARD OF DIRECTORS

Notified Date of Section: 01/04/2014

Q.1. Section 149 of The Companies Act, 2013 provides that nobody Corporate, Association or Firm can be appointed Director of a company. Only an individual can be appointed as director. Explain briefly the reasons as to why it is necessary that only an individual should be a Director of a company. (3 marks; 2013 - Dec)

Answer:

- The Supreme Court has given reasons to explain that why it is necessary to have an individual as director and nobody corporate or association of persons or body of individuals can be appointed as director.
- The relevant case in which such reasons are given is Oriental Metal Processing Works Pvt. Limited v. V.B. Thakoor.
- The Supreme Court has stated that the office of the director is an office of trust and there should be somebody readily and really available who can be held responsible if the trust seems to be broken.
- Thus a director should be a real person and not an artificial person because it would be difficult to fix responsibility of breach of trust on an artificial person.

Q.2. State briefly with reference to the applicable provisions of the Companies Act, 2013 read with rules thereunder whether an unlisted Public Company which is a wholly owned Subsidiary Company will be required to appoint Independent Directors. (2 marks; 2019 - June)

Q.3. The Articles of Association of Rajasthan Toys Private Limited provide that the maximum number of Directors in the company shall be 10. Presently, the company is having 8 directors. The Board of Directors of the said company desire to increase the number of directors to 16. Advise whether under the provisions of the Companies Act, 2013 the Board of Directors can do so. (4 marks; 2016 - June)

Answer:

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

The proviso to Section 149(1-) states that a company may appoint more than fifteen directors after passing a special resolution. From the, provisions of Section 149 (1) as above, though the minimum number of directors may vary depending on whether the company is a public company, private or a one person company, the maximum number of directors is the same for all types at 15 directors.

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

(i) Alter its Articles of Association under Section 14 of the Act;

(ii) Authorise the maximum number of directors to 16 by means of a special resolution of members passed at a duly convened general meeting of the company.

Q.4. Examine the validity of the following appointments with reference to the provisions of the Companies Act, 2013:

(i)Mr. Person together with one of his relatives holds 3% of the total * voting power of XYZ Ltd. The Board of Directors of the companyappointed him as an independent director. (1 marks; 2016 - Dec)

Answer:

(i) An independent director means a director who, neither himself norany of his relatives holds together with his relatives 2% or more of the total voting power of the company [Section 149(6) of the Companies Act, 2013].

In the given problem, Mr. Person holds together with his relatives 3% of the total voting power of XYZ Ltd. Hence, his appointment as an independent director is not valid.

Q.5. Write note on "Resident director" **(4 marks; 2016 - June)**

Answer:

1.	**Meaning of Residence of a Director in India**	**Section 149 (3)** of the Act has provided for residence of a director in India as a compulsory i.e. every company shall have at least one director who has stayed in India for a total period of not less than **182** days in the previous calendar year.
2.	**Ministry of Corporate Affairs vide its circular dated June 26, 2014 has made the following clarification with respect to resident Director**	➢ **Section 149(3) of the Companies Act, 2013 (Act)** requires every company to have at least one director who has stayed in India for a total period of not less than **182** days in the previous calendar year. Government has received requests from stakeholders for clarification with regard to applicability of these provisions in the current calendar/financial year. ➢ The matter has been examined. It is clarified that the, residency requirement' would be reckoned from the date of commencement of **Section** 14 of the Act i.e. 1st April, 2014, The first, previous calendar year, for compliance with these provisions would, therefore, be Calendar year 2014. The period to be taken into account for compliance with these provisions will be the remaining period of calendar year 2014 i.e. 1st April to 31st December. Therefore, on a proportionate basis, the number of days for which the director(s) would need to be resident in India. During Calendar year 2014, shall exceed 136 days. ➢ Regarding newly incorporated companies it is clarified that companies incorporated between 1.4.2014 to 30.9.2014 should have a resident director either at the incorporation stage itself or within six months of their incorporation. Companies incorporated after 30.9.2014 need to have the resident director from the date of incorporation itself.

Q.6. What are the modes in which a director of a company can be appointed?
(8 marks; 2009 - June) [CSEM - II]

Answer:

Provisions regarding Appointment of Directors under Sec. 152 of Companies Act 2013

1.	**First Directors**	The first directors are usually named in the articles. The articles may also provide that both number and the name of the first directors shall be determined in writing by the subscribers to the memorandum or a majority of them, Where the company has no articles or the articles are silent regarding the appointment of directors, the subscribers to the memorandum who are individuals shall be deemed to be first directors of the company until the directors are duly appointed.
2.	**General Provisions**	**(i) Appointment in General Meeting:** Except as provided in the Act, every director shall be-appointed by the company in general, meeting, **(ii)DIN:** Director Identification Number is compulsory for appointment of director of a company. **Companies Amendment Act, 2017** provides that the Central Government may prescribe any identification number which shall be treated as Director Identification Number for the purposes of this Act and in case any individual holds or acquires such identification number, the requirement of this section

		shall not apply or apply in such manner as may be prescribed. **(iii)Declaration:** Every person proposed to be appointed as a director shall furnish- his Director Identification Number and a declaration that he is not disqualified to become a director under the Act. **(iv)Consent:** A person appointed as a director shall on or before the appointment give his consent to hold the office of director in physical form DIR-2 i.e. Consent to act as a director of a company.
3.	**Retirement By Rotation**	**(i)2/3rd Directors, liable to retirement:** Unless the articles provide for the retirement of all directors at every annual general meeting, not less than two-thirds of the total number of directors of a public company or a private company, which is subsidiary of a public company, shall be liable to retire by rotation. **(ii)Independent Directors:** Independent directors shall not be included for the computation of total number of directors. **(iii)1/3rd Directors to retire by rotation-** At the annual general meeting of a public company one-third of such of the directors for the timebeing as are liable to retire by rotation, or if their number is neither three nor a multiple of three, then, the number nearest to one-third, shall retire from office, **(iv) Retirement, based on term of appointment-**The directors to retire by rotation at every annual general meeting shall be those who have been longest in office since their last appointment.
4.	**Appointment by Board of Directors**	The board of directors can appoint Directors in certain circumstances-
	(a) Additional Directors [Sec. 161(1)]	Such additional Directors can hold office up to the date of the next Annual General Meeting of the company.
	(b) Casual Vacancy "(Section 161(4) of Companies Act, 2013)	The person appointed will hold office not until the next annual general meeting but for the entire period for which the person whose place he was appointed would have held office.
	(c) Alternate Director [Sec.161(2)]	He cannot hold office for a period longer than that permissible to the original director in whose place he has been appointed. He must vacate office on the return of the original director.
5.	**Appointment by Third Parties [Sec. 161]**	A nominee director can be appointed by third parties like financial institution, foreign collaborators, holding companies, banks or other lenders etc. They can nominate a director to represent their interest on the board.

Q.7. In what way does the Companies Act, 2013 and Rules made thereunder regulate the appointment of woman director in a company? Explain. (4 marks; 2015 - June)

Answer:

1.	**Appointment of Woman Director**	Section 149 (1), read with rule 3 of Companies (Appointment and Qualifications of Directors) Rules 2014, prescribes that following class of companies shall appoint at least one woman director - 1.Every listed company 2.Every other public company having (a)• Paid up share capital of 100 crore rupees or more (b)Turnover of 300 crores rupees or more.
2.	**Prescribed period, within which woman director is to be appointed**	A company, which has been incorporated under the Act and is required to appoint a woman director, shall appoint the woman director with in 6 months from the date of incorporation.
3.	**Vacancy of woman**	However, any intermittent vacancy of a woman director shall be filled-up by the Board at the earliest but not later than immediate next Board

	director	meeting or three months from the date of such vacancy whichever is later.

Q.8. Divine Industries (Pvt.) Ltd. has a turnover of Rs. 350 crore during the financial year 2014-15. The bankers of the company have advised the company to compulsorily appoint a women director in the company as required under the Companies Act, 2013. Referring to the provisions of the Act, examine the validity of the banker's advice. What would be your answer in case the company in question is a public limited company?

(4 marks; 2016 - Dec)

Answer:

1.	**Rule 3 of Companies (Appointment and Qualification of Directors) Rules, 2014**	As per **Rule 3** of Companies (Appointment and Qualification of Directors) **Rules, 2014,** prescribes the following class of companies shall appoint at least one woman director: (i)every listed company; (ii)every other public company having :- (a) paid-up share capital of one hundred crore rupees or more; or (b) Turnover of three hundred crore rupees or more. Accordingly a private limited company [Divine Industries (Pvt.) Ltd.] is not required to appoint a woman director under **Companies Act, 2313.** The advice of the bankers is not tenable in the given circumstance.
2.	**Conclusion**	In case the company is a public limited company then as per the aforesaid provisions the Company having its turnover Rs. **300** Crore or more is required to appoint a woman director. Hence in that case the banker's advice would stand valid.

Q.9. Examine the validity of the following appointments with reference to the provisions of the Companies Act, 2013:

(i) The Board of Directors of MNP Limited appointed Ms. Neha as a Women Director in the Board Meeting held on 10th September, 2014. The said appointment was made to fill the vacancy of the Woman Director, which had occurred as a result of resignation of Ms. Sheela on 30"' June, 2014.

Will your answer differ if the Board Meeting of the company was held on 8"1 November, 2014?

(4 marks; 2015 - May)

Answer:

Appointment of Woman Director Provision:

A company incorporated under the Companies Act, 2013 and covered under second proviso of Sec. 149 (1) shall appoint Woman Director within a period of six months from the date of its incorporation.

Any intermittent vacancy of a Woman Director shall be filled-up by the board at next board meeting or three months from the date of such vacancy whichever is later.

Present Case:

"The vacancy of a woman director of MNP Limited which arose on 30th June 2014, due to the resignation of Ms. Sheela, should be filled up latest by 29"' September 2014 or the day of the next Board Meeting, whichever is later. Since Ms. Neha was appointed in the next Board Meeting after the vacancy arose, i.e. op 10t h September 2014, her appointment is valid.

Even if MNP Ltd. appoints Ms. Neha in the Board Meeting held on 8th November 2014, provided the said meeting is the first meeting of the Board after 30th June 2014 i.e. after the resignation of Ms. Sheela.

Q.10. Sky Limited, a listed company has been incorporated under the Companies Act, 2013. An intermittent vacancy of a woman director has arisen on 15th June, 2016. Advise the company to fill the vacancy as per the provisions of the Companies Act, 2013- The Board meeting was held on 14th August, **2016.**

(4 marks; 2016- Nov)

Answer:

Provision

As per 2nd proviso to Sec. 149(1) of the Companies Act, 2013, all listed company shall require to appoint atleast one woman director.

Further, Sec. 149 provides that where any vacancy arises in office of woman director shall be required to be filled up by the board by passing board resolution within:

(i) Three months of date of vacancy, or

(ii) In next Board Meeting of Company, whichever is later.

Present Case:

In this case, Sky Limited is which vacant of a woman director has arisen on 15th June, 20:6 and company held next board meeting on 14th August, 2016. In such case vacancy can be filled in board meeting held on 14th August, 2016 or also vacancy can also be filled on or before 14,h September, 2016.

Q.11. XYZ Limited is an unlisted public company having a paid- up capital of twenty crore rupees as on 31s1 March, 2015 and a turnover of one hundred fifty crore rupees during the year ended 31st March, 2015. The total number of directors is thirteen.

Referring to the provisions of the Companies Act, 2013 answer the following:

(i) State the minimum number of independent directors that the company should appoint.

(ii) How many independent directors are to be appointed in case XYZ Limited is a listed company? **(4 marks; 2016- May)**

Answer:

Provision

As per Rule 4 of Companies (Appointment and Qualification of Directors) Rules, 2014, **following class or classes of Companies shall have independent director.**

- Public Companies having paid up share capital of ten crore rupees or more.
- Public Co. having turnover of hundred crore rupees or more.
- Public Company which have in aggregate, outstanding loans, debentures and deposits exceeding fifty crore rupees.

(i) Here company is required to appoint minimum two independent directors.

(ii) If this company is a listed company, then it shall have minimum one third of total no. of directors as independent director [Sec 149(4)].

Present Case:

In the present case, XYZ Limited is an unlisted public company having a paid-up capital of twenty crore rupees as on 31sl March, 2015 and a turnover of one hundred fifty crore rupees during the year ended 31El March, 2015. Thus, as per the Companies (Appointment and Qualification of Directors) Rules, 2014, XYZ Limited shall have atleast two directors as independent directors.

Q.12. The composition of the Board of Directors of a listed company as on 31 - 03-2017 comprised of (i) Mr. A, Director, (ii) Mr. B, Director (iii) Mr. C, Director (iv) Mr. D, Director, (v) Mrs. E, Independent Director, (vi) Mr. F, Independent Director and (vii) Mr. G, Independent Director.

Mr. D & Mrs. E vacated their office of Director on 15-03-2017.

You are required to examine with reference to the provisions of the Companies Act, 2013 and what course of action would you suggest which can be taken up by the Company in this regard? **(4 marks; 2017- May)**

Answer:

Provision:

As per 2nd Proviso to Sec. 149(1) of the Companies Act, 2013, at**least one woman director shall**

be on the Board of such class or classes of companies as may be prescribed.

It further provides that any intermittent vacancy of a women director shall be filled-up by the Board at the earliest but not later than immediate next Board Meeting or three months from the date of such vacancy whichever is later.

Rule 3 of the Companies (Appointment and Qualification of Director) Rules, 2014, provides that the following class of companies shall appoint at least one woman director:

(1) Every listed company;

(2) Every other public company having:

(A) Paid-up share capital of one hundred crore rupee or more; or

(B) Turnover of three hundred crore rupee or more.

The provision of Section 149(4) provides that every listed company shall have at least 1/3rd of the total number of Directors as Independent Directors.

Present Case:

So, in present situation since the only woman director Mrs. E is vacating her office, one new woman director is required to be appointed.

After new woman director is being appointed the requirement under Sec. 149(4) of Independent director is also to be fulfilled.

Note: As per suggested issued by ICAI, it claims a clerical error in the question i.e. date of vacation of office to be read as 15.4.2017 rather than 15.3.2017.

Accordingly the **alternate answer** is as follows:

As per provisions of Sections 149(1) and 149(4), listed company as stated above, shall have at least one women director and one-third of the total number of directors as independent directors in the Board. However, on 15 - 4 - 2017, total number of directors left were five due to vacation of Mr. D and Mrs. E.

As per the requirement of the above sections, there is compliance of Sec. 149(4) as one third of the total number of directors comprises of (1/3x5) =1.6 rounded off as two, which complies with the minimum requirement of two independent directors in the board, however, pertaining to women director, Board have to fill up the intermittent vacancy at the earliest but not later than immediate next board meeting or three months from the date of such vacancy whichever is later.

150. MANNER OF SELECTION OF INDEPENDENT DIRECTORS AND MAINTENANCE OF DATABANK OF INDEPENDENT DIRECTORS

Notified Date of Section: 01/04/2014

151. APPOINTMENT OF DIRECTOR ELECTED BY SMALL SHAREHOLDERS

Notified Date of Section: 01/04/2014

Q.1. Examine the validity of the following appointments with reference to the provisions of the Companies Act, 2013:

(i)ABC Ltd., a listed company having 5,000 small shareholders, upon receiving notice from 400 of such small shareholders has refused to appoint a small shareholders' director under Section 151 of the Companies Act, 2013. (2 marks; 2016 - Dec)

Answer:

(i) According to Section 151 of the Companies Act, 2013, a listed company may have one director elected by such small shareholders in such manner and on such terms and conditions as given in rule 7 of the Companies (Appointment and Qualification of Directors) Rules, 2014.

As per the rule, a listed company, may upon notice of not less than:

(a) one thousand small shareholders; or

(b) one- tenth of the total number of such shareholders,

Whichever is lower, have a small shareholders' director elected by the small shareholders.

Hence, in the above case, since the number of small shareholders of ABC Ltd. who applied is less than 1000 and 500 (1/10th of the total 5000) small shareholders, ABC Ltd. can validly refuse to appoint such a director.

Q.2. B.B. Ltd. is a listed company and it has been served with notice for appointment of small shareholders' director. Referring to the provisions of the Companies Act, 2013, advise on the following:

What is the tenure of small shareholders' director and whether he can be re-appointed as such, after expiry of his tenure? Also state whether he can be appointed as an officer of the company on expiry of his tenure as small shareholders' director. (3 marks; 2017 - Dec)

Answer:

According to Section 151 of the Companies Act, 2013: A listed company may have one director elected by such small shareholders in such manner and on such terms and conditions as may be prescribed. Here, "Small Shareholders" means a shareholder holding shares of nominal value of not more than 20,000 or such other sum as may be prescribed. The appointment of small shareholders' director shall be subject to the provisions of Section 152 except that:

(a) Such director shall not be liable to retire by rotation;

(b) Such director's tenure as small shareholders' director shall not exceed a period of three consecutive years; and

(c) On the expiry of the tenure, such director shall not be eligible for re-appointment.

(d) He shall directly or indirectly not be appointed or associated in any other capacity with the company either directly or indirectly for a period of 3 years from the date of cessation as a small shareholder director.

Q. 3 Answer the following:

(a) DD Ltd. is a listed company and it has been served with notice for appointment of small shareholders' director. Referring to the provisions of the Companies Act, 2013, advice on the following:

(i) Define the expression 'small shareholder' and specify the number of small shareholders who may serve notice on the company for a director representing them.

(ii) Is it possible to appoint a person, who does not hold any share in the company, as small shareholders' director?

(iii) What is the tenure of small shareholders' director and whether he can be re-appointed as such, after expiry of his tenure? Also state whether he can be appointed as an officer of the company on expiry of his tenure as small shareholders' director. (4 marks; 2016 - May)

Answer:

(i) Small Shareholder:

As per explanation to Sec. 151 of the Companies Act, 2013, small shareholders means a shareholder holding shares of nominal value of not more than twenty thousand rupees or such other sum as may be prescribed.

Number of small shareholders who may serve notice on company for a director representing them:

Not Jess than one thousand small shareholders or one tenth of the total number of such shareholders whichever is lower.

(ii) Yes, it is possible to appoint a person, who does not hold any share in the company as a small shareholder's director.

(iii) Tenure of office of small shareholders Director is subject to Sec. 152 of the companies Act, 2013. Small shareholder director can be appointed for the tenure for not more than 3 consecutive years, he can not be reappointed after expiry of his tenure.

No, such person can not be appointed as an officer of the company on expiry of his tenure as small shareholder's director.

Q. 4 The Board of Directors of M/s. Diya Steels and Aluminium Limited, a listed Company having a paid up equity share capital of Rs.15crores and preference share capital of Rs.1 crore and 1100small shareholders holding equity shares, seeks your advice on the following:
(i) Is it mandatory for the Company to appoint a Director to represent Small Shareholders?
(ii) If the Company decides to appoint such a Director, the procedure to be followed by the Company for such appointment and the tenure for which such appointment can be made.
(iii) Whether such a Director be considered as an Independent Director?
(iv) When does a person appointed as a small shareholders Director vacate his office?
Advise suitably in the light of the provisions of the Companies Act, 2013 and the rules framed thereunder. (8 marks; 2018 - Nov)

Answer:

(i) According to Sec. 151 of the Companies Act, 2013, a listed company may have one director elected by such small shareholders in such manner and on such terms and such conditions as may be prescribed. Here, small shareholders means a shareholder holding shares of nominal value of not more than Rs.20,000 or such other sum as may be prescribed.

So, it is not mandatory for M/s. Diya steels and Aluminium Ltd., a listed company to appoint a director to represent small shareholders.

(ii) Procedure for Appointment of Director

The Companies (Appointment and Qualification of Directors) Rules, 2014 provides for the procedure for appointment of small shareholders' director According to which:

(i) A listed company, may upon notice of not less than

(a) One thousand small shareholders; or

(b) One - tenth of the total number of such shareholders, whichever is lower, have a small shareholders' director elected by the small shareholders.

However, a listed company may opt to have a director representing small shareholders suomotu and in such a case the provisions of sub-rule (2), given below, shall not apply for appointment of such director.

(ii) The small shareholders intending to propose a person as a candidate for the post of small shareholders' director shall leave a notice of their intention with the company at least 14 days before the meeting under their signature specifying the name, address, shares held and folio number of the person whose name is being proposed for the post of director and of the small shareholders who are proposing such person for the office of director. **However,** if the person being proposed does not hold any shares in the company, the details-of shares held and folio number need not be specified in the notice.

(iii) The notice shall be accompanied by a statement signed by the person whose name is being proposed for the post of small shareholders' director stating :

(a) His Director Identification Number

(b) That he is not disqualified to become a director under the Act; and

(c) His consent to act as a director of the company.

• M/s. Diya steels and Aluminium Ltd. shall after the completion of above procedures pass a resolution for appointment of small shareholders' Director at general meeting.

• Such directors' tenure as small shareholders' director shall not exceed a period of three consecutive years.

(iii) Director as Independent Director. Yes, small shareholders' Director shall be considered as an independent director subject to, his being eligible under Sub-section (6) of Sec. 149 and his giving a declaration of his independence in accordance with Sub-section (7) of Section 149 of the Act.

(iv) Vacation of office by small shareholder Director. A person appointed as small shareholders' director shall vacate the office if:

(a) The director incurs any of the disqualifications specified in Sec. 164;

(b) The office of the director becomes vacant in pursuance of Sec. 167;

(c) The director ceases to meet the criteria of independence as provided in Sub-section (6) of Sec. 149.

152. APPOINTMENT OF DIRECTORS

Notified Date of Section: 01/04/2014

Q.1. The Promoters of M/s Soma Limited, a listed public company propose to have the strength of the Board of Directors as eleven. They also propose to make the Managing Director and Whole Time Directors as directors not liable to retire by rotation. Advise on the following matters as per the provisions of the Companies Act, 2013:

(i) How many of the remaining directors will have to retire by rotation every year at the Annual General Meeting (AGM)?

(ii) For the purpose of increasing the strength, certain nominations were received to nominate candidates for contesting elections. One of the nominations was rejected by the directors as it was received after sending the notice of AGM and that too after the working hours of the last day on which nomination should have been received.

(5 marks; 2019 - June)

Q.2. Krugen Holdings Ltd. promoted Ms. Bhavna and designated her as the Director (Administration). Examine the validity of such a designation under the provisions of the Companies Act, 2013. **(4 marks; 2016 - June)**

Answer:

1.	**Provisions**	a. A special director or an executive director is a full-time employee of a company and is given this designation in appreciation of his merit and his usefulness to the company. b. Such directors may not be the members of the Board and as such they cannot be called directors within the meaning of the provisions of the Companies Act. c. However, the Department of Company Affairs (now MCA) has, vide **Circular No.2/1982 (1/1/82-CL-V;23/44/79-CL-II) dated 20th January, 1993 (ascertained by revised Circular No.11/1990)(3/5/89-CL-V) dated 29th May, 1990),** advised companies to desist from giving designations as 'Special Director', 'Director Administration', etc. d. To their executives, who are not members of the Board, as such designations give an impression to the public at large and those dealing with the companies and the executives that they are full-fledged directors entitled to act as such on behalf of the company.
2.	**Conclusion**	Based on these circulars Krugen Holdings Ltd. is advised not to use the designation 'Director (Administration)' for its executive Ms. Bhavana.

Q.3. Newly incorporated Abhay Limited has not mentioned names of first directors of the company in the Articles of Association. Referring to the provisions of the Companies Act, 2013, advise the Board of Directors regarding the appointment of first directors of the company. What would by your answer in case the company is a One Person Company? Also state whether provisions of the Act are applicable to a Private Limited Company.

(4 marks; 2017 - June)

Answer:

First directors of the companies are generally named in the articles of the company. Regulation **60** of Table F provides that the number of directors and the names of the first directors shall be determined in writing by the subscribers of the memorandum or a majority of them. If they are not sr named in the articles of a company, then subscribers to the memorandum who are individuals shall be deemed to be the first directors of the company until the directors are duly appointed.

In case of a One Person Company, an individual being a member shall be duly deemed to be the company's first director until the director (s) are duly appointed by the members in accordance with the provisions of **Section 152 of the Companies Act, 2013.**

Section152(1) of the Act is applicable to all companies, whether public or private.

Q.4. Mr. Solid, a young professional of 29 years, has stayed in India for 150 days in the previous financial year. He does not hold any shares in Happy Retails Limited, which is a quoted (listed) company. Small shareholders have decided amongst themselves that he is proposed to be appointed as small shareholders director who shall not be liable to retire by rotation and his tenure shall be for five years from the date of joining the office of director. Examining the provisions of the Companies Act, 2013, state whether Mr. Solid can be so appointed as small shareholders' director. (4 marks; 2017 - June)

Answer:

Rule (7) of the Companies (Appointment and Qualification of Directors) Rules'; 2dl4 contain provisions for appointment and qualification of small shareholder' directors. Sub-rule **(2)** allows a person who is not a shareholder to become shareholder's directors. Pursuant to sub- rule **(5),** the appointment of small shareholder's director shall be subject to the provisions of Section **152** except that-

(a) Such director shall not be liable to retire by rotation,

(b)Such director's tenure as small shareholders' director shall not exceed for a period of 3 corrective years and,

(c)On the expiry of the tenure, such director shall not be eligible for reappointment.

Thus, in accordance with **sub-rule (2) of Rule 7,** Mr. Solid who does not hold any shares in Happy Retails Limited can be proposed to be appointed as a small shareholder director. He shall not be liable to retire by rotation but he cannot be appointed for 5 years. Mr. Solid can be appointed as a small shareholders' director only for 3 years.

Q.5. In a public limited company, certain directors who guaranteed the company's debts retired and new directors were appointed in their places and they also signed the guarantee bonds. There was no agreement to show that the earlier guarantee had ceased to be operative. The bank who is the beneficiary, exercised its option and demanded the repayment. The retired directors contended that they have already retired and they are not liable to the bank on the strength of bond. Is the contention valid? Decide the case with regard to the provisions of the Companies Act, 2013. (4 marks; 2014 - Dec)

Answer:

In the case of **Bank of Baroda v. Official Liquidator (1992) 73 Com. Cases 688 (MP).** It was held that all the directors including the retired directors were liable jointly and severally under the guarantee and hence the contention of the Bank is correct. They have to make good the guarantee amount under the bond to the bank.

Q.6. Annual general meeting of Hero Ltd. has been scheduled in compliance with the requirements of the Companies Act, 2013. In this connection, it has some directors who are rotational and out of which some have been appointed long back, some have been appointed on the same day.

Decide in this connection,

(i) Which of the directors shall be retiring by rotation and be eligible for re-election?

(ii) In case two directors were appointed on the same day, how would you decide their retirement by rotation?

(iii)In case the meeting could not decide how the vacancies caused by retirement to be dealt with, what shall be consequences?

(iv)What will be your answer, assuming that the matter could not be decided even at the adjourned meeting? (8 marks; 2011 - May)

Answer:

(i) According to Sec. 152(6) (d), first those directors who are the longest in office must retire.

(ii) According to Sec. 152(6) (d), if two directors have been appointed on the same day, their

retirement will be determined mutually or by lot.

(iii) According to Sec. 152(7), if vacancy is not filled up and the meeting has not expressly resolved not to fill vacancy, meeting will stand adjourned till

(a) The same day in next week at same time and place.

(b) And in case the same day in the next week is a public holiday, the next succeeding day, at same time and place.

(iv) If at the adjourned meeting fresh appointment is not made and if no resolution against appointment is passed, then the retiring directors shall be deemed to have been appointed except in the following cases:

(a) Where at the meeting or at the previous meeting the resolution for the reappointment of a particular director was put to vote but lost;

(b) Where the retiring director has expressed his unwillingness to be reappointed by a written notice addressed to the company or its BOD;

(c) Where he is unqualified or has been disqualified for appointment; and

(d) Where any special or ordinary resolution is required for his appointment or reappointment.

(e) Resolution in contravention of Sec. 162 is passed.

Q.7. A and B were appointed as first directors on 4th April, 2014 in Sun Glass Ltd. Thereafter, C, D and E were appointed as directors on 6th July, 2014 and F, G and H were also appointed as directors on 7th August, 2014 in the company. In the Annual General Meeting (AGM) of the company held after the above appointments, A and B were proposed to be retired by rotation and reappointed as directors.

At the AGM, resolution for A's retirement and reappointment was passed. However, before the resolution for 'B' could be taken up for consideration, the meeting was adjourned. In the adjourned meeting also, the said resolution could not be taken up and the meeting was ended without passing the resolution for B's retirement and reappointment.

In the light of above and with reference to relevant provisions of the Companies Act, 2013, answer the following:

(i) Whether proposals for retirement by rotation and reappointment of A and B only were sufficient?

(ii) What will be the status of B as a director in the company? **(8 marks; 2015- Nov)**

Answer:

Provisions:

According to Sec. 152(6)(a)(i) of the Companies Act, 2013, unless the articles provide for the retirement of all directors at every AGM, not less than two-thirds of the total number of directors of a public company shall be persons whose period of office is liable to determination by retirement of directors by rotation.

Further Sec. 152(6)(c) of the Act states that at the first AGM of a public company held next after the date of the general meeting at which the first directors are appointed and at every subsequent AGM, one-third of such of the directors for the time being as are liable to retire by rotation, or if their number is neither three nor a multiple of three, then, the number nearest to one-third, shall retire from office.

Sec. 152(6)(d) further states that the directors to retire by rotation at every AGM shall be those who have been longest in office since their last appointment, but as between persons who became directors on the same day, those who are to retire shall, in default of and subject to any agreement among themselves, be determined by lot.

Sec. 152(7)(a) provides that if the vacancy of the director retiring by rotation, is not so filled-up and the meeting has not expressly resolved not to fill the vacancy, the meeting shall stand adjourned till the same day in the next week, at the same time and place, or if that day is a national holiday, till the next succeeding day which is not a holiday, at the same time and place. **Sec. 152(7)(b) further provides** that if at the adjourned meeting also, the vacancy of

the retiring director is not filled up and that meeting also has not expressly resolved" not to fill the vacancy, the retiring director shall be deemed to have been re-appointed at the adjourned meeting unless:

(a) At that meeting or at the previous meeting a resolution for the reappointment of such director has been put teethe meeting and lost;

(b) The retiring director has, by a notice in writing addressed to the company or its BOD, expressed his unwillingness to be so re-appointed;

(c) He is not qualified or is disqualified for appointment;

(d) A resolution, whether special or ordinary, is required for his appointment or re-appointment by virtue of any provisions of this Act; or

(e) Sec. 162 is applicable to the case.

Present Case:

(i) The proposals for retirement by rotation and reappointment of A & B: Rotation of one third of the directors of company shall be made at every AGM. As, A & B are first directors and total rotating directors are six and one third of six which is two. Therefore, two directors that is A, B should be removed or be reappointed. In the present case, A & B are first directors and they are required to retire on first AGM held next. And they also to be counted for rotational directors. So, proposal of retirement of rotation and reappointment of A and B are sufficient.

(ii) According to Sec 152(6)(c), at the AGM, one-third of rotational directors shall retire from office. Thus, B shall retire at the AGM in which he was due to retire even though it was adjourned without the resolution for B's retirement could have been taken up.

Further, at the adjourned meeting also, the vacancy of the retiring director is not filled up and that meeting also has not expressly resolved not to fill the vacancy, the retiring director shall be deemed to have been re-appointed at the adjourned meeting as he does not fall in the category of any of the exceptions mentioned in Section 152(7)(b). Hence, B will be deemed to be re-appointed as a director in the company.

Q.8. Two (2) out of Ten (10) directors on the board of XYZ Limited have retired by rotation at an Annual General Meeting. These two (2) vacancies or place of retiring directors is not filled up and the meeting has also not expressly resolved 'not to fill the vacancy'. Since the AGM could not complete its business, it is adjourned to a later date. Neither place of retiring directors could be filled up at this adjourned meeting nor did the meeting expressly resolve 'not to fill the vacancy'. Analyse & apply relevant provisions of the Companies Act, 2013 and decide:

(i) Whether in such a situation the retiring directors shall be deemed to have been reappointed at the adjourned meeting?

(ii) What will be your answer in case at the adjourned meeting, the resolutions for reappointment of these directors were lost?

(iii) Whether such directors can continue in case the directors do not call the Annual General Meeting? (8 marks; 2019- May)

153. APPLICATION FOR ALLOTMENT OF DIRECTOR IDENTIFICATION NUMBER

Notified Date of Section: 01/04/2014

Q.9. Mr. B. Pandey, a newly appointed director of Ankrit Ltd. applied for DIN (Director Identification Number). Advice him about the list of scanned documents required to be attached with DIR.3. (3 marks; 2015 - Dec)

Answer:

1. Every individual, who is to be appointed as director of a company shall make an application electronically in Form DIR-3, to the Central Government for the allotment of a Director Identification Number (DIN) along with such fees as provided in the Companies(Registration Offices and Fees) Rules, 2014.

Amendment made by Companies (Amendment) Act, 2017:

Proviso to Section 153-

"Provided that the Central Government may prescribe any identification number which shall be treated as Director Identification Number for the purposes of this Act and in case any individual holds or acquires such identification number, the requirement of this section shall not apply or apply in such manner as may be prescribed."

2. The Central Government shall provide an electronic system to facilitate submission of application for the allotment of DIN through the portal on the website of the Ministry of Corporate Affairs.

3. (a) The applicant shall download Form DIR-3 from the portal, fill inthe required particulars sought therein and sign the form and after attaching copies of the following documents, scan and file the entire set of documents electronically:

(i)Photograph;

(ii) Proof of identity;

(iii) Proof of residence;

(iv) Verification by the applicant for applying for allotment of DIN in Form DIR-4; and

(v) Specimen signature duly verified. »

(b) Form DIR-3 shall be signed and submitted electronically bythe applicant using his or her own Digital Signature Certificate and shall be verified digitally by:

(i) A Chartered Accountant in practice or a company secretary in practice or a cost accountant in practice; or

(ii) A company secretary in full time employment of the company or by the managing director or director of the company in which the applicant is to be appointed as director.

Q.10. Some changes in the particulars of a Director, who has already obtained a Director Identification Number have taken place. Now the Director wants to incorporate the changes in his DIN in the database maintained by the Central Government in this regard. Describe the procedure to be followed by the Director. (4 marks; 2016 - June)

Answer:

Intimation of changes in particulars of Director - Rule 12

(1) Every individual having DIN in the event of any change in his particulars as stated in Form DIR-3, intimate such change(s) to the Central Government within a period of 30 days of such change(s) in Form DIR-6 (Intimation of change in particulars of Director to be given to the Central Government). DIR - 6 will be filed along with copy of the proof of the changed particulars and verification in the Form DIR - 7 (Verification of applicant for change in DIN particulars) all of which shall be scanned, signed digitally by applicant and submitted electronically. Form requires pre-certification by the professional CA/CS/CMA in practice.

Amendment made by Companies (Amendment) Act, 2017:

Proviso to Section 153-

"Provided that the Central Government may prescribe any identification number which shall be treated as Director Identification Number for the purposes of this Act and in case any individual holds or acquires such identification number, the requirement of this section shall not apply or apply in such manner as may be prescribed."

(2) The Central Government shall incorporate the said changes in the electronic database after due verification from the enclosed proofs and confirm the applicant by post/email/any other mode.

(3) The DIN cell of the MCA shall also intimate the change(s) in the particulars of the director submitted to it in Form DIR-6 to the concerned Registrar(s) under whose jurisdiction the registered office of the company(s) in which such individual is a director is situated.

(4) The concerned individual shall also intimate the change(s) in his particulars to the company or companies in which he is a director within fifteen days of such change.

Q.11. Mention any four grounds for rejection of application for Director Identification Number (DIN). **(4 marks; 2011 - Dec)**

Answer:

Common causes of Rejection for Director Identification Number (DIN)

(i) The applicant details are not as per the PAN.

(ii) The particulars filed in form **DIR 3** do not match with the details given in the supporting documents submitted along with DIN application.

(iii) Residence proof like:
(a) Bank statement
(b) Electricity bill
(c) Telephone bill
(d) Utility bill etc.
Submitted are older than **2** months of submitting the application for verification.

(iv) The supporting document are not duly attested that is :
(a) Name
(b) Designation
(c) Membership
(d) Practicing certificate number etc. are not clearly indicated

(v) Passport/Driving License/Identity proofs etc. attached are expired only such documents which are currently valid should be attached.

Q.12. (a) When a Director Identification Number (DIN) application is rejected by the Ministry of Corporate Affairs portal, does the applicant necessarily need to apply for a fresh DIN? Discuss, **(4 marks; 2013- June)**

Answer: Please refer 2011 - Dec

Q.13. Is it mandatory for all the directors to obtain DIN? Discuss. **(4 marks; 2008 - Dec) [CSEM - II]**

Answer:

Provisions related to DIN	➢ Director Identification number is essential for all existing and any person intending to be appointed as a director. ➢ DIN is mandatory for the directors of Indian company who are not citizen of India where as there is no mandatory provision for directors of foreign company having branch office in India. ➢ DIN has a unique property that is once allotted to the director is valid for the life time of the director. **Amendment made by Companies(Amendment) Act, 2017Proviso to Section 153-** "Provided that the Central Government may prescribe any identification number which shall be treated as Director Identification Number for the purposes of this Act and in case any individual holds or acquires such identification number, the requirement of this section shall not apply or applying such manner as may be prescribed."

Q.14. Comment on the following:
Director Identification Number (DIN) is not mandatory for directors of foreign company having branch offices in India. **(5 marks; 2011- Dec) [CSEM - II].**

Answer:

Please refer 2008 - Dec

Q.15. Comment on the following:
Director Identification Number (DIN) is not mandatory for directors of a foreign company having branch offices in India. **(5 marks; 2013 - June)**

Answer:

Please refer 2008 - Dec

Q.16. Answer the following citing the relevant provisions of law/case law, if any:
A foreign national was intended to be appointed to the Board of an MNC in India. He contends that, director identification number (DIN) is not required for him as he is a foreign national. Whether his contention is valid? (4 marks; 2013 - Dec)

Answer:

1.	**Authenticity of the contention of foreign national**	The contention of the foreign national is not valid.
2.	**Application for Allotment of DIN, Sec. 153**	• As per **Section 153 of the Companies Act, 2013,** any individual, who is an existing director of a company or intends to be appointed as a director of a company, is required to file an application to the Central Government for allotment of DIN. It is also mandatory for directors of Indian companies who are not citizens of India. • However, DIN is not mandatory for directors of foreign company having a branch office in India.
3.	**Single irres-pective of. Directorship**	Only a single DIN is required for an individual irrespective of directorship and is a unique identification number and valid for the life time of the individual.

154. ALLOTMENT OF DIRECTOR IDENTIFICATION NUMBER

Notified Date of Section: 01/04/2014

155. PROHIBITION TO OBTAIN MORE THAN ONE DIRECTOR IDENTIFICATION NUMBER.

Notified Date of Section: 01/04/2014

156. DIRECTOR TO INTIMATE DIRECTOR IDENTIFICATION NUMBER

Notified Date of Section: 01/04/2014

157. COMPANY TO INFORM DIRECTOR IDENTIFICATION NUMBER TO REGISTRAR

Notified Date of Section: 01/04/2014

158. OBLIGATION TO INDICATE DIRECTOR IDENTIFICATION NUMBER

Notified Date of Section: 01/04/2014

159. PENALTY FOR DEFAULT OF CERTAIN PROVISIONS

Notified Date of Section: 01/04/2014

Q.1. Is it mandatory for all the directors to obtain DIN? Discuss.
(4 marks; 2008 - Dec) [CSEM - II]

Answer:

Provisions related to DIN	➢ Director Identification number is essential for all existing and any person intending to be appointed as a director. ➢ DIN is mandatory for the directors of Indian company who are not citizen of India where as there is no mandatory provision for directors of foreign company having branch office in India. ➢ DIN has a unique property that is once allotted to the director is valid for the life time of the director. **Amendment made by Companies(Amendment) Act, 2017Proviso to Section 153-** "Provided that the Central Government may prescribe any identification number which shall be treated as Director Identification Number for the purposes of this Act and in case any individual holds or acquires such

	identification number, the requirement of this section shall not apply or apply in such manner as may be prescribed."

Q.2. Comment on the following:
Director Identification Number (DIN) is not mandatory for directors of foreign company having branch offices in India. **(5 marks; 2011- Dec) [CSEM - II].**

Answer:
Please refer 2008 – Dec

Q.3. Comment on the following:
Director Identification Number (DIN) is not mandatory for directors of a foreign company having branch offices in India. **(5 marks; 2013 - June)**

Answer:
Please refer 2008 – Dec

Q.4. Answer the following citing the relevant provisions of law/case law, if any:
A foreign national was intended to be appointed to the Board of an MNC in India. He contends that, director identification number (DIN) is not required for him as he is a foreign national. Whether his contention is valid? **(4 marks; 2013 - Dec)**

Answer:

1.	**Authenticity of the contention of foreign national**	The contention of the foreign national is not valid.
2.	**Application for Allotment of DIN, Sec. 153**	• As per **Section 153 of the Companies Act, 2013,** any individual, who is an existing director of a company or intends to be appointed as a director of a company, is required to file an application to the Central Government for allotment of DIN. It is also mandatory for directors of Indian companies who are not citizens of India. • However, DIN is not mandatory for directors of foreign company having a branch office in India.
3.	**Single irres-pective of. Directorship**	Only a single DIN is required for an individual irrespective of directorship and is a unique identification number and valid for the life time of the individual.

Q.5. Some changes in the particulars of a Director, who has already obtained a Director Identification Number have taken place. Now the Director wants to incorporate the changes in his DIN in the database maintained by the Central Government in this regard. Describe the procedure to be followed by the Director. **(4 marks; 2015 - May)**

Answer:

Intimation of changes in particulars specified in DIN application:

Rule 12 of Companies (Appointment and Qualification of Directors) Rules, 2014 provides for the procedure for intimation of changes in particulars specified in the DIN application.

1. Every individual who has been allotted a DIN under these rules shall in the event of any change in his particulars as stated in Form DIR-3, intimate such change(s) to the Central Government within a period of thirty days of such change(s) in Form DIR-6 in the following manner, namely:

(i) The Applicant shall download Form DIR-6 from the portal and fill in the relevant changes and also attach copy of the proof of the changed particular and verification in the Form DIR-7 all of which shall be scanned and submitted electronically in Form DIR - 6 [Substituted by Companies (Appointment and Qualification of Directors) Amendment Rules, 2014.]

(ii) The form shall be digitally signed by a Chartered Accountant, in practice or a Company Secretary in practice or a Cost Accountant in practice

(iii) The applicant shall file the Form DIR-6.

2. The Central Government upon being satisfied, after verification of such changed particulars from the enclosed proofs, shall incorporate the said changes and inform the applicant by way of a letter by post or electronically or in any other mode confirming the effect of such change in the electronic database maintained by the Ministry.

3. The DIN cell of the Ministry shall also intimate the change(s) in the particulars of the director submitted to it in Form DIR-6 to the concerned Registrar(s) under whose jurisdiction the RO of the company(s) in which such individual is a director is situated.

4. The concerned individual shall also intimate the charftje(s) in his particulars to the company or companies in which he is a director within fifteen days of such change.

Q.6. Surya, a director in New Age Limited holding Directors Identification Number (DIN) wants to make certain changes in the particulars of his DIN. What procedure would you follow to get changes incorporated in the DIN already allotted to Surya?

(2 marks; 2017- May)

Answer:

(i) Intimation of changes in particulars specified in DIN application

1. As per Rule 12 of Companies (Appointment of Directors) Rules

2014, Surya should intimate changes to Central Government within a period of thirty days of such changes(s) in Form DIR - 6 in the following manner,

(i) The applicant (Surya) shall download Form DIR - 6 from the portals fill in the relevant changes, verify the Form and attach duly scanned copy of the proof of the changed particulars and submit electronically;

(ii) The form shall be digitally signed by a Chartered Accountant in practice or a Company Secretary in practice or a Cost Accountant in practice;

(iii) The applicant (Surya) shall submit the Form DIR - 6.

2. The Central Government, upon being satisfied, after verification of such changed particulars from the enclosed proofs, shall incorporate the said changes and inform the applicant by way of a letter by post or electronically or in any other mode confirming the effect of such change in the electronic database maintained by the Ministry.

3. The DIN cell of the Ministry shall also intimate the change(s) in the particulars of the director submitted to it in Form DIR - 6 to the concerned Registrar(s) under whose Jurisdiction the registered office of the company(s) in which such individual is a director is situated.

4. The concerned individual shall also intimate the change(s) in his particulars to the company or companies in which he is a director within fifteen days of such change.

Q.7. Mr. Vinay Kumar, applied for the first time for allotment of a Directors Identification Number (DIN) on 1st November, 2016 as he is planning to incorporate a private limited company in Form No. DIN - 3 under the Companies Act, 2013. The status of his DIN applications presently is showing as "Put Under Resubmission". He seeks your guidance as to whether his application has been rejected and is he required to obtain a fresh DIN. Advise.

(2 marks; 2017 - Nov)

Answer:

Provision:

As per Rule 10 of the Companies (Appointment and Qualifications of Directors) Rules, 2014, if any application in DIR-3 has been made for allotment for DIN and application shows status of "Put Under Resubmission" then applicant is not required to obtain a fresh DIN. But applicant can submit additional documents for rectifying DIN application within a period of fifteen days from the date on which it is marked as Resubmission.

Present Case:

- Mr. Vinay Kumar's DIN applicant in form DIR-3 shows status of "Put Under Resubmission" so, Mr. Vinay Kumar is not required to make a fresh application and his application is not rejected. But he shall require to reply, for following queries within fifteen days from the date on which it is marked as Resubmission. For e.g.:
  - Proof of Identity residence is not enclosed or expired.
  - Proof of Date of Birth is not enclosed.
  - Supporting documents are not properly attested.
  - Non-submission of affidavit (if required).
  - On resubmitting with the additional documents same DIN will be approved, if documents are found in correct order as per marked in resubmission.

160. RIGHT OF PERSONS OTHER THAN RETIRING DIRECTORS TO STAND FOR DIRECTORSHIP

Notified Date of Section: 01/04/2014

Q.1. A person other than retiring director is also eligible for appointment as director. Examine. **(4 marks; 2012 - Dec) [CSEM - II]**

1.	**Right of persons other than retiring 'directors to stand for directorship Section 160**	A person other than retiring director is also eligible for appointment as director at any general meeting, if he, or some member intending to propose him as director, has, not less than 14 days before the meeting, left at the registered office of the company, a notice in writing under his hand signifying his candidature as a director or intention of such other person proposing him for directorship.
2	**Conditions**	(a) He needs to serve company at its Registered office, 14 days notice for his willingness to be appointed as director or by such other person proposing him to be director. (b) Deposit of one lakh rupees or such higher amount as may be prescribed which shall be refunded subject to minimum 25% of total valid votes cast in favour. (c) The company shall inform the proposal to members by serving notice of 7 days. **Amendment made by Companies(Amendment) Act, 2017** **Proviso to Section 160(1)-** "Provided that requirements of deposit of amount shall not apply in case of appointment of an independent director or a director recommended by the Nomination and Remuneration Committee, if any, constituted under sub-section (1) of Section178 or a director recommended by the Board of Directors of the Company, in the case of a company not required to constitute Nomination and Remuneration Committee."

Q.2. Anil, a shareholder holding 9% equity shares of the company, who is not holding any directorship wants to stand for directorship in Pritam Ltd. in its next annual general meeting. State the procedure for appointment of Anil as per the provisions of the Companies Act, 2013. **(5 marks; 2018 - Dec)**

Answer:

In the given case, Mr. Anil not a retiring director in the company is desirous of standing for directorship of the Pritam Ltd., in pursuance of Section 160 of the Companies Act, 2013 the following procedure needs to be followed:

1.The proposed director or some member intending to propose him as a director, has, not less than fourteen days before the general meeting, left at the registered office of the company, a notice in writing under his hand signifying his candidature as a director or, as the case may be, the intention of such member to propose him as a candidate for that office, along with the deposit of one lakh rupees which shall be refunded to such person or, as the case may be, to the member, if the person proposed gets elected as a

director or gets more than twenty-five per cent of total valid votes cast either on show of hands or on poll on such resolution.

2. The company shall, at least seven days before the general meeting, inform its members of the candidature of a person for the office of a director or the intention of a member to propose such person as a candidate for that office:

(a)By serving individual notices, on the members through electronic mode to such members who have provided their email addresses to the company for communication purposes, and in writing to all other members; and

(b)By placing notice of such candidature or intention on the website of the company, if any; or

(c) Publishing the same in vernacular newspaper seven days before the meeting.

3. The candidate may obtain Director Identification Number (DIN) and give his consent in DIR-2.

4. If the candidate is elected the company shall file DIR-12.

161. APPOINTMENT OF ADDITIONAL DIRECTOR, ALTERNATE DIRECTOR AND NOMINEE DIRECTOR

Notified Date of Section: 12/09/2013

Q.1. Comment with reference to the provisions of the Companies Act, 2013 in respect of the following:-

(i) Mr. P who is not qualified to be appointed as an independent director is appointed by the Board of Directors of XYZ Company Limited, for an independent director, as an alternate director.

(ii) On the request of bank providing financial assistance, the Board of Director of PQR Limited decides to appoint on its Board Mr. Peter, as nominee director. Articles of Association of the Company do not confer upon the Board of Director any such power. Further, there is no agreement between the company and the bank for any such nomination. **(2 + 3 = 5 marks; 2018 - Dec)**

Answer:

(i) According to first proviso to Section 161(2) of the Companies Act, 2013, no person shall be appointed as an alternate director for an independent director but he is qualified to be appointed as an independent director under the provisions of this Act. In the given case, Mr. P who is not qualified to be appointed as an independent director is appointed by the Board of Directors of XYZ Company Limited; for an independent director, as an alternate director. Hence, the said appointment is not valid.

(ii) According to Section 161(3) of the Companies Act, 2013, the Board may appoint any person as a director nominated by any institution in pursuance of the provisions of any law for the time being in force or of any agreement or by the Central Government or the State Government by virtue of its shareholding in a Government company, subject to the articles of association of a company.

In the given case, on the request of bank providing financial assistance the Board of Directors of PQR Limited decides to appoint on its Board Mr. Peter, as nominee director. Articles of Association of the company do not confer upon the Board of Directors any such power and further there is no agreement between the company and the bank. Hence, the appointment of Mr. Peter as nominee director is not valid as Articles do not confer upon the Board of Directors any such power.

Q.2. Mr. Abir, a Cost Accountant and an Independent Director of Gurgaon Auto Ancillaries Ltd. will be abroad for three months from 10-11-2014. The Company wants to appoint Mr. Rahul as an alternate Director in place of Mr. Abir.

Draft a Board Resolution authorising the appointment. **(4 marks; 2014 - Dec)**

Answer:

GURGAON AUTO ANCILLARIES LTD.
Meeting of the Board of Directors.

Resolution on Agenda Item 102.3 **Date: 06.11.2014**

RESOLVED THAT in pursuance of Sec.161 (2) of the Companies Act,2013 read with Article No.....of the Articles of Association of the Company, MR. RAHUL who is not a Director/Alternate Director of the company, be and is hereby appointed as an Alternate Director of the Company in place of MR. ABIR, an Independent Director for a period of, three months commencing from 10.11.2014 or such further period till the return of Mr. Abir from abroad but not longer than that permissible to Mr. Abir for his tenure as a Director in the company.

FURTHER RESOLVED THAT the Board endorses the recommendation of the Appointment and Remuneration Committee of the Board approving on verification the eligibility of Mr. Rahul to be appointed as an Independent Director and who is otherwise not disqualified for appointment.

RESOLVED FURTHER THAT the Company Secretary be and is hereby authorized to file returns and issue notice for appointment of Mr. Rahul in various committees of the Board.

Q.3. Mr. K is appointed as an Additional Director by the Board of Directors of PNR Company Limited at its meeting held on 1st October, 2014 for a period as permitted by Law. Draft a resolution and state the body which appoints K. **(3 marks; 2015- June)**

Answer:

Appointment of Additional Director: Resolution (Section 161 of the Companies Act, 2013)

According to Section 161(1) of the Companies Act, 2013, the articles of a company may confer on its Board of Directors the power to appoint any person as an additional director at any time.

Board Resolution:

"Resolved that pursuant to trie Articles of Association of the company and Section 161(1) of the Companies Act, 2013, Mr. K is appointed as an Additional Director of the PNR Company Limited with effect from 1st October,

2014 to hold office up to the date of the next annual-general meeting or the last date on which the annual general meeting should have been held, whichever is earlier.

Resolved further that Mr. K will enjoy the same powers and rights as other directors.

Resolved further that Mr.-Secretary of PNR Company Limited be andis hereby authorised to electronically file necessary returns with the Registrar of Companies and to do all other necessary things required under the Act."

Q.4. Mr. Kachi was appointed as an additional Director of ROYAL Ltd. w.e.f. 1st October 2015, in a casual vacancy by way of a circular resolution passed by the Board of Directors. The next annual general meeting of the company was due on 31st March 2016, but the same was not held due to delay in the finalization of the accounts. Some of the shareholders of the company have questioned the validity of the appointment of Mr. Kachi and his continuation as additional Director beyond 31st March, 2016.

Advise the company on the complaint made by the shareholders. **(5 marks; 2016 - June)**

Answer:

Under Section 161 (1) of the Companies Act, 2013 the article of a company may confer on its Board of Directors the power to appoint, other than a person who fails to get appointed as a director in a general meeting, as an additional director at any time who shall hold office up to the date of the next annual general meeting or the last date on which the annual general meeting should have been held, whichever is earlier.

Further, Section 161(4) states that in the case of a public company, if the office of any director appointed by the company in general meeting is vacated before his term of office expires in the normal course, the resulting casual vacancy may, in default of and subject to any regulations in the articles of the company, be filled by the Board of Directors at a meeting of the Board.

In the given case, Mr. Kachi has been appointed as an additional director in order to fill in a casual vacancy. A casual vacancy on the Board can be filled only by means of a Board resolution passed at a meeting of the Board and not by circulation. Therefore, the appointment

of Mr. Kachi is invalid. However, it is rather strange that in the given case Mr. Kachi has been appointed as an additional director to fill a casual vacancy in Board. Actually, additional directors are appointed by the Directors (if authorized by the Articles) to increase the Number of Directors within the legally prescribed limits and not to fill a casual vacancy.

In case Mr. Kachi had been appointed as an additional director not to fill a casual vacancy, his appointment could have been made by a resolution by circulation under Section 161(1) and he would have held office titthe date of the next AGM or the last date when the next AGM should have been held, whichever is earlier.

In the given case, as the AGM was due on 31st March, 2016 which is presumably the last date for holding it, therefore his appointment would terminate on 31st March, 2016.

Q.5. Examine the validity of the following appointments with reference to the provisions of the Companies Act, 2013:

(i) Mr. D, who fails to get appointed as a director in the general meeting of AJD Limited, subsequently was appointed as an additional director by the Board of Directors of the company. **(1 marks; 2016 - Dec)**

Answer:

(i) According to Section 161(1) of the Companies Act, 2013, a person who fails to get appointed as a director in a General-Meeting, cannot be appointed as an additional director.

Hence, the appointment of Mr. D as an additional director in AJD Ltd. - is not valid.

Q.6. Write a note on Alternate directors **(4 marks; 2010 - June) [CSEM - II]**

Answer:

1.	**Conditions for Appointment of Alternate Director**	The person to be appointed as the alternate director shall be the person other than person holding any alternate directorship for any other director in the company. The Board of Directors may appoint an alternate director if authorized. (i) By the articles or (ii) **By a resolution of the company at general meeting:** An alternate director acts in the place of a director who is absent for more than three months from India. He cannot hold office for a period longer than permissible to the original director, in whose place he has been appointed. He must vacate office on the return of the original director.
2.	**Alternate Director for Independent Director**	An alternate director appointed for Independent Director must be qualified to be appointed as Independent director.
3.	**Automatic Re-appointment not Permitted**	If the term of the office of the original director is determined, in whose place he has been appointed, before he returns to India, any provision for the automatic reappointment of retiring directors in default of another appointment shall apply to the original and not to the alternate director.

Q.7. Distinguish between 'Appointment of directors by nomination' and 'appointment of directors against casual vacancy'. **(4 marks; 2016 - June)**

Answer:

1.	**Appointment of Directors by Nomination Section** t63 (3)	This new sub-Section now provides for appointment of Nominee Directors. It states that subject to the articles of a company, the Board may appoint any person as a director nominated by any institution in pursuance of the provisions of any law for the time being in force or of any agreement or by the Central Government or the State Government by virtue of its shareholding in a Government Company.
2.	**Appointment of Directors In Causal Vacancy-Section** 161(4)	If any vacancy is caused by death Or resignation of a director appointed by the shareholders in General Meeting, before expiry of his term, the Board of Directors can appoint a director to fill up such vacancy. The appointed director shall hold office only up to the term of the director in whose

		place he is appointed.

Q.8. The Board of directors of Zest Ltd. appoints Pavan as a director under Section 161, of Companies Act, 2013 by passing a resolution by circulation. The appointee now seeks your advice about the tenure of his appointment. Advise him.
(4 marks; 2012 - June) [CSEM - II]

Answer:

1.	**Appointment and Term of Additional Director [Sec.161(1)]**	If articles permits, the company may appoint additional directors. Such additional directors shall hold office only upto the date of next Annual General meeting of the company.
2.	**Conditions**	If the Annual General meeting is not held or can not be held, the person appointed as additional director shall vacate his office on the last day on which Annual General Meeting should have been held. He cannot continue his office on the ground that the meeting was not called within the prescribed time.

Q.9. In Bright Ltd., vacancy of a director is caused by the death of Mohan, a director of the company, after three months of his joining the company as director. The Board of the company, therefore, appointed Sumit in his place but did not seek approval of the company in general meeting. Referring to the provisions of the Companies Act, 2013, examine the validity of Sumit's appointment. (4 marks; 2015 - Dec)

Answer:

1.	**Appointment of .Directors in causal vacancy- Section 161 (4)**	• If any vacancy is caused by death or resignation • of a director appointed by the shareholders in General meeting • before expiry of his term • The Board of Directors can appoint a director to fill up such vacancy. • The appointed director shall hold office only up to the term of the director in whose place he is appointed.
2.	**Conclusion**	**In the given case,** Mr. Sumit is appointed against the casual vacancy caused by Mohan's demise, Sumit's appointment is valid and shall continue till Mohan's tenure expires.

Q.10. Johnson, a director in Disha Ltd. proceeds on leave for 8 months to France for personal reasons. Board of Directors at a meeting appoints Peter for a period of two months, as an alternate director. Articles of association of the company do not confer upon the Board of Directors any such power to appoint anyone as alternate director. Referring to the provisions of the Companies Act, 2013, examine the validity of the above appointment. What shall be your answer in case the Board appoints Peter for the entire period of Johnson's leave? (4 marks; 2015 - Dec)

Answer:

1.	**Analysis of the problem**	**(i) Validity of appointment of Peter as alternate director:** In this case, the appointment of an alternate director is in violation of the provisions of the **Companies Act, 2013** because Articles do not authorize the Board to appoint alternate Director nor is the appointment made in general meeting. **(ii) What, if, Peter is appointed for the entire period of Johnson's leave:** The answer would be the same even if Peter is appointed for the entire period of Johnson's leave.
2.	**Conditions of Appointment of Alternate Director, Sec.161 (2) of**	Following are some relevant conditions which must be satisfied in case of appointment of alternate director. According to **Section 161(2)** of the Act: 1. The Board of Directors of a company must be authorised by its articles or by a resolution passed by the company in general meeting for

	C.A.2013	appointment of alternate director. **2.**The person in whose place the Alternate Director is being appointed should be absent for a period of not less than **3** months form India.

Q.11. The Board of Directors of Goodwill (India) Ltd. wish to appoint an alternate director on the Company's Board in the absence of Mr. Prince, a director, who proceeded on leave. Referring to the provisions of the Companies Act, 2013, state the conditions to be satisfied before Board appoints such a director. What shall be the tenure of such alternate director in case Mr. Prince incurs a disqualification and ceases to be a director?
(4 marks; 2017 - Dec)

Answer:
Section 161(2) of the Act empowers the Board, if so authorized by its articles or by a resolution passed by the company in general meeting, to appoint a director (termed as 'alternate director) to act in the absence of a original director during his absence for a period of not less than three months from India.
The provisions applicable to an alternate director are as follows.
Applicability:
Section **161** (2) of the Act applies to all companies, whether public or private.
Conditions for appointment of an alternate director:
(a)The Board of Directors of a company must be authorised b" its articles or by a resolution passed by the company in general meeting for appointment of the alternate director.
(b)The person in whose place the Alternate Director is being appointed should be absent for a period of not less than 3 months from India.
(c)The person to be appointed as the Alternate Director shall be the person other than the person holding any Alternate directorship for any other Director in the company.
(d)If it is proposed to appoint an Alternate Director to an Independent Director, it must be ensured that the proposed appointee also satisfies the criteria of Independence as per Section 149(6) of the Act.
Terms of office of an alternate director:
(a)**Not exceeding the term permissible to original director:** An alternate director shall not hold office for a period longer than that permissible to the director in whose place he has been appointed. If the original director ceases to be a director by reason of death or vacation of office under Section 167, the alternate director shall immediately cease to hold his office.
(b)**On the return of original director:** The alternate director shall vacate his office when the original director in whose place he has been appointed returns to India.

Q.12. R Systems Ltd. is holding 40% of paid-up share capital of ATC Aviation Pvt. Ltd. R Systems appointed representative director in ATC Aviation Pvt. Ltd. to safeguard its interest. Board of Directors of R Systems Ltd. wishes to know whether the director appointed by them shall be treated as nominee director. Advise the Board.
(4 marks; 2018 - June)

Answer:
Explanation to Section 149 of the Companies Act, 2013 provides that a "Nominee Director" means a director
(i)Nominated by any financial institution in pursuance of the provisions of any law for the time being in force, or of any agreement, or
(ii)Appointed by any Government, or
(iii)Any other person to represent its interests. Thus, Director appointed by R Systems Ltd. in ATC Aviation Pvt. Ltd. shall be treated as "Nominee Director".

Q.13. 'X' was appointed as an Additional director of Precious Ltd. w.e.f. 21st November, 2018 in a casual vacancy caused by the unexpected death of "P" by way of a circular resolution passed by the Board of directors. With reference to the provisions of the Companies Act, 2013 advise the company on the validity of the appointment of 'X' and his continuation as Additional director. **(4 marks; 2019 - June)**

Q.14. "A" Ltd., a public company wants to appoint Alternate Directors. Examine the validity of acts of the company with reference to provisions of Companies Act, 2013 in following cases: (i) 'D' a director was absent for a period of two and half months. It is proposed to appoint an alternate director.
(ii) 'E' a director was absent for 4 months. It is proposed to appoint 'F as an alternate director in place of 'E'. 'F' is already acting as an alternate director in "A" Ltd. for a director 'G' who was absent for 5 months.
(iii) Can the said appointment, if permitted, be passed by circular resolution?
(1+2 + 2 = 5 marks; 2019 - June)

Q.15. Mr. Sachin was appointed as an additional Director of Conservative Finance Ltd. w.e.f. 1st October, 2009, in a casual vacancy by way of a circular resolution passed by the Board of Directors. The next annual general meeting of thecompany was due on 31s1 March, 2010, but the same was not held due to delay in the finalisation of the accounts. Some of the shareholders of the company have questioned the validity of the appointment of Mr. Sachin and his continuation as additional director beyond 31st March, 2010. Advise the company on the complaints made by the shareholders.
(5 marks; 2010 - May)

Answer:

Additional Director:

- The Board may appoint the additional directors in pursuance of the provisions of **Sec.161 (1) of the Companies Act, 2013.**
- The Board may, in its discretion appoint the additional directors whenever it deems fit.
- The appointment of additional directors can be made by the Board either by passing a resolution at a Board meeting or by passing a resolution by circulation.
- An additional director holds office upto the date of next AGM. A director appointed as an additional director vacates his office, at the latest, on the date of the next annual general meeting or the last date on which AGM should have been held and cannot continue as a director thereafter on the ground that the meeting was not or could not be called within the time prescribed [Krishna Prasad Pilani v Colaba Land and Mills Co. (1959) 29 comp Case 273: Departmental circular No. 8/3(260)/63-PR, dated 5.2.1963],

Conclusion:

(i) The appointment of Mr. Sachin is valid as per Sec. 161(1) of the Companies Act, 2013

(ii) Mr. Sachin cannot continue as a director after the last date on which annual general meeting should have been held i.e. 31st March, 2010.

Q.16. Referring to the provision of the Companies Act, 2013, examine the validity of the following:

(i) The Board of Directors of AJD Limited appointed Mr. N as an alternate director for a period of two months against a director who has proceeded abroad on leave for a period of six months. Articles of Association of the company are silent. (3 marks; 2014- Nov)

Answer:

Provision

As per Sec. 161(2) of the Companies (Amendment) Act, 2017 **the BOD of a company may, if so authorised by its articles or by a resolution passed by the company in general meeting, appoint a person, not being a person holding any alternate directorship for any other director in the company, or holding directorship in the same company [Inserted by Companies (Amendment) Act, 2017] to act as an alternate director for a director during his**

absence for a period of not less than three months from India.

Present Case:

Thus, BOD of AJD Limited can appoint Mr. N as an alternate director, but as discussed above, such appointment must be authorised by the articles or by a resolution passed in general meeting, which is not present and thus the appointment of alternate director is not valid.

Q.17. Referring to the provision of the Companies Act, 2013, examine the validity of the following:

On the request of bank providing financial assistance the Board of Directors of PQR Limited decides to appoint on its Board Mr. Peter, as nominee director. Articles of Association of the company do not confer upon the Board of Directors any such power. Further, there is no agreement between the company and the bank for any such nomination.

(3 marks; 2014- Nov)

Answer:

Provision Sec. 161(3) of the Companies Act 2013 **contains:**

Subject to the articles of a company, the Board may appoint any person as a director nominated by any institution in pursuance of the provisions of any law for the time being in force or of any agreement or by Central Government or State Government by virtue of its shareholding in a Government Company.

Present Case:

In the present case, the AOA do not confer any such power upon BOD but do not also restrict it from doing so. Thus, the appointment of Mr. Peter as nominee director shall be valid assuming that Board is not prohibited by the articles to appoint a nominee director.

Q.18. Queens Limited is a company listed at Bombay Stock Exchange. Company's Articles empower the Board of Directors to appoint additional director. The Board of Directors, therefore, appoints Mr. K, as the additional director. It may, however, be pointed out that earlier, the proposal to appoint Mr. K, as a director on the Company's Board was rejected by the members at the company's Annual General Meeting.

Examining the provisions of the Companies Act, 2013, answer the following:

(i) Whether Mr. K's appointment as additional director by the Board of Directors is valid?

(ii) Whether the Company's Annual General Meeting can appoint Mr. K as the additional director when the proposal to appoint comes before the meeting for the first time?

(iii) In case the AGM of the company is not held within the stipulated time, decide whether Mr. K who was appointed by the Board as additional director, for the first time, can continue to act as a director? **(8 marks; 2015- Nov)**

Answer:

Provision:

As per Sec. 161(1) of Companies Act, 2013.

(A) The AOA of a company may confer upon its BOD the power to appoint any person as an additional director at any time.

(B) A person, who fails to get appointed as a director in a general meeting of the company cannot be appointed as an additional director in the same company.

(C) Additional director shall hold office up to the date of the next AGM or t ne last date on which the AGM should have been held, whichever is earlier.

Present Case:

(i) **Invalid:** Mr. K's appointment as additional director by the Board is not valid as Mr. K was rejected by the members before appointed as additional director. No, additional director is appointed if he was rejected for appointment as director.

(ii) The power to appoint additional directors vests with the BOD and not with the members of the company. The only condition is that the Board must be conferred such power by the articles

of the company. Therefore, in the present case, the company's AGM cannot appoint Mr. K. as the additional director when the proposal to appoint comes before the meeting for the first time because the company's Articles empower the Board of Directors to appoint additional director.

(iii) Mr. K who was appointed by the Board as additional director, shall hold office till the AGM, At AGM he is removed and has to vacate the office. However, if the AGM is not held then the last day at which the AGM is to be held would be the last day for Mr. K as additional director.

Q.19. On a reference made by the Central Government, the Company Law Board passed an order authorizing the Central Government to appoint its nominees as directors of Bangalore Computers Ltd., to safeguard the interest of shareholders and public interest. Referring to the provisions of the Companies Act, 2013 state the restrictions, if any, on the number of directors and the period for which such appointment may be made. State also the action that may be taken by the Central Government with regard to the affairs of the company when such appointment of directors is made by the Central Government.

(4 marks; 2016- May)

Answer:

As per Sec. 161(3) of Companies Act, 2013, subject to Articles of a company a board may appoint any person as a director nominated by any institution in pursuance of the provisions of any law for the time being in force or of any agreement or by the CG or SG by virtue of the shareholding of the company.

The Central Government (CG) is empowered to appoint its nominees as directors of a company to effectively safeguard the interest of the company or its shareholders or the public interest. If the CG wants to appoint its nominees as Directors of such a company then it has to make a reference to the Tribunal and if the Tribunal is satisfied that the affairs of the company have been conducted in a manner oppressive to any member of the company or in a manner prejudicial to the interests of the company or to public interest, it may pass an order asking the CG to appoint directors for a period not exceeding three years on any one occasion.

One person can be appointed as a nominee director nominated by CG and for such tenure as may be specified by CG.

Action taken by Central Government:

- CG selects a person to be appointed as a nominee director and it takes the charge of affairs of the company.
- All the activities are to be done with prior approval of nominee director.
- Nominee director is required to be report the CG regarding affairs of the company.

Q.20. Mr. Abhi was appointed as an additional director of Pioneer Limited on 14th March, 2016. The annual general meeting of the company was scheduled to be held on 29th September, 2016 but due to heavy rains and floods all records of the company were destroyed. In order to rebuild the records, the company approached the Registrar of Companies for extension of time for holding the annual general meeting till 30th December, 2016. In the light of the Companies Act, 2013 advise Mr. Abhi, who was appointed as additional director during the year. **(4 marks; 2017- May)**

Answer:

Provision:

As per Sec. 161 (1) of the Companies Act, 2013, the additional director shall hold office upto the date of the next annual general meeting or the last date on which the annual general meeting should have been held, whichever is earlier.

Again as per the third provision to the Sec. 96 of the Companies Act, 2013, Registrar may, for any special reason, extend the time within which any annual general meeting, other than the first annual general meeting, shall be held, by a period not exceeding three months.

Present Case:

In present case, the AGM was scheduled on 29th September, 2016 but was not held on that date and last date on which AGM should have been held is 30th September, 2016. So, Mr. Abhi can hold the office after 30th September, 2016, as the company have sought the extension for holding AGM till 30'h December, 2016.

Q.21. Examine the following with reference to the provisions of the Companies Act, 2013:

(i) Mr. Narayan, a Director of KPR Limited who is proceeding on a long foreign tour, appointed Mr. Shankar as an alternate director to act for him during his absence. The Articles of the company provide for appointment of alternate directors. Mr. Narayan claims that he has a right to appoint an alternate director. (2 marks; 2017 - May)

Answer:

According to Sec. 161(2) of the Companies (Amendment) Act, 2017, the Board of Directors of a company may, if so authorised by its articles or by a resolution passed by the company in general meeting, appoint a person not being a person holding any alternate directorship for any other director in the company or holding directorship in the same company, to act as a alternate director for a director during his absence for a period of not less than three months from India.

Present case:

Hence, the BOD of KPR Ltd. may appoint a person, not being a person holding any alternate directorship for any other director in the company, to act as an alternate director for a director during his absence, as:

(a) The Articles of KPR Limited provides for appointment of alternate director.

(b) Mr. Narayan, director of company is proceeding for a long foreign tour.

However, the power to appoint alternate director lies with the Board of Directors and not with the director himself. Hence, Mr. Narayan canncv himself appoint alternate director.

So, Mr. Narayan's claim that he has a right to appoint an alternate director is not valid.

Q.22. The Board of Directors of Sakthi Limited decides to appoint on its Board, Mr. Ravi as a nominee director upon the request of a bank which has extended a long term financial assistance to the company. The Articles of Association of the company do not confer upon the Board any such power. Also, there is no formal agreement between the company and the bank for any such nomination. (2 marks; 2017 - May)

Answer:

According to Sec. 161(3) of the Companies Act, 2013. Nominee Director can be appointed by the Board subject to the articles of a company.

Present Case: The Board of Directors of Sakthi Limited cannot appoint alternate director as the Articles of Associations of the company do not confer upon **BOD** any such power to appoint nominee director.

Q.23. M/s. Bright Motors (P) Limited at the Annual General Meeting (AGM) held on 30.09.2016 appointed Mr. Anmol as a Non-Executive Director on the board of the company for a period of three years. On 2nd October, 2017 Mr. Anmol suffered a severe heart failure and expired. The board of directors of the company on 16m October, 2017 appointed Mr. Prateek to fill the casual vacancy so created. The appointment of Mr. Prateek was made for a term of three years by the board. Subsequently at the AGM held on 29-09-2018. Mr. Prateek's appointment was not proposed or approved as the board was of the view that it is not required. But the CFO of the company is of the opinion that the board of directors have contravened the provisions of the Companies Act, 2013 in respect of non-approval of the appointment of Mr. Prateek and his office tenure. Decide. (4 marks; 2019- May)

162. APPOINTMENT OF DIRECTORS TO BE VOTED INDIVIDUALLY

Notified Date of Section: 12/09/2013

Q.1. Mr. Bond and Mr. James were appointed as Directors of James bond Ltd. at the AGM held on 30th September, 2017 by a single resolution. State the relevant provisions of the Companies Act, 2013 and identify is it possible to appoint the above Directors by a single resolution? (4 marks; 2018- May)

Answer:

As per Sec. 162 of the Companies Act, 2013,

(i) Two or more directors of a company cannot be elected as directors by ' a single resolution.

(ii) Thus, each director shall be appointed by a separate resolution unless the meeting first agreed that the appointment shall be made by a single resolution and no vote has been cost against such agreement.

(iii)A resolution moved, in connection of this provision shall be void, whether or not objection thereto was raised at the time it was moved.

Present Case:

In this case, it is not possible to appoint Mr. Bond and Mr. James by a single resolution but for this the company shall firstly require to pass a resolution for appointment of two directors by single resolution and no vote has been cast against such agreement.

Q. 2 In ABC Ltd. three Directors were to be appointed. The item was included in agenda for the Annual General Meeting scheduled on 30th September, 2010, under the category of 'Ordinary Business'. All the three persons as proposed by the Board of Directors were elected as Directors of the company by passing a 'single resolution' avoiding the repetition (multiplicity) of resolution. After the three directors joined the Board, certain members objected to their appointment and the resolution. Examine the provisions of Companies' Act, 2013 and decide. Whether the contention of the members shall be tenable and whether both the appointment of Directors and the 'single resolution' passed at the Company's Annual General Meeting shall be void. (4 marks; 2010 - Nov)

Answer.

Appointed directors must be voted individually:

According to **Sec. 162(1) of the Companies Act, 2013,** two or more directors of a company cannot be elected as directors by a single resolution. Thus, each director shall be appointed by a separate resolution unless the meeting first agreed that the appointment shall be made by a single resolution and no vote has been cast against such agreement.

As per Sec. 162(2) a resolution moved in contravention of this provision shall be void, whether or not objection thereto was raised at the time it was so moved.

Further as per Sec 162(3) a motion for approving a person for appointment, or for nominating a person for appointment as a director, shall be treated as motion for his appointment.

Principle of Proportional Representation for appointment of Directors:

According to **Sec. 163(1) of the Companies Act, 2013,** the articles of a company may adopt the principle of proportional representation for appointing not less than two third of the total number of directors, whether by a single transferable vote or by a system of cumulative voting or otherwise. In such a case, appointments will be so made once in every three years and interim casual vacancies will be filled in conformity with the provisions of Sec. 161(4).

Present Case: Appointment will be void under Sec. 162 unless the motion is preceded by an unanimous resolution, authorising appointment of two or more directors by a single resolution.

Q. 3 Referring to the provision of the Companies Act, 2013, examine the validity of the following:
Mr. P who is not qualified to be appointed as an independent director is appointed by the Board of Directors of XYZ Company Limited, for an independent director, as an alternate director.
(2 marks; 2014- Nov)

Answer:

According to first proviso to section 161 (2) of the Companies Act, 2013,**no person shall be appointed as an alternate director for an independent director unless he is qualified to be appointed as an independent director under the provisions of this Act.**

In the present case, Mr. P who is not qualified to be appointed as an independent director, as an alternate director. Thus, the said appointment by the Board of Directors of XYZ Company Limited; for an independent director, as an alternate director. Thus, the said appointment is not valid.

163. OPTION TO ADOPT PRINCIPLE OF PROPORTIONAL REPRESENTATION FOR APPOINTMENT OF DIRECTORS

Notified Date of Section: 12/09/2013

164. DISQUALIFICATIONS FOR APPOINTMENT OF DIRECTOR

Notified Date of Section: 01/04/2014

Q.1. Mr. BHUSHAN is holding the post of Director in five companies out of which SAMAROH LTD. is one. For the financial year ended on 31st March, 2010, Samaroh Ltd. failed to pay interest on loans taken from a financial Institution and also failed to repay the matured deposits. On 1st July, 2010 Mr. Bhushan accepting the post of additional director in Fedex Ltd, submitted a declaration that the disqualification specified in Section 164 of the Companies Act, 2013 is not applicable in his case. Decide whether the declaration submitted by Mr. Bhushan to Fedex Ltd. is in order. (6 marks; 2011 - June)

Answer:

Disqualifications for Appointment of Director

Section 164(1) Provides that a person shall not be eligible for appointment as a director of a company, if -

(a) He is unsound of mind and stands so declared by a competent Court;
(b) He is an un discharged insolvent;
(c) He has applied to be adjudicated as an insolvent and his application is pending;
(d) He has been convicted by a Court of any offence, whether involving moral turpitude or otherwise, and sentenced in respect thereof to imprisonment for not less than six months and a period of five years has not elapsed from the date of expiry of the sentence. Provided that if a person has been convicted of any offence and sentenced in respect thereof to imprisonment for a period of seven years or more, he shall not be eligible to be appointed as a director in any company.
(e) An order disqualifying him for appointment as a director has been passed by Tribunal and the order is in force;
(f) He has not paid any calls in respect of any shares of the company held by him, whether alone or jointly with others, and six months have elapsed from the last day fixed for the payment of the call;
(g) He has been convicted of the offence dealing with related party transactions under section 188 at any time during the last preceding five years; or
(h) He has not complied with sub-section (3) of section 152.

Section 164(2)also provides that no person who is or has been a director of a company which -

(a) Has not filed financial statements or annual returns for any continuous period of three financial years; or
(b) Has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for one year or more, shall be eligible to be

re-appointed as a director of that company or appointed in other company for a period of five years from the date on which the said company fails to do so.

Provided that where a person is appointed as a director of a company which is in default of clause (a) or clause (b), he shall not incur the disqualification for a period of six months from the date of his appointment.

In case of Government Companies, Section 164(2) shall not apply -

Notification No. [F. No. 1/2/2014- CL.V], dated 5-06-2015.

Every Director shall inform to the company concerned about his disqualification under sub-section (2) of Section 164, if any, in Form DIR-8before he is appointed or re-appointed.

Whenever a company fails to file the financial statements or annual returns, or fails to repay any deposit, interest, dividend, or fails to redeem its debentures, as specified in sub-section (2) of section 164, the company shall immediately file Form DIR-9, to the Registrar furnishing therein the names and addresses of all the Directors of the company during the relevant financial years.

When a company fails to file the Form DIR-9 within a period of thirty days of the failure that would attract the disqualification under sub-section (2) of section 164, officers of the company specified in clause (60) of section 2 of the Act shall be the officers in default.

Upon receipt of the Form DIR-9 under sub-rule (2), the Registrar shall immediately register the document and place it in the document file for public inspection. Any application for removal of disqualification of directors shall be made in Form DIR-10.

However, a private company may by its articles provide for any disqualifications for appointment as a director in addition to those specified in sub-sections (1) and (2).The disqualifications referred to in clauses (d), (e) and (g) of sub-section (1) shall continue to apply even if the appeal or petition has been filled against the order of conviction or disqualification.

Q.2. Mr. X is a director is Greenfield Industries Limited. He is a man of wide knowledge of commercial matters. The company has not filed financial statements with the Registrar of Companies for the years ended 31st March, 2014, 31s* March, 2015 and 31st March, 2016. However, it has filed the annual returns for those years in compliance of the provisions of the Companies Act, 2013.

Considering Mr. X's huge experience, Redfield Industries Limited wants to induct him as a director on its Board. Referring to the provisions of the Companies Act, 2013 examine the validity of such proposition. **(4 marks; 2017 - June)**

Answer:

Amendment made by Companies (Amendment) Act, 2017 Section 164(2) also provides that no person who is or has been a director of a company which -

(a)Has not filed financial statements or annual returns for any continuous period of three financial years; or

(b)Has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for one year or more, shall be eligible to be re-appointed as a director of that company or appointed in other company for a period of five years from the date on which the said company fails to do so.

In the given case, Greenfield Industries Limited has not filed its financial statements for the financial years ended 31st March, 2014, 31st March, 2015 and 31st March, 2016. Therefore, it has not file a such statements for a continuous period of 3 financial years. However, it has filed annual return for those 3 financial years. Non-filing of any one Of financial statements or annual returns for a continuous period of 3 financial years will disqualify such director from being appointed as a director in any other company.

Applying the above provisions of **Section 164(2)(a), in the given case,** Mr. X, a director of Greenfield Industries Limited cannot be appointed as a director in Redfield Industries Limited till the expiry of five years.

Q.3. Enumerate the disqualifications of a director mentioned in Section 164 of Companies Act, 2013. **(8 marks; 2010 - Dec) [CSEM - II]**

Answer:

1.	**Disqualifications of directors [Sec. 164 of Companies Act, 2013]**	(a)he is of unsound mind and stands so declared by a competent Tribunal; (b)he is an undischarged insolvent; (c)he has applied to be adjudicated as an insolvent and his application is pending; (d)he has been convicted by the **Tribunal** and sentenced for at least 6 months of imprisonment for an office involving morale turpitude and 5 year's have not elapsed since the expiry of his sentence. (e) he has failed to pay any call in respect of shares for 6 months; (f) He has been disqualified by an order of the **Tribunal.** (g) he has been convicted of the offence dealing with related party transactions under **Section 188 of Companies Act, 2013** at any time during the last preceding five years; or (h) he has not got the DIN.	
2.	**Disqualification by. reason of default made by a company**	No person who is or has been a director of a company, which has made following defaults, shall be eligible to be re-appointed as a director of that company or appointed in other company for a period of five years from the date on which the said company fails to do so.	
		(a) Non filling of Financial statement and annual returns	The company has not filed financial statements or annual returns for any continuous period of three financial years; or
		(b) Non payment of deposits, debentures etc	The company has failed to- ➢ repay the deposits accepted by it or pay interest thereon; or ➢ redeem any debentures on the due date or pay interest due thereon; or ➢ pay any dividend declared and such failure to pay or redeem continues for one year or more,
3.	**Additional grounds of disqualification in case of Private Company**	A private company may by its articles provide for any disqualifications for appointment as a director in addition to those specified in sub-sections (1) and (2) of Section 164 as stated above. **Exceptions:** Provided that disqualifications referred to in clauses (d), (e) and (g) of Section 164(1) shall not take effect - (i)for thirty days from the date of conviction or order of disqualification; (ii)where an appeal or petition is preferred within thirty days as aforesaid against the conviction resulting in sentence or order, until expiry of seven days from the date on which such appeal or petition is disposed off; or (iii)where any further appeal or petition is preferred against order or sentence within seven days, until such further appeal or petition is disposed off.	

Q.4. What is meant by the term 'disqualifying company' under the Companies (Disqualification of Directors under Section 164(2) of Companies Act, 2013? State the grounds under which the directors are disqualified under the said rules.

(6 marks; 2011 - June) [CSEM - II]

Answer:

Please refer 2010 – Dec

Q.5. Manish, a director of PQR Ltd., defaulted in filing financial statements and annual return with the Registrar of Companies for a continuous period of three financial years ended 31st March, 2012. Based on the provisions of the Companies Act, 2013, Validate the following:

(i) Whether Manish can continue to be a director of PQR Ltd. when he is also a director in UV Ltd.? Also narrate whether he can be reappointed in PQR Ltd. as well as in UV Ltd.

(ii) If the defaulting company is a private limited company, what would be your answer?

(4 marks; 2013 - Dec)

Answer:

1.	**Disqualification of Director**	**(a) For appointment**	A person shall not be capable of being appointed as a director of a company, if such person is already a director of any company who has not filed the financial statements and annual returns for continuous period of 3 financial years.
		(b) For appointment in any other public company and reappointment in the same company	Such person shall not be eligible to be appointed as a director of any other public company and for re - appointment in the same company for a period of 5 years from the date on which such public company, in which heis a director, failed to file financial statements and annual returns.
2.	**Answer to the queries of the problem given**	(i) Manish the director of PQR Ltd. is disqualified to be appointed as a director of UV Ltd. under **Section 164(2) of Companies Act, 2013** for a period of 5 years from the date on which the said default has been committed i.e. the last due date for filing the financial statements and the annual returns. Further, Manish is disqualified from being re-appointed in PQR Ltd. for 5 years from the date of default, (ii) No, the answer remains the same. Whether the Defaulting co. private or public Manish can not appoint as director in any public co. (UV Ltd.) and reappoint in the same (Pvt/public) till 5 years, (according to **Section 164(2) of Companies Act, 2013).**	

Q.6. Mr. Ravindranathan is holding the post of Director in three companies out of which Goodluck Colours Limited is one. For the financial year ended on 31st March, 2009, Goodluck Colours Limited failed to pay interest on loans taken from a financial institution and also failed to repay the matured deposits. On 1[51] June, 2009 Mr. Ravindranathan accepting the post of Additional Director in Soma Footwear Limited, submitted a declaration that the disqualification specified in Sec. 164 of the Companies Act, 2013 is not applicable in his case. Decide whether the declaration submitted by Mr. Ravindranathan to Soma Footwear Limited is in order. (5 marks; 2010- May)

Answer:

Disqualification for appointment of Directors Provision:

As per Sec. 164(2) of Companies Act, 2013 a director of a company shall be disqualified from being appointed as a director in any other company, if the company of which he is already a director:

(i) Has not filed Financial Statements for any continuous three financial years; or

(ii) fails to repay its deposit or interest thereon on due date or redeem its debentures on due date or pay dividend declared and such default continues for one year or more, shall be eligible to be re-appointed as a director of that company or appointed in other company for a period of five years from the date on which the said company fails to do so:

Provided that where a person is appointed as a director of a company which is in default of clause (a) or clause (b), he shall not incur the disqualification for a period of six months from the date of his appointment.

In the present case, Good luck Colours Limited has committed the following defaults:

(i) Failure to pay interest on loans taken from a financial institution for the financial year ended on 31st March, 2009:

However, such failure does not attract the disqualification under Sec. 164(2) as the disqualification is said to be incurred only if the default relates to re-payment of public deposits, and not on non-payment of interest on 'loans' obtained from a financial institutions.

(ii) Failure to repay the matured deposits on due date for the financial year ended on 31st March, 2009.

Default in repayment of matured deposits or interest thereon would result in applicability of Sec. 164(2) only if such default continues for one year or more. In the absence of any information, it may be assumed that such fault has not continued for one year, as on 1st June, 2009.

Accordingly, none of the directors of Goodluck Colour Limited are disqualified under Sec. 164(2). Hence, Mr. Ravindranathan can be appointed as an additional director of Soma Footwear Limited on 1st June, 2009, and so the declaration given by Mr. Ravindranathan is in order.

Q. 7 State with reference to the provisions of the Companies Act, 2013, whether the following persons can be appointed as a Director of a company.
(i) Mr. L, who has not paid any calls in respect of any shares of the company held by him and five months have passed from the last day fixed for the payment of calls.
(ii) Mr. G is Director of LDT Limited, who has not filed the company's annual return pertaining to the annual general meeting held in the calendar years 2014, 2015 and 2016.

(4 marks; 2016 - Nov)

Answer:

(i) Provision:

As per Sec. 164(1)(f) of the Companies Act, 2013, which provide for disqualification of director, a person is disqualified for appointment as a director if he has not paid any call on shares of the company held by him and six months have elapsed from the last day fixed for payment of the call.

Present Case:

In this case, Mr. L who has not paid any calls in respect of only shares of the company held by him and five months have been passed from the last day fixed for the payment of calls. So that as per Sec. 164(1)(f), As per the provisions a person is disqualified for appointment as a director if he has not paid any call on shares of the company held by him and six months have been elapsed from the last date fixed for the payment of the call. In the present case only five months have been passed therefore Mr. L is qualified to be appointed as director.

(ii) Provision:

As per Sec. 164(2)(a), where a person who is or has been a director of a company shall be disqualified from being appointed as a director of that company or appointed in any o.ther company for a period of five years if the company of which he is or has been a director has not filed financial statements or annual returns for any continuous period of three financial years.

Present Case:

In this case, LDT Limited has not filed its annual returns for 2014,2015 and 2016. So as per above provision Mr. G who has been director of the company shall be disqualified for appointment or reappointment in same company or another company for five years.

Q. 8 Mr. Vikram, a director of M/s Tubelight Limited has made default in filing of annual accounts and annual returns with Registrar of Companies for a continuous period of 3 financial years ending on 31st March, 2016. Examine the validity of the following under the Companies Act, 2013:

(i) Whether Mr. Vikram can continue to be a director of M/s Tubelight Limited (defaulting company) and also M/s Green Light Limited, where he is also a director? Also state whether he can be re-appointed as director in these two companies.
(ii) What would your answer be in case Mr. Vikram is a nominee director of a Public Financial Institution?
(iii) What would be your answer in case the defaulting company (i.e. M/s.Tubelight Limited) is a private limited company? (4 marks; 2017 - Nov)

Answer:

Provision:

According to Sec. 164(2) of the Companies Act, 2013, a person who is or has been a director of a company which:

(a) Has not filed the financial statements or annual returns for any continuous three financial year; or

(b) has failed to repay the deposits accepted by it or pay interest thereon on due date or redeem its debenture on due date or pay interest due thereon or pay any dividends declared and such failure continues for one year or more.

Shall not be eligible to be re-appointed as a director of that company or appointed in other company for a period of five years from the date on which the company fails to do so.

Provided that where a person is appointed as a director of a company which is in default of clause (a) or clause (b), he shall not incur the disqualification for a period of six months from the date of his appointment.

As per Sec. 167(1) (a) of the Companies Act, 2013, the office of a director shall become vacant in case he incurs any of the disqualifications specified under Sec. 164(2) of the Companies Act, 2013.

Present Case:

In given case, M/s. Tubelight Ltd. has made default in filing of annual accounts and annual returns with ROC for a continuous period of three financial year ending on 31st March, 2016. So company has defaulted under Sec. 164(2), so consequences are as follows:

(i) Here, Mr. Vikram is a director of M/s. Tubelight Limited and M/s. Green light Limited. M/s. Tubelight Limited did not file financial statements for three years ended on 31st March, 2016. So this, constitutes disqualification under Sec. 164(2) but, Mr. Vikram will not incur disqualification for a period of six months.

Provided that where he incurs disqualification as per Sec. 164(2), the office of director shall become vacant in all the Companies other than the company which is in default under that sub section.

Since, Mr. Vikram has attracted disqualification under Sec. 164(2) of the Companies Act, 2013, he cannot continue to be director of M/s. Greenlight Ltd., has to vacate office of Greenlight Ltd. immediately. Mr. Vikram is not eligible to be reappointed in those two companies for five years.

(ii) Nominee director is a director as appointed by Public Financial Institution as per Sec. 161(3), so disqualification under Sec. 164(2) shall not applied to nominee director. Nominee director can not be removed by disqualification as per Sec. 164(2), so if Mr. Vikram is a nominee director then he continue to be the director of both the companies.

(iii) As per Ministry of Corporate Affairs Notification No. 463(E) and 464(E) dated 5th June 2015, provision of Sec. 162 shall not applied to a private company.

So, if M/s. Tubelight Limited is a private company then, Mr. Vikram a director of M/s. Tubelight Limited shall not be disqualified under Sec. 164(2), because provisions of Sec. 164 shall not applied to M/s. Tubelight Pvt. Ltd. So Mr. Vikram can continue to hold office in both the companies, M/s. Tubelight Ltd. & M/s. Greenlight Ltd.

Q. 9 Mr. Dhruv is a Director of M/s. LT Limited and XT Limited respectively. M/s. LT Limited did not file its financial statements for the year ended 31st March 2016, 2017 & 2018 respectively with the Registrar of Companies (ROC) as mandated under the Companies Act, 2013. M/s. LT Limited also did not pay interest on loans taken from a public financial institution from 1sl April 2017 and also failed to repay matured deposits taken from public on due dates from 1s' April 2017 onwards.

Answer the legality of the following in the light of the relevant provision of the Companies Act, 2013:

(i) Whether Mr. Dhruv is disqualified under Companies Act, 2013 and if so, whether he can continue as a Director in M/s LT Limited? Further can he also seek reappointment when he retires by rotation at the AGM of M/s. XT limited scheduled to be held in September 2019?

(ii) Mr. Dhruv is proposed to be appointed as an Additional Director of M/s. MN Limited in June 2019. Is he eligible to be appointed as an Additional Director in M/s. MN Limited? Decide.

(4 marks; 2019 - May)

165. NUMBER OF DIRECTORSHIPS

Notified Date of Section: 01/04/2014

Q.1. Excel Limited is a listed company with a turnover of Rs. 60 crores in Financial Year 2016-17. The Company appoints Ms. R as the Women Director on 1st March, 2017. Ms. R is already a director in twelve companies including ten Public Companies. State briefly whether the appointment of Ms. R in Excel Ltd. is valid as per provision of the Companies Act, 2013. (4 marks; 2018 - Dec)

Answer:

Number of directorships: As per Section 165(1) of the Companies Act,2013, no person shall hold office as director, including any alternate directorship, in more than 20 companies at the same time.

Out of the limit of 20, the maximum number of public companies in which a person can be appointed as a director shall not exceed 10.

Private companies that is either holding or subsidiary company of a public company shall be included in reckoning the limit of public companies in which a person can be appointed as a director.

In the present case, Ms. R was appointed as a women director on 1st March, 2017 in Excel Limited. She was already holding directorship in twelve companies including ten public companies.

As Ms. R was already a director in ten public companies, her appointment in Excel Limited is not valid as it will lead to her directorship in 11 public companies.

In given case, either she can choose between the companies in which she wishes to continue to hold the office of director or resign her office as director in the other remaining companies to maintain the limit of holding of directorship.

Q.2. Referring to the provisions of the Companies Act, 2013, examine the validity of the following appointment of Directors:

Brown Limited, having a turnover of Rs. 60 crores in the financial year 2016-17 appoints Ms. Rose as the women director on 1st March, 2017. Ms. Rose already holds directorship in twelve companies including ten public companies. She is whole time Cost Accountant in practice. (4 marks; 2017- Nov)

Answer:

As per Sec. 165(1) of the Companies Act, 2013 no person after commencement of this Act, shall hold office as a director including alternate directorship in more than twenty Companies.

Provided that the maximum number of public companies in which a person can be appointed as a director shall not exceed ten.

Explanation to Sec. 165(1) clarifies that for reckoning the limit of public companies in which a

person can be appointed as director, i.e. ten, directorship in private companies that are either hoiding or subsidiary company of a public company shall be included.

In this case, Ms. Rose, already holds position as director in twelve companies including ten public companies. Now she is appointed as director in Brown Ltd., a public company. As she already holds directorship in ten public companies, she cannot accept position as director in Brown Ltd. even though limit of twenty directorship does not exceeds as per Sec. 165.

Q.3. Ms. Jasmine holds directorship in eight public companies including managing directorship in two companies and directorship in six companies. In addition, she also holds alternate directorship in three companies and independent directorship in three subsidiary companies of Brown Limited. **(4 marks; 2017- Nov)**

Answer:

Ms. Jasmine holds directorship in eight public companies. In addition she also holds alternate directorship in three companies. So that total directorship counts eleven assuming that alternate directorship position is also in a public company. So Ms. Jasmine holds position as director in eleven public companies and now she takes directorship as independent director in three subsidiary company of Brown Limited, a public company. So as per Sec. 165, subsidiary or holding of public company shall be deemed as public company. So, she already holds position as director in public company she cannot be appointed as director in subsidiary of Brown Limited.

Note: Penalty for violating provisions relating to restriction on number of directorships

A person cannot be director in more than 20 companies, including alternate directorship. Out of the 20 companies, only maximum 10 can be public companies - **section 165(1) of Companies Act, 2013.**

Penalty for violation of **section 165(1)** can be five thousand rupees for each day after the first during which such contravention continues - **section 165(6) of Companies Act, 2013** amended vide the Companies (Amendment) Ordinance, 2019 w.e.f. 2.11.2018.

Till 2.11.2018, the section provided for fine which could be imposed only by Court. Now, penalty can be imposed by RoC or RD who is authorized for this purpose.

Even earlier, the offence was compoundable. However; procedure of compounding had to be complied with. Now, directly penalty can be imposed after issuing Show Cause Notice.

A person cannot be appointed as director if the number of directorships exceed the prescribed **limit-section 164(1)(i) of Companies Act, 2013** inserted vide the Companies (Amendment) " Ordinance, 2019 w.e.f. 2.11.2018.

166. DUTIES OF DIRECTORS

Notified Date of Section: 01/04/2014

Q.1. Comment on "Directors ought not to misuse the trust entrusted on them". **(5 marks; 2010 - Dec) [CSEM - II]**

Answer:

1.	**Directors as Trustees**	Directors of the company are to some extent, trustees for the assets of the company and for the right which are conferred on them by law and conventions.
2.	**Why Directors are Treated as Trustees?**	A trustee is a person who is vested with the legal ownership of the assets which he administers for the benefit of another orothers. Directors are regarded as a trustee of the company's property and of the powers that vest in them because they administer those assets and perform duties in the interest of the company and not for their own benefit.
3.	**Fiduciary Position with the Company**	Director's stands in fiduciary position towards the company in regard to the power conferred on them by the Companies Act, and by the articles of association, and also with regard to the funds of the company, which are under their control.
4.	**Conclusion**	So, the directors ought not to misuse the trust entrusted on them.

Q.2. Mr. Sunil Goyal, a director of XYZ Limited wants to go on foreign trip. He wants to assign his office to the Vice President of the company. Mr. Sunil Goyal seeks your advise whether he can do so. Referring to the provisions of the Companies Act, 2013 advise him in the matter. (4 marks; 2017 - June)

Answer:

In accordance with the previsions of the Companies Act, **2013,** as contained in Section **166(6),** a director of a company shall not assign his office. Any assignment so made shall be void/Therefore, Mr. Sunil Goyal, the director of the company who wants to go on a foreign trip cannot assign his office to the Vice President. He is advised accordingly not to assign his office. However, for the purpose of quorum and smooth function of Board, Alternate director may be appointed under the provisions of Section **161** of Companies Act, **2013.**

167. VACATION OF OFFICE OF DIRECTOR

Notified Date of Section: 01/04/2014

Q.1. Five Board meetings were held in Asha Ltd. during the period from January to June in the calendar year 2016. Rajeev, an additional director, attended none of these meetings. For the first two meetings he sought leave of absence from the Board but did not inform the Board for the remaining three meetings. Examining the provisions of the Companies Act, 2013, decide whether he is disqualified to act as a director.

(4 marks; 2016 - Dec)

Answer:

Section 167(1)(b)	Section 167(1)(b) states that the office of a director shall be vacated if he absents himself from all the meetings of the Board of Directors held during a period of 12 months with or without seeking leave of absence of the Board. Mr. Rajeev absented from all the meetings of the Board for 6 months by seeking leave of absence in first two and not seeking leave of absence in last three. It is not that he did not attend all the meetings for a period of 12 months.
Conclusion	Thus, his office does not become vacant and he can continue to be a director on the Board of the Company. Disqualification of Directors is dealt with under section **164** of the Companies Act, **2013** and is different from vacation of the office of directors under Section **167.**

168. RESIGNATION OF DIRECTOR

Notified Date of Section: 01/04/2014

Q.1. A Director claims that he may leave the company any time merely by submitting his resignation without waiting for its acceptance.
Discuss whether it is acceptable and valid? (3 marks; 2013 - Dec)

Answer:

The claim of director is right, valid and acceptable. A resignation of director once communicated to the company need not be accepted by the Board of Directors.

- There is misconception that any resignation has to be accepted.
- The resignation is effective of the date if any date is specified in his letter of resignation.
- If no date is specified, it becomes effective only from the time when the letter of resignation is received by the company.
- But a whole-time director being an employee, Resignation cannot be effective unless the resignation is accepted.

Q.2. Vijay, a director, resigns after giving due notice to the company and he forwards a copy of resignation in e-form DIR-11 to the Registrar of Companies (RoC) within the prescribed time. What would be the status of Vijay if the company fails to intimate about the resignation of Vijay to RoC? (4 marks; 2018 - June)

Answer:

Resignation of Director (Section 168 of the Companies Act, 2013):

A Director may resign from his office by giving a notice in writing to the company. The Board shall on receipt of such notice take note of the same. The company shall within 30 days from the date of receipt of notice of resignation from a director, intimate the Registrar in Form DIR - 12 and post the information on its website, if any.

Such director may also forward a copy of his resignation along with detailed reasons for the resignation to the Registrar within 30 days from the date of resignation in FORM DIR-11 along with the prescribed fee. The resignation of a director shall take effect from the date on which the notice is received by the company or the date, if any, specified by the director in the notice, whichever is later.

In the present case, Vijay, a director resigns after giving due notice to the company and he forwards a copy of resignation in e-form DIR-11 to the RoC within the prescribed time.

If the company fails to intimate about the resignation of Vijay to RoC, even then the resignation of Vijay shall take effect from the date on which the notice is received by the company or the date, if any, specified by Vijay in the notice, whichever is later.

In section 168 of the Companies Act, 2013, in sub-section (1), in the proviso, for the words, "director shall also forward", the words "director may also forward" shall be substituted.

Q.3. Mr. Prasad is Managing Director of Bapi Ltd. He gave his resignation letter to the Chairman of the Board of Directors on 31st December, 2013, and requested that he should be relieved immediately. When does the resignation of Mr. Prasad take effect?

(3 marks; 2014 - June)

Answer:

- According to Section 168(Resignation of director), A director can resign from his office by serving a notice of his resignation upon the Company or the Board.
- There is no need for its acceptance by the Board or the Company.
- However, if a Managing Director resigns, he cannot give up his office at his pleasure simply by serving the notice.
- This is because he occupies two positions i.e., of a director and an employee.
- In case of Managing Director, the notice or letter of resignation is required to be approved or accepted by the company and he has to be relieved of his duties and responsibilities attaching to his office from which he has resigned.
- Similar views were accepted in the case of Achutha Pal vs. Registrar of Companies, (1956) 36 Comp. Cases 598.

Accordingly, in the given case, the resignation of Mr. Prasad, the Managing Director shall be effective when approved or accepted by the company and he is relieved of his duties and responsibilities attaching to his office within a reasonable time.

Q.4. The Chairman and Managing Director of Progressive Ltd. resigned on 6th May, 2009 as such, but the company filed Form No. DIR -12 with the Registrar of Companies stating the date of resignation as 15th March, 2010. The company issued various cheques to its investors in repayment of their deposits after 6lh May, 2009 which were bounced. The investors filed a complaint against the former chairman and managing director. The articles of association of the company provided that the resignation would be effective from the date it was tendered. Will the chairman and managing director be liable in the instant case?

(4 marks; 2011 - Dec) [CSEM - II]

Answer:

1.	**Responsibility of Chairman and MD in the given Case**	The Chairman and Managing Director of Progressive Limited could not be held responsible under **Section 141** of the Negotiable Instruments Act, 1881 as they had resigned from their directorship on 6th May, 2009 and the cheques were issued after 6th May, 2009 which were bounced.
2.	**Case Law Analysis**	**Dushyant D. Anjaria Vs. Wall Street Finance Ltd. (2001):** In this case, the Bombay High Court has held that the resignation of a Director would be effective from the date it was submitted because the letter brings out clearly his intentions to resign. However, if there was delay on the part of the company in intimating the ROC about the date of

		the resignation, the resigning Director could not be saddled with responsibility and liability for such delay. **Pandurang Camotim Sancoalcar Vs. Suresh Prabhakar Prabhu** Date of filing of Form DIR -12 is not conclusive as to date of resignation of director-date shown inthe letter of resignation is to be used. Articles of association of the company also provided that the resignation would be effective from the date it was tendered. **Glossop Vs. Glossop (1907)** In this case, it was held that the resignation of a director would become effective on and from the date it was tendered and also from the Articles of Association of the Company, it would be clear that resignation of a Director would be effective from the date it was tendered.

Q.5. Paras, a director of Spike (Pvt.) Ltd. resigns from the office of director. He has forwarded a copy of resignation to the company and the Registrar of Companies (ROC) in time. The company, however, has not filed relevant form to the ROC. Explaining the provisions of the Companies Act, 2013 in this regard, decide the status of Paras.

(4 marks; 2016 - June)

Answer:

1. -	**Section 168 of the Companies Act, 2013** read with **Rule 15 and 16 of the Companies (Appointment and Quali-fication of Directors) Rules, 2014**	• **A** director may resign from his office by giving notice in writing. • The Board shall, on receipt of such notice within 30 days intimate the Registrar in **Form DIR-12** and also place the fact of such resignation in the Directors' Report of subsequent general meeting of the company and post the information on its website. • The director shall also forward a copy of resignation alongwith detailed reasons for the resignation to the Registrar in **Form DIR - 11 within** 30 days from the date of resignation. • The notice shall become effective from the date on which the notice is received by the company or the date, if any specified by the director in the notice, whichever is later. • In case of failure of the company to intimate the Registrar, as the director has already informed the registrar of his resignation within time, the document would get registered in the records of the registrar.
2.	**Conclusion**	**In the present case** Resignation of Mr. Paras shall remain valid and shall be recorded by the Registrar.

Q.6. Pawan, the Managing Director of ABC Ltd., resigned on 10th May, 2012. The company has filed e-form No. DIR-12 with the Registrar of Companies mentioning the date of resignation as 5th July, 201T3. The company issued various cheques to its investors in repayment of the deposits after 10th May, 2012 and the said cheques were dishonoured. The investors filed complaints against the company and Pawan, the former Managing Director of the company. Discuss and advise whether Pawan shall be liable or not.

(8 marks; 2014 - June)

1.	MD of ABC Ltd. could not be held responsible	The Managing Director of ABC Limited could not be held responsible under Section 141 of the Negotiable Instruments Act, 1881 as he had resigned from his directorship on 10th May, 2012 and the cheques issued after 10th May, 2012 which were bounced.
2.	Effective date of resignation. Dushyant D. Anjaria Vs. Wall Street Finance Ltd. (2001) comp. Cas. 655	In this case, the Bombay High Court had held that the resignation of a Director would be effective from the date it was submitted because the letter brings out clearly his intention to resign. However, if there was delay on the part of the company in intimating the ROC about the date of the resignation, the resigning Director could not be saddled with responsibility and liability for such delay.

	(Bom)	
3.	Date of DIR 12 is not conclusive. (Pandurang ... CLA 265)	Date of filing of Form DIR -12 is not conclusive as to the date of resignation of director shown in the letter of resignation is to be considered. (Pandurang Camotim Sancoalcar Vs. Suresh Prabhakar Prabhu 48SCL 437, 53 CLA 265.)
4.	Provisions of Articles	Articles of association of the company also provided that the resignation would be effective from the date it was tendered.
5.	Resignation to be effective on tendering date. (Glossop Vs.. 370)	It was held that the resignation of a director would become effective on and from the date it was tendered and from the Articles of Association of the Company, it would be clear that resignation of a Director would be effective from the date it was tendered.

Q.7. Mr. Atul Rastogi, the Managing Director of ABC Limited has resigned from the Managing Directorship of the company. He, however, wants to continue as a director in the company. Referring to the provisions of the Companies Act, 2013, state whether Mr. Atul can continue as a director in the company. **(4 marks; 2017 - June)**

Answer:

Yes. According to the provisions of the **Companies Act, 2013,** Mr. Atul Rastogi can continue as a director of the company in the given case. In **G. Subba Rao. v. Rasmi Die-Casting Ltd. [1998] 93 Com. Cases**

797, the Andhra Pradesh High Court held that from the definition of 'managing director' as per **Section 2 (26) [Corresponds to Section 2(54) of the Companies Act, 2013],** it is clear that the managing director has to act under the superintendence, control and direction of the Board of directors. Moreover, powers of routine administrative nature like the power to affix common seal, to draw and endorse any negotiable instrument do not fall within the substantial powers conferred upon the managing director. What is to be seen is whether the> managing director making any representation for and on behalf of a company had in fact, 'actual authority' either in terms of the provisions of the constitution of that company or by virtue of the delegation by the Board of directors.

A managing director must hold and continue to hold the office of director. . A managing director is first a director and then a managing director with certain additional powers **[Shanta Shamsher Jung Bahadur v. Kamani**

Brothers P. Ltd. (1959)29 Com Cases 501 (Bom:)]. A managing director is an ordinary director entrusted with special powers. If a company wants to appoint a person as managing director, who is not a director of the company, he has first to be appointed as an additional director in accordance with the provisions of Section 161 of the Companies Act, 2013 of the Act.

Q.8. Vijay, a director resigns after giving due notice to the company and he forwards a copy of resignation in e-form DIR-11 to the Registrar of Companies (ROC) within the prescribed time.

What would be the status of Vijay if the company fails to intimate about the resignation of Vijay to ROC? **(2 marks; 2017- May)**

Answer:

(ii) Resignation of Directors: As per Companies (Amendment) Act, 2017,

A director may resign from his office by giving a notice in writing to the company. The Board shall on receipt of such notice take note of the same. The company may within 30 days from the date of receipt of notice of resignation from a director, intimate the Registrar in Form DIR -12 and post the information on its website, if any.

Such director may also forward a copy of his resignation along with detailed reasons for the resignation to the Registrar within 30 days from the date of resignation in FORM DIR-11 along with the prescribed fee.

Provision:

As per Sec. 168 of the Companies Act, 2013, the resignation of a director shall take effect from the date on which the notice is received by the company or the date, if any, specified by

the director in the notice, whichever is later.

Present Case:

In the present case, Vijay, a director resigns after giving due notice to the company and he forwards a copy of resignation in e-form DIR - 11 to the ROC within the prescribed time.

Thus the resignation shall be effective from the date company received the notice, even though the company fails to intimate about the resignation to ROC.

Q.9. The Board of Directors of Raj Steels Limited consists of one Managing Director, one Technical Director and three ordinary Directors. Mr. Sriram, an ordinary Director sent his resignation in writing-to the Company. Mr. Raj, the Managing Director also sent his resignation to the Chairman of the Board of Directors and requested that he shall be relieved immediately. When does the resignation take effect? Is it possible for a Director to resign orally or withdraw the resignation? (8 marks; 2013 - Nov)

Answer:

Effective date of Resignation [Sec. 168(2)]

Resignation of Director shall take effect from later of the following date(s), i.e. whichever is later:

(a) Date on which the Notice is received by the Company, or

(b) Date, if any, specified by the Director in the Notice.

Is Acceptance of Resignation required?

(i) The resignation takes effect immediately, without requiring any acceptance:

- where the articles do not contain any provision requiring acceptance of resignation; or
- Where the articles allow the director to resign at anytime.

(ii) The resignation takes effect only on acceptance:

- where the articles require the acceptance of the resignation; or
- where the resignation states that it is to take effect on acceptance; or
- Where the director who has tendered resignation is MD/WTD/ manager [Achuta Pai v ROC].

Present Case:

Mr. Sriram, an ordinary director has ceased to be a director of Raj Steels Ltd. from the time when such resignation is given to the company, provided his resignation letter does not state that the resignation is to take effect on acceptance or the articles of Raj Steels Ltd. does not so require.

Resignation by Mr. Raj, the MD

A director who has been appointed as MD, WTD or manager, cannot resign at his sweet will. His resignation takes effect only when his resignation is accepted by the company [Achutha Pai v ROC].

Resignation of Mr. Raj will take effect only when it is approved or accepted by the company. Thus, he cannot be relieved immediately.

Resignation by director orally

- Verbal resignation is sufficient, provided the intention to resign is clear.
- However, if the articles require resignation to be in writing, a verbal resignation is not effective.

Exception:

Verbal resignation is effective if made in the GM and accepted at the GM. This will be so, even if the articles require resignation in writing [Lqfchford Premier Cinema Ltd. v Ennion and Paterson],

Withdrawal of Resignation:

A resignation once made cannot be withdrawn. However a director may withdraw the

resignation tendered by him, if:

- his resignation requires acceptance in order to be effective; •
- the withdrawal of resignation is made before his resignation has been accepted; and
- the withdrawal of resignation is made:

(i) With the consent of the shareholders or the Board; or

(ii) In accordance with the articles of the company.

169. REMOVAL OF DIRECTORS

Notified Date of Section: 01/04/2014

Q.1. MR. ADAM a 15% shareholder of a company and other shareholders have lost confidence in the Managing Director (MD) of the company. He is a director not liable to retire by rotation and was re-appointed as Managing Director for 5 years w.e.f. 1.4.2012 in the last Annual General Meeting of the company.

Mr. Adam seeks your advice to remove the MD after following the procedure laid down under the Companies Act, 2013:

(i) Specify the steps to be taken by Mr. Adam and the company in his behalf;

(ii) Draft a suitable resolution to be passed for removal of MD;

(iii) Is it necessary to state reasons to support the resolution for his removal?

(3 + 2 + 1=6 marks; 2012 - Dec)

Answer :(i)

- Under Section 169 of the Companies Act, 2013, a company may, by ordinary resolution, remove a director before the expiry of his tenure.
- For the purpose, special notice from a shareholder (Mr. Adam in the present case) shall be required to be given to the company for moving a resolution to remove a director.
- On receipt of notice, the company shall forthwith send a copy thereof to the director concerned (MD in the present case) and he shall be entitled to be heard on the proposed resolution at the meeting.
- Copy of the representation, if any, made by the director be also sent to all members of the company to whom notice of the general meeting is normally sent.
- In case, the representation is received too late, the same shall be read at the meeting. The representation need not be sent if the Company Law Board (now Tribunal) is satisfied that it will cause needless publicity for defamatory matter.
- Under Section 115 (Resolution requiring special notice), special notice of the intention to move the resolution shall be given not less than 14 days before the meeting.

In the present case, if the AGM is due to be held, Mr. Adam may send the special notice 14 days before the AGM. He already holds more than 10% shares in the company. Once the ordinary resolution is passed in the general meeting, MD will cease to be a director of the company and consequently MD of the company.

(ii) Mr. Adam may give special notice of his intention to move the followingresolution, as ordinary resolution: "RESOLVED THAT Mr.....Managing Director of the Company be and is hereby removed as a director of the company under Section 169 of the Companies Act, 2013 with immediate effect."

(iii) A statement of reasons is not necessary to support the resolution for removal of a director. L/C vs. Escorts Ltd.(2013) 59 Comp. Cases 548 (SC)

Q.2. MR. AMAN a 15% shareholder of a company and other shareholders have lost confidence in the Managing Director (MD) of the company. He is a director not liable to retire by rotation and was re-appointed as Managing Director for 5 years w.e.f. 01.04.2015 in the last Annual General Meeting of the company.

Mr. Aman seeks your advice to remove the MD after following the procedure laid down under the Companies Act, 2013.

(i) Specify the steps to be taken by Mr. Aman and the company in his behalf;

(ii) Draft a suitable resolution to be passed for removal of MD;

(iii) Is it necessary to state reasons to support the resolution for his removal?

(3 + 2 + 1=6 marks; 2016 - Dec)

Answer: (i)

- Under Section 169 of the Companies Act, 2013, a company may, by ordinary resolution, remove a director before the expiry of his tenure. For the purpose, special notice from a shareholder (MR. AMAN in the present case) shall be required to be given to the company for moving a resolution to remove a director.
- On receipt of notice, the company shall forthwith send a copy thereof to the director concerned (MD in the present case) and he shall be entitled to be heard on the proposed resolution at the meeting.
- Copy of the representation, if any, made by the director be also sent to all members of the company to whom notice of the general meeting is normally, sent.
- In case, the representation is received too late, the same, shall be read at the meeting. The representation need not be sent if the Company Law Board (now Tribunal) is satisfied that it will cause needless publicity for defamatory matter.
- Under Section 115 (Resolution requiring special notice), special notice of the intention to move the resolution shall be given not less than 14 days before the meeting.
  In the above case, if the AGM is due to be held, Mr. Aman may send the special notice 14 days before the AGM. He already holds more than 10% shares in the company. Once the ordinary resolution is passed in the general meeting, MD will cease to be a director of the company and consequently MD of the company.

(ii) Mr. Aman may give special notice or his intention to move the following resolution, as ordinary resolution: "RESOLVED THAT Mr.....
Managing Director of the Company be and is hereby removed as a director of the company under Section 169 of the Companies Act, 2013 with immediate effect."

(iii) A statement of reasons is not necessary to support the resolution for removal of a director. L/C vs. Escorts Ltd.(2013) 59 Comp. Cases 548 (SC).

Q.3. In a general meeting, a motion was put for removal of small shareholders' director. A small shareholder contended that only small shareholders are entitled to vote on this motion as it is related to removal of small shareholders' director and motion should be passed as special resolution. Is the argument valid? Analyse with reference to the provisions of the Companies Act, 2013. (4 marks; 2018 - Dec)

Answer:

A small shareholder director can be removed by in pursuance to Section 169 of Companies Act, 2013 by passing an ordinary resolution in a general meeting. All the shareholders are eligible to vote irrespective of small shareholder or otherwise. The argument hence is not valid.

170. REGISTER OF DIRECTORS AND KEY MANAGERIAL PERSONNEL AND THEIR SHAREHOLDING

Notified Date of Section: 01/04/2014

171. MEMBERS' RIGHT TO INSPECT

Notified Date of Section: 01/04/2014

172. PUNISHMENT

Notified Date of Section: 01/04/2014

MEETING OF BOARD AND ITS POWER

173. MEETINGS OF BOARD (38 QUESTIONS)

Notified Date of Section: 01/04/2014

Q.1. Decide under the provision of The Companies Act, 2013, whether notice of a board meeting is required to be sent to an interested director. (2 marks; 2013- Dec)

Answer:

Section 173 of The Companies Act, 2013 requires that notice must be given to every director. Therefore, notice must be givento a director even if he is precluded from voting on a proposed business. [John Shaw & Sons (Salford) Ltd v. Peter Shaw & John Shaw]

Q.2. Examine with reference to the provisions of the Companies Act, 2013 whether notice of a Board Meeting is required to be sent to the following persons:

(i)Alternate Director;

(ii) An interested Director;

(iii) A Director who has expressed his inability to attend a particular Board Meeting;

(iv) A Director who has gone abroad. (4 marks; 2014 - June)

Answer:

Notice of Board Meeting:

- **(i)** **Alternate Director:**Where a director goes abroad for a period of more than 3 months and an alternate director has been appointed in his place under Section 161 of The Companies Act, 2013 the notice should be served to the alternate director as well as on the original director who is outside India for the time being although there is no legal precedence in this regard, it would be a prudent practice on strictly construing Section 173.
- **(ii)** An Interested Director: Notice must be given to a director even though he is precluded from voting of the meeting on the business to be transacted.
- **(iii)** A Director who has expressed his inability to attend a particular Board Meeting: If a director states that he will not be able to attend the next Board Meeting, notice must be given to that director.
- **(iv)** A Director who has gone abroad: A director is entitled to a notice even though he is outside India provided he has made sufficient arrangement with the company for sending such notice to him. The right to receive notice cannot be waived.

Q.3. List out the Matters not to be dealt with in a meeting through Video Conferencing or Other Audio Visual Means as prescribed under the Companies Act, 2013 and the Rules made thereunder. (5 marks; 2016 - Dec)

Answer:

The following matters shall not be dealt with in any meeting held throughvideo conferencing or other audio visual means:

- (i) The approval of the Annual Financial Statements.
- (ii) The approval of the Board's report.
- (iii) The approval of the prospectus.
- (iv) The Audit Committee Meeting for consideration of Financial Statements including consolidated Financial Statements, if any to be approved by the Board under sub-section (1) of Section 134 of the act and
- (v) The approval of the matter relating to amalgamation, merger, demerger, acquisition and takeover.

Q.4. "Decision taken by the Board of Directors cannot be altered or changed by the shareholders even if they want to approve it with unanimous majority". Comment with reference to the provisions of the Companies Act, 2013. (3 marks; 2016 - Dec)

Answer:

- The statement is true.
- If some powers are vested in directors, they and they alone can exercise these powers.
- Shareholders will not dictate them how to use these powers. The directors while exercising their powers do not act as agents for the majority or even all the members and hence the members cannot supersede the powers of directors.
- The shareholders can however change the directors if they so wish, as the directors are elected or removed in general meeting but they just cannot dictate the director. If the power being exercised by the directors is given to them by the AOA. The shareholders can make' alterations to Articles.

Q.5. Examine with reference to the provisions of the Companies Act, 2013 whether notice of a Board Meeting is required to be sent to the following persons:
(i)An interested Director; "
(ii) A Director who has expressed his inability to attend a particular Board Meeting;
(iii) A Director who has gone abroad (for less than 3 months). (6 marks; 2017 - June)

Answer:

Notice of Board Meeting:

(i) **Interested director:** Section 173(3) of the Companies Act, 2013 makes it mandatory for every director to be given proper notice of every board meeting. It is immaterial whether a director is interested or not. In case of an Interested Director, notice must be given to him even though he is precluded from voting at the meeting on the business to be transacted.

(ii) **A Director who has expressed his inability to attend a particular Board Meeting:** In terms of Section 173(3) even if a director states that he will not be able to attend the next Board Meeting; notice must be given to that director.

(iii) **A director who has gone abroad:** A director who has gone abroad is still a director. Therefore, he is entitled to receive notice of board meetings during his stay abroad. The Companies Act, 2013, allows delivery of notice of meeting by electronic means also. This is important because the Companies Act, 2013 permits a director to participate in a meeting by video conferencing or any other audio visual means.

Q.6. Examine the following aspect related to convening of board meeting with reference to the provisions of the Companies Act, 2013:
(i)The Chairman of Greenhouse Limited convened a board meeting and two weeks' notice was served on all Directors of the company. Two of the independent directors on the board objected on the grounds that no proper agenda for the meeting was circulated.
(ii) Purple Florence Limited proposes to hold its board meeting at a shorter notice through video conferencing. (7 marks; 2018 - June)

Answer :(i)

- According to section 173 (3) of the Companies Act, 2013, a meeting of the Board shall be called by giving not less than 7 days' notice in writing to every director at his address registered with the company and such notice shall be sent by hand delivery or by post or by electronic means.
- According to the question, two of the independent directors on the Board has objected on the grounds that no proper agenda for the meeting was circulated.
- The Companies Act, 2013 does not specifically provide for sending agenda along with the notice of the meeting.
- However, generally as a good secretarial practice, the notice is accompanied with the agenda of the meeting.
- Thus, the contention of the independent directors objecting on the grounds that no agenda for the meeting was circulated, does not hold good.
- Further, the Chairman of Greenhouse Limited has convened the Board meeting by serving a two weeks' notice (i.e. more than 7 days).
- Hence, the meeting shall be valid.

(ii) According to Section 173 of the Companies Act, 2013:

(a)The directors can participate in a meeting of the Board either in person or through video conferencing or other audio visual means, as may be prescribed, which are capable of recording and recognising the participation of the directors and of recording and storing the proceedings of such meetings along with date and time. Further, Central Government may provide for matters which cannot be dealt in a meeting through video conferencing or other audio visual means.

(b) A meeting of the Board shall be called by giving not less than 7 days' notice in writing to every director at his address registered with the company.

- Provided that a meeting of the Board may be called at shorter notice to transact urgent business subject to the condition that at least one independent director, if any, shall be present at the meeting.
- Further, in case the independent directors are not present at such a meeting of the Board, decisions taken at such a meeting shall be circulated to all the directors and shall be final only on ratification thereof by at least one independent director, if any.
- Hence, Purple Florence Limited can hold a board meeting at a shorter notice through video conferencing, for transacting urgent business subject to the condition that at least one independent director, if any, shall be present at the meeting.

Further, if the independent directors are absent from the meeting of the Board, decision taken at such a meeting shall be circulated to all the directors and shall be final, only on ratification thereof by at least one independent director, if any.

Q.7. The Board of Directors of Best Consultants Limited, registered in Kolkata, proposes to hold the next board meeting in the month of May, 2017. They seek your advice in respect of the following matters:

(i)Can the board meeting be held in Chennai, when all the directors of the company reside at Kolkata?

(ii) Is it necessary that the notice of the board meeting should specify the nature of business to be transacted?

Advice with reference to the relevant provisions of the Companies Act, 2013.

(2+ 2 = 4marks; 2018 - Dec)

Answer :(i)

- There is no provision in the Companies Act, 2013 under which the board meetings must be held at any particular place.
- The Companies Act lays down the provisions for holding meetings by video conferencing, sending notices, procedures at the meeting etc.
- Hence, there is no difficulty in holding the board meeting at Chennai even if all the directors of the company reside at Kolkata and the registered office is situated at Kolkata provided that the requirements regarding the holding of a valid board meeting and the other provisions relating to the signing of register of contracts, taking roll calls, etc. are complied with.

(ii)

- Section 173(3) of the Companies Act, 2013 provides for the giving of notice of every board meeting of not less than seven days to every director of the company.
- There is no provision in the Act laying down the contents of the notice.
- Therefore, it may be construed that notice may be interpreted as intimation of the meeting and does not necessarily include the sending of the Agenda of the meeting.
- Although, considering the importance of Board Meetings and the responsibilities placed on the Directors for decisions taken at the meetings, it is inevitable for them to be properly prepared and informed about the items to be discussed at the Board Meetings.
- As a matter of good secretarial practice, the notice should include full details and particulars of the business to be transacted at the Board Meetings.
- The articles of association of the company may make it compulsory to do so in almost all cases.

Q.8. A meeting of the Board of 'No Holiday Ltd.' was held on a national holiday. However due to lack of quorum, the proceedings of the meeting could not be held and therefore the Chairman of the meeting decided with the consent of the majority that the Board meeting be adjourned to next Monday. However, the date fixed for the adjourned meeting happened to be a 'national holiday'. Advise and draw your analogy with reference to the provisions of the Companies Act, 2013, whether the adjourned meeting of the Board can be held on a day which is a public holiday. (4 marks; 2015 - Dec)

Answer:

The Companies Act, 2013 vide Section 173 (3) merely states that a meeting of the Board shall be called by giving not less than seven days' notice in writing to every director at his address registered with the company and such notice shall be sent by hand delivery or by post or by electronic means. It further provides for the board meeting to be held on shorter notice to transact urgent business subject to the condition that at least one independent director, if any, shall be present at the meeting.

Therefore, with reference to Section 96 and Section 173(3) of Companies Act, 2013 as far as the holding of a board meeting is concerned, it may be held at any place on any day including a national holiday if agreed by the directors.

However, when a board meeting is adjourned due to lack of quorum, then under section 174(4) the meeting shall stand automatically adjourned to the same day at the same time and place in the next week or if that day is a national holiday till the next succeeding day, which is not a national holiday, at the same time and place, unless the Articles provide otherwise. Therefore, the adjourned meeting cannot be held on a national holiday unless the Articles of the company provide that it can. The meeting will have to be held on the next working day to the national holiday.

Q.9. XYZ Ltd. has 6 directors on its Board of Directors. Out of 6 directors, 5 are foreigners and they reside in America. The company wants to convene its Board meeting in Mumbai but all the 5 directors are preoccupied and are not in a position to travel to India. Advice the company regarding conduct of such a Board meeting as per provisions of the Companies Act, 2013 and relevant Rules. Will the same Rules or provisions be applicable in case the company wants to approve annual financial statements in the Board meeting? (4 marks; 2017 - Dec)

Answer:

The directors of the company may participate in a meeting of Board/Committee of directors under the Companies Act, 2013 through video conferencing or other audio visual mean. "Video conferencing or other audio visual means" means audio-visual electronic communication facility employed which enables all the persons participating in a meeting to communicate concurrently with each other without ah intermediary and to participate effectively in the meeting.

A director participating in a meeting through use of video conferencing shall be counted for the purpose of quorum. The minutes shall also disclose the particulars of the directors who attend the meeting through electronic mode Therefore, to convene Board meeting, the director present in India shall act as Chairman and shall be physically present in Mumbai.

According to Rule 4 of the following matters shall not be dealt with in any, meeting held through video conferencing or other audio visual means:

(i) the approval of the annual financial statements;
(ii) the-approval of the Board's report;
(iii) the approval of the prospectus;
(iv) the Audit Committee Meetings for **2** consideration of financial statement including consolidated financial statement if any, to be approved by the board under **sub-section (1) of Section 134** of the Act; and
(v) The approval of the matter relating to amalgamation, merger, demerger, acquisition and takeover. Therefore, Annual financial statements cannot be approved in a meeting conducted through video conferencing. **Amendment made by Companies (Amendment) Act, 2017 Second Proviso to Section 173(2)-**

"Provided further that where there is quorum in a meeting through physical presence of directors, any other director -may participate through video conferencing or other audio visual means in such meeting on any matter specified under the first proviso."

Q.10. The Board of directors of a company met thrice in the year 2012 and the fourth meeting was not held for want of quorum. As a Company Secretary, examine the provisions of the Companies Act, 2013 and decide with reasons whether the company has complied with the requirement of minimum number of meetings to be held in a calendar year or violated the requirement thereof? (4 marks; 2013 - Dec)

Answer:

Meetings of Board of Directors and QUORUM	Section 173 of the Companies Act, 2013 deals with Meetings of the Board and Section 174 deals with quorum.	
	1. First Board Meeting	The Act provides that the first Board' meeting should be held within thirty days of the date of incorporation.
	2. Minimum Board Meetings and Time Lag	In addition to the first meeting to be held within thirty days of the date of incorporation, there shall be minimum of four Board meetings every year and not more one hundred and twenty days shall intervene between two consecutive Board meetings.
	3. In case of OPC, Small Company and Dormant Company	In case of One Person Company (OPC), small company and dormant company, at least one Board meeting should be conducted in each half of the calendar year and the gap between two meetings should not be less than Ninety days.
Conclusion	In the above case, as a Company Secretary I would like to comment that the Company has not complied with the requirement of minimum number of Board Meetings (four) to be held in a year as the Company has conducted only 3 (three) Board Meetings in the year 2012 and the fourth Board Meeting could not be held for the want of quorum. So, in the year 2012 the Company has violated the provisions of Section 173 of the Companies Act, 2013.	

Q.11. Comment on
A-director insists that his note of dissent be recorded in the minutes of the Board meeting which he attended and did not agree to some of the points of the agenda.
(5 marks; 2016 - Dec)

Answer:

1.	**Section 118(4) of Companies Act, 2013**	As per **Section 118(4) of Companies Act, 2013**in case of a meeting of the Board of Directors or of a committee of the Board, the minutes shall also contain: (a)the names of the directors present at the meeting; and (b)In the case of each resolution passed at the meeting, the names of the directors if any, dissenting from, or not concurring with the resolution. The Secretarial Standards on Meetings of Board of Directors **(SS-1)** also insist on inclusion of the same in the minutes. It provides that the fact of the dissent and the name of the Director who dissentedfrom the Resolution should be recorded.
2.	**Conclusion**	Therefore, the Director who attended the Board meeting and did not agree on certain points can insist that his dissent be recorded in the minutes.

Q.12. Comment on "Secretarial Standard does not empower Company Secretary of a company to call a meeting of Board of Directors on its own". (5 marks; 2018 - June)

Answer:

Secretarial Standard does not empower Company Secretary of a company to call a meeting of Board of Directors on its own.

Any Director of a company may, at any time, summon a meeting of the Board, and the Company Secretary or where there is no Company Secretary, any person authorised by the Board in this

behalf, on the requisition of a Director, shall convene a meeting of the Board, in consultation with the Chairman or in hisabsence, the Managing Director or in his absence, the whole-time Director, where there is any, unless otherwise provided in the Articles.

Q.13. Articles of Reality Ltd. provides that directors participating through audio-visual means in its Board meetings shall always be counted for quorum. Examine the validity of this provision with reference to the Companies Act, 2013. (5 marks; 2018 - Dec)

Answer:

Under Section 173 of Companies Act, 2013, read with Rules 3 and 4 of Companies (Meetings of Board and its powers) Rules, 2014, a director participating in a meeting through video conferencing or other audio visual means shall be counted for the purpose of quorum, unless he is to be excluded for any items of business under Rule 4.

As per Rule 4 the following matters shall not be dealt with in any meeting held through video conferencing or other audio visual means.

(i) The approval of the Annual Financial Statements;

(ii) The approval of the Board's report;

(iii) The approval of the prospectus;

(iv) The Audit Committee Meetings for consideration of financial statement including consolidated financial statement, if any, to be approved by the Board under sub section (1) of Section 134 of Companies Act, 2013; and

(v) The approval of the matter relating to amalgamation, merger, demerger, acquisition and takeover. Provided that in case where there is quorum in a meeting through physical presence of directors, any other director may participate through video conferencing or other audio visual means.

Q.14. A Board meeting of a listed public company was called at shorter notice to transact an urgent business. None of the Independent directors could attend the meeting. Examine the validity of resolution(s) passed at the meeting referring to the provisions of the Companies Act, 2013. (4 marks; 2018 - Dec)

Answer:

Accordable to Section 173(3) of the Companies Act, 2013 a meeting of the Board may be called at shorter notice to transact urgent business subject to the condition that at least one independent director, if any, shall be present at the meeting.

In case of absence of independent directors from such a meeting of the Board, decisions taken at such a meeting shall be circulated to all the directors and shall be final only on ratification thereof by at least one independent director, if any.

Accordingly, all decisions taken at the meeting needs to be circulated to all the directors and shall be final only on ratification of at least one independent director.

Q.15. Prepare an Agenda items for a Board Meeting with a minimum of any eight items to be discussed. (5 marks; 2019 - June)

Q.16. Director, Ravi, was appointed on 1st July, 2018. On 2nd July, 2018 he wrote to Managing Director[1] of the company to inspect the minutes of the board meeting held on 1st August, 2017. The Managing Director refused as he was not a director at that time. Ravi attended a meeting held on 1sl September, 2018 and resigned on 3rd October, 2018. On 4th October, 2018 he wrote to the Managing Director to send him a copy of the signed minutes of the meeting held on 1st September, 2018. Again, the Managing Director refused. Are the actions of Managing Director valid under Companies Act, 2013/Secretarial Standards? Comment. (4 marks; 2018 - Dec)

Answer:

According Para 7.7.1. of Secretarial Standard on Board Meeting a Director is entitled to inspect the Minutes of a Meeting held before the period of his Directorship. Further, Para 7.7.2 provides that a Director is entitled to receive a copy of the signed Minutes of a Meeting held during the period of his Directorship, even if he ceases to be a Director.

Therefore, the actions of managing director are not valid. Claim of Mr. Ravi for inspecting the Minutes of-a Meeting held before the period of his Directorship and for receiving a copy of the signed Minutes of a Meeting held during the period of his Directorship is valid.

Q.17. State whether a Board meeting of a company can be held at any place.
(4 marks; 2010 - June) [CSEM - II]

Answer: (a)

Secretarial Standards on Board Meeting (SS - 1)		
1.	Time, place, day of meeting	A meeting may be convened at any time and place, on any day, excluding a national holiday. Notice of the meeting, wherein the facility of participation through electronic mode is provided, shall clearly mention a venue, whether registered office or otherwise, to be the venue of the meeting and it shall be the place where all the recordings of the proceedings at the meeting would be made.
2.	Conclusion	Thus, we can say that as per SS-1, Board meetings can be held at any place.

Q.18. Comment on the following:
Board meetings of the company to be held at the registered office of the company during the working hours on a day that is not a national holiday. (5 marks; 2011 - Dec) [CSEM - II]

Answer:

Secretarial Standards on Board Meeting (SS-1)		
1.	Time, place, day of meeting	A meeting may be convened at any time and place, on any day, excluding a national holiday. Notice of the meeting, wherein the facility of participation through electronic mode is provided, shall clearly mention a venue, whether registered office or otherwise, to be the venue of the meeting and it shall be the place where all the recordings of the proceedings at the meeting would be made.
2.	Conclusion	Thus, we can say that as per SS-1, Board meetings can be held at any place.

Q.19. The Board of directors of Vedic Ltd. desirous of transacting certain matters through video conferencing, seek your advice on the matters which cannot be dealt with through video conferencing. Advise the Board. (4 marks; 2015 - June)

Answer:

Matters not to be dealt with in a meeting through video conferencing or other audio visual means.

Rule 4 of Companies (Meetings of Board and its Powers) Rules,2014	The following matters shall not be dealt with in any meeting held through video conferencing or other audio visual means.- (a) the approval of the annual financial statements: (b) the approval of the Board's report; (c) the approval of the prospectus; (d) the Audit Committee Meetings for consideration of accounts; and (e) The approval of the matter relating to amalgamation, merger, demerger, acquisition and takeover.

Q.20. Referring to the provision of Companies Act, 2013 advise the directors of a company in the following matters:
(i)The company wishes to obtain approval of the financial statement in a meeting held through video conferencing.
(ii)Due to urgency, the company wants to get its prospectus approved in a meeting held through video conferencing, (4 marks; 2019 - June)

Q.21. Jolly Retails Ltd. issued a notice for the meeting of its Board of directors scheduled for on 5th June 2019 at its corporate office. One of the directors intimated that he would be participating in the meeting through video conferencing. The Secretary contended that the meeting cannot be participated through video conferencing and that the concerned director cannot insist that the company should provide video conferencing facilities for attending the board meeting. Is the contention of the Secretary tenable as per the provisions of the Companies Act, 2013? Discuss with relevant case laws if any.

(5 marks; 2019 - June)

Q.22. State the legal requirements to be complied with by a. public company in respect of a Board Meeting.

Examine with reference to the provisions of the Companies Act, 2013 whether notice of a Board Meeting is required to be sent to the following persons:

(i) Alternative Director;

(ii) An interested Director;

(iii) A Director who has expressed his inability to attend a particular Board Meeting;

(iv) A Director who has gone abroad. **(8 marks; 2013-May)**

Answer:

Legal requirement to be complied with by a Public Company in respect of a Board Meeting [Sec. 173]

1. **First meeting of BOD:** Every company shall hold the first meeting of the BOD within thirty days of the date of its incorporation and thereafter hold a minimum number of four meetings of its BOD every year in such a manner that not more than one hundred and twenty days shall intervene between two consecutive meetings of the Board. **Sec. 173(1)**

Provided that the CG may, by notification, direct that the provisions of this sub-section shall not apply in relation to any class or description of companies or shall apply subject to such exceptions, modifications or conditions as may be specified in the notification.

2. **Mode of Participation of Directors:** The participation of directors in a meeting of the Board may be either in person or through video conferencing or other audio visual means, as may be prescribed, which are capable of recording and recognising the participation of the directors and of recording and storing the proceedings of such meetings along with date and time. **[Sec. 173(2)]**

Provided that the CG may, by notification, specify such matters which shall not be dealt with in a meeting through video conferencing or other audio visual means.

Provided further that where there is quorum in a meeting through physical presence of directors, any other director may participate through video conferencing or other audio visual means a in such meeting on any matter specified under the first proviso.

3. **Notice of Meeting:** A meeting of the Board shall be called by giving not less than seven days' notice in writing to every director at his address registered with the company and such notice shall be sent by hand delivery of by post or by electronic means.

Provided that a meeting of the Board may be called at shorter notice to transact urgent business subject to the condition that at least one independent director, if any, shall be present at the meeting:

Provided further that in case of absence of independent directors from such a meeting of the Board, decisions taken at such a meeting shall be circulated to all the directors and shall be final only on ratification thereof by at least one independent director, if any.

4. **Penalty:** Every off icer of the company whose duty is to give notice under this section and who fails to do so shall be liable to a penalty of twenty- five thousand rupees.

Notice of Board Meeting:

(i) If an alternate director has been appointed in the place of any director under Sec. 161 (2) of Companies Act, 2013 the notice should be served to the alternate director as well as the original director who is outside India for the time being.

(ii) Notice must be given to an interested director even though he is precluded from voting at the meeting on the business to be transacted.

(iii) If a director states that he will not be able to attend the next Board meeting, notice must be given to that director also.

(iv) The director is entitled to a notice even though he is outside India provided he has made sufficient arrangement with the company for sending such notice to him.

Q.23. Elaborate the provisions of the Companies Act, 2013 regarding Notice of Board Meeting. Draft a notice for the first meeting of the Board of Directors of India Timber Ltd. **(8 marks; 2015-Nov)**

Answer:

Provisions related to Notice of Board Meeting:

Notice of Board Meeting is required pursuant to Sec. 173(3) of the Companies Act, 2013.

According to this section, a meeting of the Board shall be called by giving not less than seven days' notice in writing to every director at his address registered with the company and such notice shall be sent by hand delivery or by post or by electronic means.

Provided that, a meeting of the Board may be called at shorter notice to transact urgent business subject to the condition that at least one independent director, if any, shall be present at the meeting.

Provided Further that In case, of absence of independent directors from such a meeting of the Board, decisions taken at such a meeting shall be circulated to all the directors and shall be final only on ratification thereof by at least one independent director, if any.

Rule 3 of the Companies (Meetings of Board and its Powers) Rules,

2014 further provides that the notice of the meeting shall inform the directors regarding the option available to them to participate through video conferencing mode or other audio visual means, and shall provide all the necessary information to enable the directors to participate through video conferencing mode or other audio visual means.

On receiving such a notice, a director intending to participate through video conferencing or audio visual means shall communicate his intention to the Chairperson or the company secretary of the company. He shall give prior intimation to the effect sufficiently in advance so that the company is able to make suitable arrangements in this behalf.

Any director who intends to participate in the meeting through electronic mode may intimate about such participation at the beginning of the calendar year and such declaration shall be valid for one year:

Provided that such declaration shall not debar him from participation in the meeting in person in which case he shall intimate the company sufficiently in advance of his intention to participate in person.

If the director does not give any intimation of his intention to participate that he wants to participate through the electronic mode, it shall be assumed that the director shall attend the meeting in person.

Further as per Sec. 173(4) of the Companies Act, 2013: Every officer of the company whose duty is to give notice under this section and who fails to do so shall be liable to a penalty of twenty five thousand rupees.

Draft Notice

India Timber Limited

Address: .....

Dated .....

To

Mr.....

Address:..... ....

..... (each director to be addressed individually)

Dear Sir,

Notice is hereby given that first meeting of the Board of Directors will be held at the registered office of the company at..... (address).....

(place) on..... (Monday), the 23rd of November at 11.30 AM.

Notice of First Meeting of BOD: First Board Meeting of Directors of India Timber Ltd. is to be held on 23rd of Nov at 11:30 AM at Registered Office.

Agenda:

(i) To elect the chairman of the meeting

(ii) To grant leave of absence, if any to the directors of the Co.

(iii) To take on record the declarations from directors

(iv) To authorise an officer of the company to sign the contracts

(v) To take note of duties of Directors

(vi) To take note on general disclosure of interest of Directors

(vii) To Designate a Promoter of Co.

Yours Faithfully

For India Timber Limited

(Secretary)

Q.24. What are the conditions to be fulfilled for calling meetings at shorter notice than as prescribed by Companies Act, 2013?

One of the directors, a senior professional, objected to receiving the notice by e-mail. Advise him. **(4 marks; 2016-May)**

Answer:

Calling Meeting at Shorter Notice

A meeting of the Board may be called at shorter notice to transact urgent business subject to the condition that at least one independent director, if any, shall be present at the meeting. **[Proviso to Sec. 173(3)]**

Following conditions to be fulfilled for calling meetings at shorter notice:

- At least one independent director, if any shall be present at the meeting.
- If no independent director is present at such meeting of the Board then the decisions taken at such meeting shall be circulated to all the directors and shall be final only on ratification thereof by at least one independent director, if any.

Present Case: Under Sec 173 (3) a meeting of the Board shall be called by giving not less than seven days notice in writing to every director at his address registered with the company and such notice shall be sent by hand delivery or by post or by electronic means.

So Senior Professionals objection is not valid.

Q.25. Examine the following with reference to the provision of the Companies Act, 2013:

(iii) The Chairman of Evergreen Limited convened a board meeting and two weeks' notice was served on all directors of the company. Two of the independent directors on the board objected on the grounds that no proper agenda for the meeting was circulated.

(2 marks; 2017-May)

Answer:

Sec. 173(3) of the Companies Act, 2013, provides for the giving of notice of every board meeting of not less than seven days to every director of the company. There is no provision in the Act laying down the contents of the notice. Hence it may be construed that notice may be interpreted as intimation of meeting and does not necessarily include the sending of the Agenda of the meeting.

Further, the Chairman of Evergreen Limited has convened the Board Meeting by serving a two weeks' notice (i.e. more than 7 days). Hence, the meeting shall be valid.

Q.26. Examine the following with reference to the provision of the Companies Act, 2013:

Sunshine Limited proposes to hold its board meeting at a shorter notice through video conferencing. **(2 marks; 2017-May)**

Answer:

According to Sec. 173(3) of the Companies Act, 2013, every board meeting shall be called by giving at least seven days notice in writing to all the directors at their registered address. The notice may be sent by hand delivery or by post or by electronic means.

Provided that a meeting of the Board may be called at shorter notice to transact urgent business subject to the condition that at least one independent director, if any, shall be present at the meeting.

Further, in case the independent directors are not present at such a meeting of the Board, decisions taken at such a meeting shall be circulated to all the directors and shall be final only on ratification thereof by at least one independent director, if any.

Present Case:

In light of above provisions, Sunshine Limited can hold a board meeting at a shorter notice through video conferencing, for transacting urgent business subject to the condition that at least one independent director, if any, shall be present at the meeting. Further, if the independent directors are absent from the meeting of the Board, decision taken at such a meeting shall be circulated to all the directors and shall be final only on ratification thereof by at least one independent director, if any.

Q.27. Examine the validity of the following with reference to the relevant provisions of the Companies Act, 2013 and/or decided case laws:

The Articles of Association of Big Limited provide that a meeting of the Board of Directors of the company shall be held at 11.00 A.M. on the last day of every quarter ending 31st March, 30th June, 30th September and 31st December. Relying on such a clause in the Articles, the' company did not send notices to the directors in respect of the Board meeting held on 30th September, 2008. Some of the directors have questioned the validity of the board meeting on the ground that individual notices have not been sent to the directors.

(2.5 marks; 2009-May)

Answer:

Notice of Board Meeting

Provision:

Sec. 173(3) of the Companies Act prescribes:

A meeting of Board shall be called by giving not less than seven days notice in writing to every director at his address registered with the company and such notice shall be sent by hand delivery or by post or by electronic means. **Sec 173(4)Lays down** that every officer of the

company whose duty is to give notice as aforesaid and who fails to do so shall be punishable with fine which may extend to twenty five thousand rupees."

It would, of course, be sufficient compliance with the provisions of Sec. 173 if, for instance, the directors are duly informed that in future the meeting would be held on the first Saturday of every month. But even then the notice of meeting should be given.

It has been held in Arunachalam Chettiar vs. Kaleshwarar Mills Ltd. (1957) I.M.L.J.254-A.I.R. 1957Mad. 309that where articles of the company provide that there will be a meeting on the first Saturday of every month, there will not be no necessity of the service of the notice under Sec. 173 in as much as a provision in the articles is sufficient compliance of Sec. 173. **Thus** if notice is not served in such a situation the proceedings at the meeting shall not become invalid provided

(i) All the directors attend the meeting and do not raise any objection to the non-service of notice; or

(ii) Where the absent directors make no complaint about the want of notice, particularly when the proceedings are ratified at a subsequent meeting whereat the absentee directors are present [Re State of Wyoming Syndicate (1901)2 Ch. 431],

Present Case:

Notice was not served on the plea that date of meeting is contained in the AOA. However, some of the directors have questioned the validity on the ground that individual notices have not been sent. Hence, the contention of objecting directors is valid and the proceedings of the said meeting invalid.

Q.28. Seafood Limited, a public limited company was incorporated on 1st April, 2015. The company has conducted four Board meetings during the financial year 2015-16 i.e. on 6th April, 2015, 28,h August, 2015, 30th September, 2015 and 30th March, 2016.

(i) Has the company contravened the provisions of the Companies Act, 2013 in respect-of the conduct of the meetings?

(ii) Will your answer differ if the company was incorporated under Section8of the Companies Act, 2013? **(4 marks; 2016-Nov)**

Answer:

Provision

As per Sec. 173(1) of the Companies Act, 2013, every company is required to hold its first Board Meeting within thirty days of its incorporation. Further, atleast four Board Meetings shall be held in every calendar year. The time gap between two consecutive Board Meetings shall not be more than one hundred and twenty days.

In case, where there is company licenced under Sec. 8 then such company as per Sec. 173(1) shall require to hold at least one Board Meeting within every six calendar months.

Present Case

(i) Seafood Ltd., a public limited company was incorporated on 1st April, 2015. The company has conducted four Board Meetings during the financial year 2015-16 i.e. on 6th April, 2015, 28th August 2015, 30th September, 2015 & 30th March, 2016. The company has validly called first Board Meeting as on 6th April, 2015 as it is held within thirty days of its incorporation. Thereafter, the Seafood Limited is required to hold three Board Meeting within 31st December, 2015 and time gap between two meetings shall not be more than one hundred and twenty days. Here, the Seafood Ltd. has not hold 3 meetings till 31st December, 2015 as it has considered financial year but it should required to take calendar year. So it amounts to contravention of Sec. 173(1) and also the time gap between 1st and 2nd Board Meetings is more than one hundred and twenty days.

So, Seafood Limited has contravened the provisions of Sec. 173(1) of the Companies Act, 2013 in respect of the conduct of subsequent board meeting.

(ii) If Seafood Limited is a company licenced under Sec. 8 then it has not contravened the provision of Sec. 173(1) as it has convened the Board Meeting on 6th April 2015, 28th August,

2015, 30th September, 2015 and 30th April, 2016. Seafood Ltd. has held at least one meeting within every six calendar months so it has not contravened the provisions of Sec. 173(1) of the Companies Act, 2013.

Q.29. 17th Board meeting of Jai Entertainment Ltd. was held at its registered office situated at B-17, Industrial Area, Suncity. While discussing the matter of appointment of Mr. Kaabil as Managing Director of the company, certain defamatory remarks were made by Mr. X, one of the directors. The draft minutes submitted by the Company Secretary also incorporated the indecent remarks of Mr. X. The chairman wants to remove those undesirable remarks from the minutes. Can he do so? (4 marks; 2017-May)

Answer:

As per Sec. 118 of the Companies Act, 2013, the statutory requirements relating to keeping of the minutes of meeting states that,

There shall not be included in the minutes, any matter which, in the opinion of the Chairman of the Meeting,

(a) Is or could reasonably be regarded as defamatory of any person; or

(b) is irrelevant or immaterial to the proceeding; or

(c) is detrimental to the interests of the company.

Thus, Mr. X can remove remarks from the minutes, as it is the discretionary power of the chairman with regard to inclusion or non inclusion of any matter in the minutes

Q.30. Draft a board resolution for appointment of Mr. Paul as the Managing Director for 5 years with effect from 1st July, 2009 of DBM Limited passed in the board meeting of the said company held on 6th June, 2009. (5 marks; 2009-May)

Answer:

The Required Board Resolution is as under:

Subject: Appointment of Managing Director

Passing Authority: Board of Director

Nature of the Resolution : Resolution with simple majority "Resolved that pursuant to the provisions of Sec. 197,198 and 203 read with Schedule V and other applicable provisions, if any, of the Companies Act, 2013, (including any statutory modifications or re-enactment(s) thereof, for the time being in force), subject to, the consent of the Board of Directors be and is hereby accorded for the appointment of Mr. Paul as Managing Director of the Company for a period of five years effective from 01st June, 2008 and that he may be paid remuneration by way of salary, commission and perquisites in accordance with Part II of Schedule V of the Act, 2013. **Resolved further that** the Company Secretary of the company be and in hereby authorized to do all such acts, deeds, matters and things as may be deemed necessary to give effect to this resolution.

Q.31. Mr. White is working as Chief Accountant in M/s. White Metal Limited. The Board of Directors of the said company propose to charge him with the duty of ensuring compliance with the provisions of the Companies Act, 2013 so that books of account can be properly maintained and Financial Statement including consolidated Financial Statement if any can be prepared as per the provisions of law.

Draft a "Board Resolution" for the said purpose. Also point out the consequences in case of default, when such a resolution is passed. (8 marks; 2011-Nov)

Answer:

Draft Board Resolution for Charging a person with the duty of compliance with the requirements of Sec. 128 & 129 of the Companies Act, 2013

Subject : Charging of Chief Accountant

Passing Authority : Board of Director

Nature of Resolution : Simple Majority

RESOLVED THAT pursuant to Sec. 128 &129 of the Companies Act, 2013. Mr. White Chief

Accountant of the company be and is hereby charged with the duty of seeing that the requirements of Sec. 128 & 129 of the Companies Act, 2013 are duly and fully complied with.

RESOLVED FURTHER THAT the said Mr. White is hereby entrusted with the authority to do such Act, through and deeds as may be necessary or expedient for the purpose of compliance with the requirements of the said Sec. 128 & 129 of Companies Act, 2013.

Consequences in case of default: According to Sec. 128(6), the following persons are responsible to ensure that the company duly complies with the provisions of Sec. 128:

(i) The Managing Director

(ii) The whole time Director in charge of finance

(iii) The Chief Financial Officer

(iv) Any other person charged by the Board.

Penalty for default is imprisonment upto one year or fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees or with both.

In any penal proceedings, it shall be a defense to prove that a competent and reliable person was charged with the duty of seeing that these requirements are complied with and that he was in a position to discharge that duty.

Q.32. Mr. N is appointed as an Additional Director by the Board of Directors of MNR Company Limited at its meeting held on 1st October, 2014 for a period as permitted by the law.

Draft a resolution and state the body which appoints N. (3 marks; 2014-Nov)

Answer:

Certified true copy of resolution passed at meeting of BOD of MNR Company Ltd. held at registered office of company on 1st Oct. 2014 at 10 am.

Type of Meeting : Board Meeting

Type of Resolution : Simple Majority

RESOLVED THAT pursuant to provisions of Sec. 161 and other applicable provisions (including any modification 1 enactment thereof) if any of Companies Act, 2013, Mr. N be and is hereby appointed as an Additional Director on Board of Directors of the company who shall hold office upto date of ensuing AGM of company.

RESOLVED FURTHER THAT Mr. N be and is hereby severally authorized to do all the acts deeds and things which are necessary to appointment of aforesaid person as an additional director of the company.

Q.33. The Board of Directors of RPS Limited decides to pass a resolution by circulation for allotment of 1,000 equity shares to Mr. A. Draft a specimen Board Resolution to be passed by circulation for this purpose. (4 marks; 2015-May)

Answer:

Specimen Board Resolution - Passed by circulation

RPS Limited

To

Mr. ..... , Director (Address in India only)

Dear Sir,

The following resolution, which is intended to be passed as a resolution by circulation as provided in Section 175 of the Companies Act, 2013, is circulated herewith as per the provisions of the said section.

If only you are not interested in the resolution, you may please indicate by appending your signature in the space provided beneath the resolution appearing herein below as a separate perforated slip if you are in favour or against the said resolution. The perforated slip may please be returned if and when signed within ..... days of this letter. However, it

need not be returned if you are interested in the resolution.

Yours Faithfully,
(Secretary)

RPS Limited
Resolution by circulation Passed
by the directors as per
circulation effected ..... 20 .....

"RESOLVED THAT the Board of Directors of RPS Limited decided for allotment of 1,000 equity shares to Mr. A."

Q.34. Draft the minutes of above referred meeting containing the matter regarding appointment of Managing Director in addition to the usual item's.

(4 marks; 2017-May)

Answer:

Draft Minutes

Minutes of 20th meeting of the Board of Directors of Jai Entertainment Limited held on ..... the ..... 2017, at 21, LIC Colony, Allahabad.

Present:

1..... Chairman
2..... Director
3..... Director
4..... Director

In attendance Secretary

1. Confirmation of minutes of the 16th Board meeting:

The minutes of the 19th meeting of the Board of Directors held on were considered and confirmed.

2. Appointment of Managing Director:

The Board noted the appointment of Shri ..... director of the company as the Managing Director of the company. In this connection, the followings resolved were passed:

Resolved that Shri ..... , who fulfils the conditions specified in Part I and II of Schedule V to the Companies Act, 2013, be and is here by appointed as the Managing Director of the company for a period of five yearseffective from ..... and that he may be paid remuneration by way of salary, commission and perquisites in accordance with Part II of Schedule V to the Act.

Resolved further that secretary of the company be and is hereby directed to file the necessary returns with the ROC and to all acts and thingsas may be necessary in this connection.

3. Next Board Meeting:

The Next meeting of the Board will be held on ..... the ..... 20..... at the registered office of the company.

4. Vote of thanks:

The meeting ended with a vote of thanks to the chair.

Q.35. Mr. Mutthu Swami is working as Chief Accountant in Eastern Pharmaceuticals Ltd. The Board of Director of the said company propose to charge him with the duty of ensuring compliance with the provisions of the Companies Act, 2013 so that accounts and Balance Sheet and Profit and Loss account can be maintained and prepared in accordance with the provisions of law for the time being in force. Draft a "Board Resolution" for the said purpose. Also point out the consequences in case of default, when such resolution is passed. **(5 marks; 2010-May)**

Answer:

Please refer 2011 - Nov

Q.36. Morbani Woods Limited decide to appoint Mr. Wahid as its Managing Director for a period of 5 years with effect from 1st May, 2013. Mr. Wahid fulfils all the conditions as specified In Part I and Part II of Schedule V of the Companies Act, 2013.

The terms of appointment are as under:

(i) Salary[1] Rupees one lakh per month;

(ii) Commission, as may be decided by the Board of Directors of the company;

(iii) Perquisites:

Free Housing,

Medical reimbursement upto Rs. 10,000 per month,

Leave Travel concession for the family,

Club membership fee,

Personal Accident Insurance Rs. 10 lakh,

Gratuity, and

Provident Fund as per Company's policy.

You, being the Secretary of the said Company, are required to. draft a resolution to give effect to the above, assuming that Mr. Wahid is already the Managing Director in a public limited company. (8 marks; 2013-May)

Answer:

Draft Board Resolution

RESOLVED THAT consent of all the directors present at the meeting be and is hereby accorded to the appointment of Mr. Wahid, who is already the Managing Director of another public limited company and fulfils the conditions as specified in Part I and II of Schedule V of the Companies Act, 2013, as the Managing Director of the company for a period of 5 years effective from 1st May, 2013 subject to approval by a resolution of shareholders in a general meeting and that Mr. Wahid may be paid remuneration as follows:

(i) Salary of one lakh rupees per month

(ii) Commission

(iii) **Perquisites:** Free Housing, Medical reimbursement upto Rupees Ten thousand per month, Leave Travel Concession for the family, Club membership fee, Personal Accident Insurance of Rupees Ten Lakhs, Gratuity, Provident Fund etc.

RESOLVED FURTHER THAT in the event of loss or inadequacy of profits, the salary payable to him shall be subject to the limits specified in Schedule V.

RESOLVED FURTHER THAT the Secretary of the company be and is hereby authorised to prepare and file with the Registrar of Companies necessary Return in respect of the above appointment.

Q.37. The Board of Directors of XYZ Limited decided to pass a resolution to purchase 35,000 equity shares of Rs. 100 each of PQR Limited at a meeting. Draft a specimen Board Resolution to be passed at the said meeting. (4 marks; 2013-Nov)

Answer:

Board Resolution of XYZ ltd. for Purchase of Equity Shares

The following resolution was passed at the meeting of Board of Directors of XYZ Ltd. held at its Registered Office situated at Sector 62, Noida on 7"[1] of December at 9 AM.

'RESOLVEDTHAT pursuant to provisions of Sec. 186 of the Companies Act, 2013 the company can purchase 35,000, equity shares of Rs. 100 each of PQR Ltd. and the resolution be passed by all the directors present unanimously.

Q.38. Mr. Shukla is working as General Manager (Finance and Accounts) in Target Limited. The Board of Directors of the said company propose to entrust him with the duty of ensuring compliance with the provisions of the Companies Act, 2013 so that the books of accounts, balance sheet, statement of profit and loss and the cash flow statements can be prepared and maintained in accordance with law.

Draft a Board Resolution for the said purpose. Also point out the consequences in case of default when such a resolution is passed. (4 marks; 2017-Nov)

Answer:

Draft Board Resolution for Charging a person with the duty of compliance with the requirements of Sec. 128 & 129 of the Companies Act, 2013:

Subject	Charging of Chief Accountant
Passing Authority:	Board of Director
Nature of Resolution	Simple Majority

RESOLVED THAT pursuant to Sec. 128 & 129 of the Companies Act, 2013. Mr. Shukla, GM (Finance and Accounts) of the company be and is hereby charged with the duty of seeing that the requirements of Sec. 128 & 129 of the Companies Act, 2013 are duly and fully complied with.

RESOLVED FURTHER THAT the said Mr. Shukla hereby entrusted with the authority to do such Act, through and deeds as may be necessary or expedient for the purpose of compliance with the requirements of the said Sec. 128 & 129 of Companies Act, 2013.

Consequences in case of default:

According to Sec. 128(6), the following persons are responsible to ensure that the company duly complies with the provisions of Sec. 128:

(i) The Managing Director

(ii) The Whole Time Director in charge of finance

(iii) The Chief Financial Officer

(iv) Any other person charged by the Board.

Penalty for default is imprisonment upto one year or fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees or with both. In any penal proceedings, it shall be a defense to prove that a competent and reliable person was charged with the duty of seeing that these requirements are complied with and that he was in a position to discharge that duty.

174. QUORUM FOR MEETINGS OF BOARD(8 QUESTIONS)

Notified Date of Section: 01/04/2014

Q.1. The board meeting of MANO LTD. was held on 10th June, 2014 at Lucknow at 10.30 a.m. At the time of starting the board meeting, the number of directors present were 8. The total number of directors in the company were 10. The board transacted eight items in the board meeting on that day. At 12 noon after the completion of four items in the agenda, 5 directors left the meeting.

Examine the validity of all these transactions explaining the relevant provisions of the Companies Act, 2013. (4 marks; 2014 - Dec)

Answer:

- Section 174 of the Companies Act, 2013, provides for the quorum for meeting.
- The quorum for a meeting of the Board of Directors of a company shall be one third of its total strength (any fraction contained in the said one" third being rounded off as one), or two directors, whichever is higher. Where at any time the number of interested directors exceeds or is equal to two thirds of the total strength, the number of remaining directors, that is to say, the number of directors who are not interested present at the meeting being not less than two shall be the quorum during such time.

- In this case, the quorum is 4 (i.e. 1/3rd of 10 = 3 1/3 rounded off as 4). Hence, the quorum was present at the time of commencement of meeting. As a rule, in the case of a meeting of the Board of Directors, the meeting cannot transact any business, unless a quorum is present at the time of transacting the business.
- It is not enough that a quorum was present at the commencement of the business.
- The quorum of the Board is required at every stage of the meeting and unless a quorum is present at every stage, the business transacted is void. (Balakrishna V. Balu SubudhiAIR 1949 Pat 184).

In the given situation four items were transacted with the quorum and thus they are valid. Other four items were transacted after 5 directors left the meeting resulting in the reduction of quorum as only 3 directors were present as against the required quorum of 4 directors. Hence, such four transactions are void.

Q.2. There are 9 (nine) directors in a company and out of which 2 offices of the directors have fallen vacant. What will be the quorum for the board meeting under the provisions of the Companies Act, 2013? (2 marks; 2015 - June)

Answer:

- According to Section 174(1) of the Companies Act, 2013, the quorum for a meeting of the Board of Directors of a company shall be one third of the total strength of Board (any fraction contained in the said one third being rounded of as one) or two directors whichever is higher.
- The total strength is to be derived after deducting the number of directors whose offices are vacant.
- Therefore, where total number of directors is 9 and 2 offices of the directors have fallen vacant, we find: 1/3 of (9-2) = 1/3 of 7 = 2 1/3 directors which will be rounded off as 3.
- Therefore, being higher than 2, 3 directors would constitute the quorum for the Board Meetings.

Q.3. Out of 9 directors in Rooftop Ltd., 5 are Indian nationals, 3 are foreign residents and one is a person of Indian origin. The articles of the company stipulate that quorum for a Board meeting shall be 5 directors of which at least one director shall be a foreign resident. Referring to the provisions of the Companies Act, 2013, examine the validity of the above provision in the articles. (4 marks; 2016 - Dec)

Answer:

1	**Section 174**	**Section 174** states that quorum for a meeting of the Board of Directors of a company shall be one third of its total strength or two directors, whichever is higher. Any fraction of a number shall be rounded off as one. Further according to Secretarial Standard on Board Meeting **(SS-1),**where the Quorum requirement provided in the Articles is higher than one-third of the total strength, the company shall conform to such higher requirement.
2	**Conclusion**	**Hence, in the given case** of Rooftop Ltd, the quorum as given in the Articles of the Company stands valid.

Q.4. Comment on

A meeting of the Board of directors was scheduled to take place at the factory premises of a company and not at the registered office. At the scheduled date and time, the required quorum was not present. The Chairman of the meeting announced that the meeting is dissolved. (5 marks; 2016 - Dec)

Answer:

1.	**Section 174 of the Companies Act, 2013**	As per **Section 174 of the Companies Act,-2013**the meeting of the Board of Directors shall be adjourned due to want of quorum, unless the articles provide shall be held to the same day at the same time and place in the next week or if the day is National Holiday, the next working day at the same time and place.
2.	**Conclusion**	Hence, the decision of Chairman to dissolve the meeting is invalid. The

		meeting shall be held at same place i.e. factory premises and at same time in the next week provided it is not a national holiday.

Q.5. Star Gen Ltd. held a meeting of its Board of directors on 31st October, 2010 at its registered office. Though the company has 12 directors on its Board, only 5 directors were present at the commencement of the meeting. Thereafter, even while the meeting was in progress, 2 more directors left the meeting and the remaining directors carried on the proceedings of the meeting. Discuss the validity of decisions, if any, taken by the remaining 3 directors. (4 marks; 2012 - Dec) [CSEM - II]

Answer:

1.	Quorum of the meeting	One third of total strength or two, directors, whichever is higher, shall be the quorum for a meeting.
2.	What, if the numbers of directors is reduced below the quorum due to resignation etc.	If due to resignations or removal of director(s), the number of directors of the company is reduced below the quorum as fixed by the Articles of Association of the company, then, the continuing Directors may act for the purpose of increasing the number of Directors to that required for the quorum or for summoning a general meeting of the Company. It shall not act for any other purpose.
3.	. Participation through video conferencing or other audio visual means	For the purpose of determining the quorum, the participation by a director through Video Conferencing or other audio visual means shall also be counted. Amendment made by Companies(Amendment) Act, 2017 Second Proviso to Section 173(2)- "Provided further that where there is quorum in. a meeting through physical presence of directors, any other director -may participate through video conferencing or other audio visual means in such meeting on any matter specified under the first proviso."
4.	Quroum in case of interested directors	If at any time the number of interested directors exceeds or is equal to two-thirds of the total strength of the Board of directors, the numberof directors who are not interested and present at the meeting, being not less than two shall be the quorum during such time.
5.	Adjournment of meeting due to want of quorum	The meeting shall be adjourned due to want of quorum, unless the articles provide shall be held to the same day at the same time and place in the next week or if the day is National Holiday, the next working day at the same time and place.
6.	Conclusion	Therefore, in the given case during the proceeding of the meeting, the prescribed quorum was not present. Hence, the business transacted is void.

Q.6. Pipliya Powders Limited has four Directors. A Board meeting was convened. It was attended by two Directors only and they appointed Mr. Soorajbhan who was related to both of them, as an Additional Director. Decide, whether the said appointment is valid under the provisions of the Companies Act, 2013?

Draft a "Board Resolution" for appointment of a person as an Additional Director in a public company. (8 marks; 2012 - Nov)

Answer:

Provision

Contracts voted upon by the Interested Director shall be void where:

1. His exclusion from quorum would have resulted in a situation of no quorum.

2. Exclusion of his vote would have resulted in failure of such resolution. [Victors Ltd. Vs firestone Tyre & Rubber Co.]

Present Case:

Pipliya Powders Limited has four Directors. A Board meeting was convened. It was attended by two Directors only and they appointed Mr. Soorajbhan who was related to both of them, as an

Additional Director.

Thus the appointment of Mr. Soorajbhan as an Additional Director is void.

Draft Board Resolution:

"Resolved that pursuant to the AOA of the company and Sec. 161 of the Companies Act, 2013, Mr. X be and is hereby appointed as an Additional Director of the company with effect from 1.4.2015 to hold office up to date 'of the next AGM of the company.

Resolved further that Mr. Y who is appointed as an additional director will enjoy the same powers and rights as other directors.

Resolved further that Mr. Z, Secretary of the company be and is hereby authorized to electronically file **necessary** returns with the Registrar of Companies by putting his digital signature and to do all other necessary things required under the Act."

Q.7. The board meeting of MNO Ltd. was held on 10th May, 2008 5t Chennai at 11 a.m. At the time of starting the board meeting the number of directors present were seven. The total number of directors were ten. The board transacted ten items in the board meeting. At 12 noon after the completion of four items in the agenda four directors left the meeting. Examine the validity of these transactions explaining the relevant provisions of the Companies Act, 2013. (5 marks; 2008- Nov)

Answer:

Quorum means the minimum number of directors competent to transact and vote on any business, i.e. the minimum number of directors who are authorised to act as a Board and who do not suffer any disability at a duly convened Board Meeting. Unless the required quorum is present, no business can be transacted at a Board Meeting.

The provisions relating to quorum are contained in Sec. 174.

As per Sec. 174 the quorum shall be higher of:

(i) one third of total strength (any fraction contained in that one-third shall be rounded off as one), or

(ii) Two directors.

If the quorum is not present as per Sec. 174 and the number of interested directors exceed or is equal to two third of total strength, then the quorum shail be higher of:

(i) Number of remaining directors present at the meeting (i.e., disinterested directors): or

(ii) Two directors,

Meaning of 'total strength': 'Total strength' means the total strength of the BOD of a company, as reduced by the number of directors whose places are vacant at that time.

Present Case:

Total No. of Directors = 10 1/3rd of 10 Directors = 3.33 or 4.

No. of Directors present:

(i) Seven at the time of commencement of Board Meeting till 12 noon during which four items of agenda were undertaken.

(ii) three after 12 noon, after which 6 items of agenda were undertaken.

Validity of Transaction:

Since seven directors were present at the time of commencement of Board Meeting, the meeting has been validly held.

However, after transacting four items on agenda, four directors left, because of which the number of directors present has fallen below the quorum required. Since, quorum is required at the time of transacting each and every business, the remaining six agenda items cannot be validly discussed and voted upon. Therefore, resolutions passed in respect of these six agenda items are void, and have no legal effect.

Q.8. Mutual Distrust Private Limited has two shareholders namely A and B holding fifty one percent and forty nine percent respectively. Both are working as directors. Due to differences between them, A decides to hplda board meeting on 30,h April, 2014 but the same could not be held due to non-co-operation from B and lack of quorum. Advice A about the steps that can be taken under the Companies Act, 2013 to resolve the matter.

(8 marks; 2014 - May)

Answer:

Provision:

Quorum means the minimum number of directors competent to transact and vote on any business, i.e. the minimum number of directors who are authorised to act as a Board and who do not suffer any disability at a duly convened Board Meeting. Unless the required quorum is present, no business can be transacted at a Board Meeting.

The provisions relating to quorum are contained in Sec. 174.

As per Sec. 174 the quorum shall be higher of:

(i) one third of total strength (any fraction contained in that one-third shall be rounded off as one), or

(ii) Two directors.

Note:

- Where a quorum is not present, the Board meeting cannot commence and so no business can be transacted at the Board meeting. In such a case the Board meeting shall be adjourned as per the provisions of Sec 174. As per Sec. 174, where a Board meeting is not held for want of quorum , it shall automatically stand adjourned to the same day, time and place in the next week or if that day is a public holiday, then to next succeeding day, which is not a public holiday. However, a company may, by its articles, prescribe the day when the adjourned meeting will be held. In the absence of any statutory provision with respect to absence of quorum in an adjourned Board meeting it is implied that an adjourned Board meeting has not been exempted from the requirement of quorum.
- If at the adjourned meeting a quorum is not present within half an hour from the time appointed for holding the meeting the members present shall be the quorum.

Present Case:

Mr. A should adjourn the meeting and if at that meeting also Mr. B is not present then Mr. A alone cannot conduct a board meeting.

175. PASSING OF RESOLUTION BY CIRCULATION (4 QUESTIONS)

Notified Date of Section: 01/04/2014

Q.1. As the Company Secretary of Joy Ltd., what steps would you take in case the scheduled Board Meeting could not complete the ' agenda slated thereat. The items of business left un transacted are of extreme importance for the company's growth and the same cannot be deferred until the next Board meeting because of urgency. Advise the Board about the steps to be taken to get the untransacted items passed.

(4 marks; 2015 - Dec)

Answer:

1.	**Un transacted Items to be passed by circulation**	Resolution may be passed in respect of Board approvals in one of the two ways, either at the Board Meeting or by circulation. The items which could not be transacted and decided at the board meeting, if cannot be deferred till the next board meeting may be passed by circulation provided they do not include such items as are required to be passed only at the meeting of directors under **Section 179(3) of the Companies Act, 2013.**
2.	**Procedure as per Section 175 and**	In order to get the un transacted item pass the Board may consider the following procedure as laid down in **Section 175** and Point no. **6**

	Point no 6 of Secretarial Standards	of Secretarial Standards on Board Meetings.	
		1.	The resolution in draft form together with the necessary papers may be circulated to the directors or members of committee at their address registered with the company in India by post, hand delivery or through electronic means which may include e-mail or fax.
		2.	The said resolution must be passed by majority of directors or members entitled to vote.
		3.	If more than one third of directors require that the resolution must be decided at the meeting, the chairperson shall put the resolution to be decided at the meeting.
		4.	Each business proposed to be passed by way of Resolution by circulation shall be explained by a note setting out the details of the proposal, relevant material facts that enable the Directors to understand the meaning, scope and implications of the proposal, the nature of concern or interest, if any of any Director in the Proposal, which the Director had earlier disclosed and the draft of the Resolution proposed.
		5.	The note shall also indicate how a Director shall signify assent or dissent to the Resolution proposed and the date by which the Director shall respond.
		6.	Each Resolution shall be separately explained. The decision of the Directors shall be sought for each Resolution separately.
		7.	Not more than seven days from the date of circulation of the draft of the Resolution shall be given to the Directors to respond and the last date shall be computed accordingly.
		8.	The Resolution, if passed, shall be deemed to have been passed on the last date specified for signifying assent or dissent by the Directors or the date on which assent from more than two-third of the Directors has been received, whichever is earlier, and shall be effective from that date, if no other effective date is specified in such Resolution. 9. The resolution passed through circulation be noted at a subsequent meeting and made part of the minutes of such meeting.

Q.2. In the course of administration of the affairs of a limited company, Chairman of the Board of directors came across a matter which required the approval by way of a board resolution. In the prevailing circumstances, it is not possible to convene and hold a Board meeting. The chairman approaches you to advise him of the way and the relevant procedure to obtain such approval without holding the Board meeting. Advise the chairman, taking into account the relevant provisions of the Companies Act, 2013.

(8 marks;2012-May)

Answer:

Circular Resolution:

Please refer 2009 - May [1] {C} (c) on page no. 112

Q.3. Chairman of Board of Directors of ABC Ltd. came across a matter, which required the approval by way of a board resolution. In the prevailing circumstances, it is not possible to convene and hold a Board Meeting. The Chairman approaches you to advise him of the way and the relevant procedure to obtain such approval without holding the Board Meeting. You are required to advise him on the matter as per the provisions of the Companies Act, 2013. **(5 marks; 2009 - May)**

Answer:

Circular Resolution:

In some urgent matters, it may not be possible to wait till the next meeting of Board or its Committee. In such case, it is permissible to pass a resolution by circulation - **Sec. 175(1) of the 2013 Act.**

This is termed as 'circular resolution'.

A Company shall be deemed to have duly passed a resolution by the Board or Committee by circulation if the following conditions are fulfilled under Sec 175(1):

(i) The resolution in draft together with the necessary papers, if any, has been circulated to all the directors or members of the committee, as the case may be.

(ii) At their addresses in India registered with the company by hand delivery or by post or by courier or through such electronic means as may be prescribed and

(iii) Has been approved by a majority of the directors or members of the committee who are entitled to vote on the resolution.

Again as per Sec. 175(2)

The said circular resolution shall be noted at a subsequent meeting of the Board or Committee thereof, as the case may be and made part of the minutes of such meeting.

When circular resolution requires confirmation at Board Meeting

If not less than one-third of Board of Directors of a company for the time being requires that any resolution under circulation should be decided at a meeting, the chairman shall put the resolution to be decided at a meeting of the Board. [Proviso to Sec. 175(1)]

Present Case:

- A draft resolution, in duplicate, along with necessary papers, should be sent to all Directors of Board or members of the Committee to their address registered with the company in India by hand delivery or by post or courier or through electronic means. Sending by courier, hand delivery or post should be only to address in India [Sec. 175(1)]
- As per Secretarial Standard SS-7 on circular resolution (effective from 6.11.2008), Chairperson of Board or M Dor in their absence, any director should decide whether approval should be obtained by circular resolution.
- The draft resolution should be sent to all directors of Board/members of Committee in India, even if some of them are not entitled to vote.
- It is legally not necessary to send draft resolution to directors out of India though it is a good practice of corporate governance to do so, so that they are kept informed.
- The issue does not arise if the draft resolution is sent by electronic means (unless a company is nasty and wants to avoid sending draft resolution to directors outside India).
- The draft resolution should be approved by majority of directors who are entitled to vote on the resolution [Sec. 175(1)]
- They should sign and return one copy of draft resolution in token of approval. It is a good secretarial practice to give serial numbers to these circular resolutions.
- Regulation 75 of Model Articles of company limited by shares [as contained in Table-F of Schedule I of the 2013 Act] reads as follows - 'Save as otherwise expressly provided in the Act, resolution in writing signed by all directors or all members of Committee, for the time being entitled to receive notice of the meeting of Board or Committee, shall be as valid and effectual as if it had been passed at the meeting of Board or Committee.

Thus, the regulation expects unanimous approval. However, fortunately, it starts with the words save as otherwise expressly provided in the Act'. Hence, provisions of Sec. 175 of the Companies Act, 2013 Act will prevail. As per Secretarial Standard SS-5 on Minutes issued by ICSI and also as per Secretarial Standard SS-7, the circular resolutions should be noted and minutized in Board Meeting.

-As per Secretarial Standards (SS-1 and SS-7) of ICSI, a circular resolution should be sent in draft form with necessary papers to all directors/all members of committee as applicable. It can be

sent by hand, post, fax, email or any other electronic mode. It will be deemed to have been passed on the date on which it is signed, dated and approved by all directors then in India (not less than quorum) or approved by majority of directors entitled to vote on the resolution, whichever is earlier. The circular resolution should be noted at next Board meeting and recorded in the Minutes of such meeting. Minutes should record dissent, if any, and also that interested directors did not vote.

Q.4. Proximo Limited has 9 Directors out of whom 3 Directors have gone abroad. The Chairman had an urgent matter to be approved by the Board of Directors which could not be postponed till the next Board meeting. The Company, therefore, circulated the resolution for approval of the Directors. 4 out of 6 Directors in India approved the resolution. The Company claimed that the resolution was passed. Examine with reference to the provisions of Sec. 175 of the Companies Act, 2013 the validity of the resolution. (5 marks; 2009-Nov)

Answer:

Provision: Please refer 2009 - May

Present Case:

Total No. of Directors = 9

Directors abroad = 3

Directors present in India = 6

Required Quorum = 1/3 of 9 = 3

Therefore resolution may be passed as 6 Directors are present in India.

However, the resolution will be passed only if :

(i) A majority of all the director (whether in India or outside India) who are entitled to vote in favour of the resolution i.e. five Directors :

(ii) All the directors who are present in India vote in favour of the resolution, i.e. six directors

In the given case, the resolution has been approved by 4 out of 6 directors who are for the time being in India. Neither the approval of all the directors in India is obtained (viz. six) nor the approval of majority of those directors who are entitled to vote (whether in India or outside India) is obtained (viz. five), hence the resolution shall not be deemed to be passed by circulation, thus, the resolution is not validly passed.

176. DEFECTS IN APPOINTMENT OF DIRECTORS NOT TO INVALIDATE ACTIONS TAKEN (3 QUESTIONS)

Notified Date of Section: 12/09/2013

Q.1. MR. WELDON was appointed as a director in SAM LTD. on 1.10.2011. Certain acts were done by the Board of Directors, of which MR. WELDON also formed part. Later, on 1.9.2012, certain defect was found in the appointment of MR. WELDON as director. Discuss whether the acts done by the Board Meeting can be considered as invalid owing to such defect being found at a later date? (6 marks; 2012 - Dec)

Answer:

According to Section 176 of The Companies Act, 2013, (Defects in appointment of directors not to invalidate actions taken) No act done by a person as a director shall be deemed to be invalid, notwithstanding that it was subsequently noticed that his appointment was invalid by reason of any defect or disqualification or had terminated by virtue of any provision contained in this Act or in the articles of the company:

Provided that nothing in this section shall be deemed to give validity to any act done by the director after his appointment has been noticed by the company to be invalid or to have terminated.

Q.2. A was appointed director of the company in its annual general meeting. He took over the office and started acting on behalf of the company as its director. Subsequently it was found that the appointment of the director was not valid because in the meeting where he was appointed certain members who had voted were not qualified to vote and certain members had voted twice by mistake. There were also certain mistakes in the counting of the votes. As such, the appointment of the director was held to be invalid. Would the acts of A, done by him as director be valid and binding upon the company?

(3 marks; 2013 - Dec)

Answer:

- Yes, According to Section 176 (Defects in appointment of directors not to invalidate actions taken) of the Companies Act, 2013 all the acts of a director are valid notwithstanding the fact that his appointment is afterward discovered to be invalid, by reason of any default and defect in his appointment. This is to protect outsiders as well as members dealing with the company.
- In this case the defects in the appointment of the director were found out subsequent to his appointment.
- The director had no knowledge of the defects until he had started acting as a director.
- The validity of the acts of the director cannot be questioned just on the basis of irregularities subsequently discovered in the appointment of the director.
- All the acts done by director are valid and binding on the company.

Q.3. Advise the Board of Director of Spectra Papers Limited regarding validity and extent of their powers, under the provisions of the Companies Act, 2013 in relation to the following matters:

(i) Buy-back of the shares of the Company, for the first time, upto 10% of the paid up equity share capital without passing a special resolution.

(ii) Delegation of Power to the Managing Director of the company to invest surplus funds of the company in the shares of some companies. **(5 marks; 2010-May)**

Answer:

(i) **As per Sec. 179 of the Companies Act, 2013,** the Board is entitled to exercise all such powers as the company is authorised to exercise. Similarly, the Board is authorised to do all such acts and things as the company is authorised to do. However, the provisions of Sec. 179 are subject to the provisions of Sec. 180, 181,182 of Companies Act, 2013.

The board shall exercise the powers mentioned under Sec. 179(1) only by means of a resolution passed at a meeting of the Board. Among other powers, the powers to buy-back is also included in Section 179. First proviso to Section 68(2)(b) empowers the Board to buy-back not more than ten percent of the total paid-up equity capital and free reserves of the company.

Present Case:

In the present case, the Board is authorised to buy-back the shares of the company upto ten percent of the paid up equity share capital, provided resolution authorising the buy-back is passed at a Board meeting and not by circular resolution.

(ii) **As per Sec. 179,** the Board is entitled to exercise all such powers as the company is authorised to exercise. Similarly, the Board is authorised to do all such acts and things as the company is authorised to do. However, the provisions. of Sec. 179 are subject to the provisions of Sec. 180, 181, 182 of Companies Act, 2013.

As per Sec. 179, the powers relating to investment of funds of the company shall be exercised by the Board at a Board Meeting only However, such power may be delegated by the Board, subject to the following three conditions:

(a) The powers may be delegated to a committee of directors, managing director, manager, a principal officer of the company or a principal officer of the branch office.

(b) The delegation of power is made by passing a resolution at a Board meeting.

(c) The resolution passed at the Board meeting shall specify -

- the total amount upto which the funds may be invested; and

- the nature of investments that may be made.

However, Sec. 186 requires that the power relating to investment of funds of the company shall be exercised by the Board by passing a unanimous resolution at a Board meeting only. Therefore, such power cannot be delegated by the Board to any other person.

Present Case:

In the present case, the power to invest surplus funds of the company in the shares of some companies is proposed to be delegated to the managing director of the company. Such delegation is not permissible at law in view of provisions of Sec. 186.

177. AUDIT COMMITTEE (9 QUESTIONS)

Notified Date of Section: 01/04/2014

Q.1. Write short note on the Constitution of Audit Committee under Sec. 177 of the Companies Act, 2013. (3 marks; 2015- Dec)

Answer:

Audit Committee [Section 177]

Constitution of Audit Committee: As per the Section 177 of the Companies Act, 2013, every listed public company and the following classes of companies shall constitute an Audit Committee:

(a) All public companies with a paid up capital of ten crore rupees or more;

(b) All public companies having turnover of one hundred crore rupees or more

(c) All public companies, having in aggregate, outstanding loans or borrowings or debentures or deposits exceeding fifty crore rupees or more.

The paid up share capital or turnover or outstanding loans, or borrowings or debenture or deposits, as the case may be, as existing on the date of last audited Financial Statements shall be taken into account for the purposes of this rule.

As per Section 139 of Companies Act, 2013, where a company is required to constitute an Audit Committee under Section 177, all appointments, including the filling of a casual vacancy of an auditor under this section shall be made after taking into account the recommendations of such committee.

Amended made by Companies (Amendment) Act, 2017

(i) In sub-section (1), for the words "every listed company", the words "every listed public company" shall be substituted;

(ii) In sub-section (4), in clause (iv), after the proviso, the following provisos shall be inserted, namely:

Provided further that in case of transaction, other than transactions referred to in section 188, and where Audit Committee does not approve the transaction, it shall make its recommendations to the Board:

Provided also that in case any transaction involving any amount not exceeding one crore rupees is entered into by a director or officer of the company without obtaining the approval of the Audit Committee and it is not ratified by the Audit Committee within three months from the date of the transaction, such transaction shall be voidable at the option of the Audit Committee and if the transaction is with the related party to any director or is authorised by any other director, the director concerned shall indemnify the company against any loss incurred by it:

Provided also that the provisions of this clause shall not apply to a transaction, other than a transaction referred to in section 188, between a holding company and its wholly owned subsidiary company.

Q.2. What is the role of the Audit Committee vis-a-vis the statutory auditor when the company wishes to engage them to perform certain engagements not restricted under Section 144? (4 marks; 2017 - Dec)

Answer:

The company shall appoint a statutory auditor to perform certain engagements not restricted under Section 144 with the approval of the Audit committee.

The audit committee shall recommend the appointment of statutory auditor to perform those engagements to the Board and prepare a report on the same engagements.

Q.3. An Audit Committee of a Public Limited Company constituted under section 177 of the Companies Act, 2013 submitted its report of its recommendation to the Board. The Board, however, did not accept the recommendations. In the light of the situation, analyze whether:

(i)The Board is empowered not to accept the recommendations of the Audit Committee.

(ii) If so, what alternative course of action, would be Board resort to?

(3 + 1=4 marks; 2018 - Dec)

Answer:

(i) As per Section 177(2) and (3) of the Companies Act, 2013 an audit committee must be formed within a year of the commencement of the Act or within a year of the incorporation of a company as the case may be, and will consist of at least 3 directors out of which the independent directors shall constitute the majority.

Under Section 177(8) the Board's Report which is laid before a general meeting of the company under Section 134(3) where the financial statements of the company are placed before the members, must disclose the composition of the audit committee and also where the Board has not accepted any recommendations of the audit Committee the same shall be disclosed alongwith the reasons therefor. Therefore, the Board is empowered not to accept the recommendations of the Audit Committee but only under genuine circumstances and with legitimate reasons.

If the Board does not accept the recommendations of the Audit Committee, it shall disclose the same in its report under Section 134(3) placed before a general meeting of the company.

Q.4. An Audit Committee of a Public Limited Company constituted under Section 177 of the Companies Act, 2013 submitted its report of its recommendation to the Board. The Board however did not accept the recommendations. In the light of the situation, State whether:

(i)The Board is empowered not to accept the recommendations of the Audit Committee.

(ii) If so, what alternative course of action, would be Board resort to?

(iii) As a chairman of the Audit Committee, how would you respond to the situation?

(3 marks; 2014 - June)

Answer:

(i) As per Section 177(Audit Committee), the Board's report under Section 134 shall disclose the composition of the Audit Committee and where the Board had not accepted any recommendation of the Audit Committee, the same shall be disclosed in such report along with the reasons therefore.

(ii) If the Board does not accept the recommendation of the Audit Committee, it shall record the reasons therefore and communicate such reasons to the shareholders.

(iii) The chairman of the Audit Committee shall attend the Annual General Meeting(s) of the company to provide any clarifications on matters relating to Audit.

Amended made by Companies (Amendment) Act, 2017

(i) In sub-section (1), for the words "every listed company", the words "every listed public company" shall be substituted;

(ii) In sub-section (4), in clause (iv), after the proviso, the following provisos shall be inserted, namely:

Provided further that in case of transaction, other than transactions referred to in section 188, and where Audit Committee does not approve the transaction, it shalL make its recommendations to the Board:

Provided also that in case any transaction involving any amount not exceeding one crore rupees is entered into by a director or officer of the company without obtaining the approval of the Audit Committee and it is not ratified by the Audit Committee within three months from the date of the transaction, such transaction shall be voidable at the option of the Audit Committee and if the transaction is with the

related party to any director or is authorised by any other director, the director concerned shall indemnify the company against any loss incurred by it:

Provided also that the provisions of this clause shall not apply to a transaction, ether than a transaction referred to in section 188, between a holding company and its wholly owned subsidiary company.

Q.5. Audit Committee is to be formed by each and every company and the auditor has right to vote in the meejing of such Audit Committee. Comment. (4 marks; 2016 - June)

Answer:

The requirement of constitution of Audit Committee has been limited to:

(a) Every listed Public Companies; or

(b) The following class of companies -

(i) All public companies with a paid up capital of ten crore rupees or more;

(ii) All public companies having turnover of one hundred crore rupees or more;

(iii) All public companies, having in aggregate, outstanding loans or borrowings or debentures or deposits exceeding fifty crore rupees or more.

In addition to the auditor, the KMP shall also have a right to be heard in the meeting of the Audit Committee when it considers the auditor's report, though they shall not have voting rights. **In the given case**, the auditor does not have power to vote at the meeting.

Q.6. M/s Daga Limited (an unlisted company) without any public deposits as per the audited financial statements of the company as at March 31st, 2018 gives you the following informations:

Paid-up Share Capital	Rs. 20 crores
Gross Turnover	Rs. 500 crores
Bank Borrowings	Rs. 50 crores (from a National Bank)
Other Borrowings	Rs. 30 crores (from a Public Financial Institution)

department of the company wants to form a Vigil Mechanism for directors and employees of the company. Advise whether it is mandatory for M/s Daga Limited to formulate a Vigil Mechanism for directors and employees of the company. (4 marks; 2019 - June)

Q.7. Explain the provisions of the Companies Act, 2013 relating to the constitution of an audit committee. What role does the audit committee play in the management of a company? (4 marks; 2015 - June)

Answer:

Audit Committee Sec.177 of Companies Act, 2013

1.	**Companies, required to have Audit Committees**	The requirement of constitution of Audit Committee has been limited to: (a)Every listed Public Companies; or (b)The following class of companies - (i)all public companies with a paid up capital of ten crore rupees or more; (ii)all public companies having turnover of one hundred crore rupees or more; (iii)all public companies, having in aggregate, outstanding loans or borrowings or debentures or deposits exceeding fifty crore rupees or more. **Note:** **Amended by Companies Act, 2017:** In Section 177 of the Companies Act, 2013,.in sub-section (1), for the words "every listed company", the words "every listed public company" shall be substituted;
2.	**Composition of Directors**	The Committee shall comprise of minimum 3 directors with majority of the directors being Independent Directors. The majority of members of audit committee including its chairperson shall be person with ability to read and understand the financial statement.

3.	**Transition Period**	A transition period of one year from the date on which the new Act comes into effect has been provided to enable companies to reconstitute the Audit Committee.
4.	**Role of Audit Committee Section 177 (4)**	Every Audit Committee shall act in accordance with the terms of reference specified in writing by the Board. Terms of reference as prescribed by the board shall inter alia, include, - (a)the recommendation for appointment, remuneration and terms of appointment of auditors of the company; (in case of Government Companies, in Clause (1) of sub-section (4) of Section 177, for the words "recommendation for appointment, remuneration and terms of appointment" the words "recommendation for remuneration" shall be substituted -Exemption Notification dated 05-06-2015) (b)review and monitor the auditor's independence and performance, and effectiveness of audit process; (c)examination of the financial statements and the auditors' report thereon; (d)approval or any subsequent modification of transactions of the company with related parties; The Audit Committee may make omnibus approval for related party transactions proposed to be entered into by the company subject to such Conditions as prescribed under rule 6A of the Companies (Meetings of Board and its Powers) Rules, 2014. Further in case of transaction, other than transactions referred to in Section 188(Related Party Transactions), and where Audit Committee does not approve the transaction, it shall make its recommendations to the Board". In case any transaction involving any amount not exceeding one crore rupees is entered into by a director or officer of the company without obtaining the approval of the Audit Committee and it is not ratified by the Audit Committee within three months from the date of the transaction, such transaction shall be voidable at the option of the Audit Committee and if the transaction is with the related party to any director or is authorized by any other director, the director concerned shall indemnify the company against any loss incurred by it: The provisions of this clause shall not apply to a transaction, other than a transaction referred to in Section 188, between a holding company and its wholly owned subsidiary company. (e) scrutiny of inter-corporate loans and investments; (f) valuation of undertakings or assets of the company, wherever it is necessary; (g)evaluation of internal financial controls and" risk management systems; (h)Monitoring the end use of funds raised through public offers and related matters.

Q.8. State the situations under which a company is required to constitute the Audit Committee? **(4 marks; 2019 - June)**

Q.9. Referring to the provisions of the Companies Act, 2013, examine the following:
(i) XYZ Limited, a listed company has constituted an audit committee consisting of five members out of whom two are independent directors. Subsequently, the company increased the composition of audit committee to six members with three independent directors.
(2 marks; 2016- Nov) [CA Final -I]

Answer:

Composition of Audit Committee:

Provision: Please refer 2012 - May

Present Case:

Here, XYZ Ltd. is a listed company. So as per Sec. 177, XYZ Ltd. shall required to constitute audit committee. XYZ Limited has constituted an audit committee consisting of five members out of whom two are independent directors. Subsequently, the company increased the composition of audit committee to six members with three independent directors. In both above cases XYZ Ltd. has not majority members as independent directors so that the company has contravented the provision of Sec. 177 of the Companies Act, 2013.

178. NOMINATION AND REMUNERATION COMMITTEE AND STAKEHOLDERS RELATIONSHIP COMMITTEE (4 QUESTIONS)

Notified Date of Section: 01/04/2014

Q.1. Logical Solutions Ltd., a listed company, is having a Corporate Social Responsibility (CSR) committee constituted with the following members:

Rohan — Whole-time director and Chairman of CSR committee and Board Sohan — Non-executive director Mohan — Independent director

Can company constitute a Nomination and Remuneration committee consisting of same three members of CSR committee with same composition? Discuss. (5-marks; 2018 - Dec)

Answer:

Under section 178 of Companies Act, 2013, the Board of Directors of every listed public company shall constitute the Nomination and Remuneration Committee consisting of three or more non-executive directors out of which not less than one-half shall be independent director. The Chairperson of the company (whether executive or non-executive) may be appointed as a member of the Nomination and Remuneration Committee but shall not chair such Committee.

In the above case the CSR Committee cannot serve as Nomination and Remuneration committee as the composition is different.

Q.2. Explaining the provisions of the Companies Act, 2013, state the duties of Nomination and Remuneration Committee. (4 marks; 2016 - June)

Answer:

1.	**Nomination and Remuneration Committee**	**Applicability** :The Board of Directors of every listed company and (i) all public companies with a paid up capital of ten crore rupees or more; (ii) all public companies having turnover of one hundred crore rupees or more; (iii) all public companies, having in aggregate, outstanding loans or borrowings or debentures or deposits exceeding fifty crore rupees or more.
2.	**Composition**	The committee shall consist of three or more non-executive directors out of which not less than one-half shall be independent directors, as maybe prescribed shall constitute the Nomination and Remuneration Committee .
3.	**Duties of the Nomination And Remuneration Committee**	The duties of the Nomination and Remuneration Committee have now been specified. They include: (a)identifying persons who are qualified to become Directors and who may be appointed in senior management in accordance with the criteria laid down; (b)recommend to the Board their appointment and removal; (c)carry out evaluation of every Director's performance; (d)formulate the criteria for determining qualifications, positive attributes and independence of a Director and (e)Recommend to the Board a policy, relating to the remuneration for the Directors, KMP and other employees.

Q.3. Examining the provisions of the Companies Act, 2013, relating to the constitution of a 'Nomination and Remuneration Committee' and 'Stakeholders Relationship Committee', answer the following:

(i)Is it mandatory for a listed company to constitute such committees? Also state whether it is mandatory for a non-listed public company having paid-up share capital of Rs. 5 crore to constitute such committees?

(ii)What shall be the composition of the committees in case the company is required? To constitute such committees? **(4 marks; 2015 - Dec)**

Answer:

1.	**Provisions of Sec. 178 read with Rule 6 of Companies (Meetings of Board and its powers) Rules, 2014**	**(i) Which types of Companies are required to Have the said Com-mittee**	(i) Yes, it is mandatory for a listed company to constitute such committees. The Board of Directors of following companies shall constitute Nomination' and Remuneration Committee of the Board: (a) Every listed Companies; (b) The following class of companies: (i) all public companies with a paid-up capital of ten crore rupees or more; (ii) all public companies having turnover of one hundred crore rupees or more; (iii) all public companies, having in aggregate, outstanding loans or borrowings or debentures or deposits exceeding fifty crore rupees or more.
		(ii) Composition of committees	The Nomination remuneration Committee shall consist of three or more non-executive directors out of which not less than one-half shall be independent directors. **Stakeholders Relation Ship company** In case a company consists more than 1000 shareholders, debenture-holders, deposit-holders and any other security holders at any time during a financial year, the company is required to constitute a Stakeholders relationship Committee consisting of a chairperson who shall be a non-executive director and such other members as may be decided by the Board

Q.4. Referring to the provisions of the Companies Act, 2013, answer the following:

(A) Which companies are required to constitute a 'Nomination and Remuneration Committee'?

(B) What is the composition of the above committee? **(4 marks; 2015-May)**

Answer:

(A) Formation of Nomination and Remuneration Committee:

As per the provisions of Sec. 178 of the Companies (Amendment) Act, 2017, a Nomination and Remuneration Committee shall be constituted by the BOD of:

(a) Every listed Public Company and

(b) Such other class or classes of companies as may be provided. **Rule 6 of the Companies (Meetings of Board and its powers) Rules, 2014, has prescribed** the following classes of companies that shall constitute Nomination and Remuneration Committee of the Board:

1. Every listed Public Company.

2. All public companies with a paid up capital of ten crore rupees or more;

3. All public companies having a turnover of hundred crore rupees or $_s$ more;

4. All public companies, having in aggregate, outstanding loans or borrowings or debentures or deposits exceeding fifty crore rupees or more.

Explanation: The paid up share capital or turnover or outstanding loans, or borrowings or debentures or deposits, as the case may be, as existing on the date of last audited Financial

Statements shall be taken into account for the purposes of this rule.

(B) Composition of Nomination and Remuneration Committee The above mentioned classes of companies shall constitute the Nomination and Remuneration Committee consisting of three or more Non Executive Directors out of which not less than one half shall be Independent Directors.

The Chairperson of the company (whether executive or non-executive) ' may be appointed as a member of the Nomination and Remuneration Committee but shall not chair such committee.

179. POWERS OF BOARD (6 QUESTIONS)

Notified Date of Section: 01/04/2014

Q.1. Advise the Board of Directors of a Limited Company regarding validity and extent of their powers, under the provisions of the Companies Act, 2013 in relation to the following matters:

(i)Buy-Back of the shares of the company, for the first time up to 10% of the paid up equity share capital without passing a special resolution.

(ii) Delegation of power to the Managing Director of the company to invest surplus funds of the company in the shares of some companies. (2+ 2 = 4 marks; 2014 - June)

Answer: (i)

- Section 68 (Power of a company to purchase its own shares) of the Companies Act, 2013 facilitates buy-back of shares upto 10% of the'total paid up equity capital and free reserves.
- Hence, special resolution in general meeting of the company is not required. The proposed buy-back of shares is in order provided other conditions laid down in Section 68 of the Companies Act, 2013 are fulfilled.

(ii)

- Section 179 (Power of Board)of the Companies Act, 2013 empowers the Board of Directors to delegate to the Managing Director the power to invest in general terms.
- But Section 186 (Loan and investment by the company of the said Act provides that no investment shall be made unless it is sanctioned by a resolution passed at a meeting of the board with the consent of all Directors present. Section 186 does not provide for delegation.
- Hence the proposed delegation of power to the Managing Director to invest is not in order.

Q.2. "The power to borrow includes the power to give security". Comment.

(5 marks; 2010 - Dec) [CSEM - II]

Answer:

1.	**Powers of Board of Directors- Sec. 179 of Companies Act, 2013**	This section empowers the Board of Directors to exercise its power in all areas, except where it is specifically mentioned in the Companies Act or- in the MOA or AOA that the powers shall be exercised at a general meeting by the shareholders. As per sub-Section (3)(d), the powers of Board includes power to borrow Money.
2.	**Restriction on Powers of Board of Directors**	In case the company wants to borrow money, where the money to be borrowed, together with the money already borrowed by the company, will exceed aggregate of its paid up share capital and free reserves, a apart from the temporary loans obtained from the company's banks in the ordinary course of business, consent of members by passing special resolution in general meeting will be required.
3.	**Does Power to borrow Include Power to Give Security**	The power to borrow whether express or implied includes the power to charge the assets of the company by way of security to the lender. Hence, The given statement is correct that the 'power to borrow includes the power to give security'.

Q.3. Can the Board of directors of a company delegate any of its powers to others? Discuss. **(4 marks; 2013 - June) [CSEM - II]**

Answer:

1.	**Powers of Board Section 179**	**Section 179** of the Act deals with the powers of the board; all powers to do such acts and things for which the company is authorised is vested with board of directors. But the board can act or do the things for which powers are vested with them and not with general meeting.
2.	**Powers that can be excised with Board Resolution only. [Section 179(3) read with Rule 8 of Companies Meetings of Board and its Powers Rules 2014**	The following powers of the Board of directors shall be exercised only by means of resolutions passed at meetings of the Board, namely: (a)to make calls on shareholders in respect of money unpaid on their shares; (b)to authorise buy-back of securities under Section 68; (c)to issue securities, including debentures, whether in or outside India; (d)to borrow monies; (e)to invest the funds of the company; (f)to grant loans or give guarantee or provide security in respect of loans; (g)to approve financial statement and the Board's report; (h)to diversify the business of the company; (i) to approve amalgamation, merger or reconstruction; (j) to take over a company or acquire a controlling or substantial stake in another company; (k) to make political contributions; (l) to appoint or remove key managerial personnel (KMP); (m) to take note of appointment(s) or removal(s)of one level below the Key Management (n) to appoint internal auditors and secretarial auditor; (o) to take note of the disclosure of director's interest and shareholding; (p) to buy, sell investments held by the company(other than trade investments), constituting five percent or more of the paid-up share capital and free reserves of the investee company; (q) to invite or accept or renew public deposits and related matters; (r) to review or change the terms and conditions of public deposit; (s) to approve quarterly, half yearly and annual financial statements or financial results as the case may be. (t) To appoint internal auditors and secretarial auditor.
2.	**Delegation of Powers to Directors, MD, Manager etc.**	Board may$_t$ by a resolution passed at a meeting, delegate • to any committee of directors, • the managing director, • the manager or • any other principal officer of the company or • in the case of a branch office of the company, the principal officer of the branch office, the powers specified in clauses (d) to (f) on such conditions as it may specify

Q.4. Comment on the Powers of the directors of a company are co-extensive with those of the company. (5 marks; 2015 - June)

Answer:

1.	**Powers of Board of Directors Sec.179(1)of Companies Act, 2013**	The Board of Directors of a company shall be entitled to exercise all such powers, and to do all such acts and things, as the company is authorised to exercise and do subject to below mentioned two conditions **Condition 1** in exercising such power or doing such act or thing, the Board shall be subject to the • provisions contained in that behalf in this Act, or • in the memorandum or articles, or • in any regulations not inconsistent therewith and duly made thereunder, • including regulations made by the company in general meeting **Condition 2** Board shall not exercise any power or do any act or thing which is directed or required, whether under this Act or by the memorandum or articles of the company or otherwise, to be exercised or done by the company in general meeting. Hence the Directors shall exercise their powers bonafide and in the interest of the company.
2.	**Members cannot Supersede the Directors's Powers**	The Directors shall exercise their powers bona fide and in interest of the company. The directors while exercising their powers do not act as agents for the majority or even all the members and so the members cannot by resolution passed by a majority or even unanimously supersede the director's powers or instruct them how they shall exercise their powers.
3.	**Separate power of Members and directors**	A company is an entity distinct from its shareholders and its directors. Some of its powers may, according to its articles, be exercised by directors, certain other powers may be reserved for the shareholders in general meeting. The powers of management are vested in the directors. They and they alone can exercise these powers.
4.	**Conclusion**	Therefore, from the provisions of **Section 179** and the exposition of the law stated above, it is clear that subject to the restrictions contained in the Act, Memorandum and Articles, the powers of directors are co-extensive with those of the company itself.

Q.5. The Board of directors of XYZ Ltd. wants to delegate all or any of their powers to any of the directors of the company or any person even not in the employment of the company for transfer of securities. Referring to the provisions of the Companies Act, 2013 advise in the matter. (5 marks; 2018 - Dec)

Answer:

There is no restriction on delegation of powers of the Board of Directors of the company except as provided in first proviso to Section 179(3) of Companies Act, 2013.

It provides that The Board may delegate power to borrow money, to invest the fund of the company and to grant loan or give guarantee or provide security in respect of loans, by way of resolution to any committee of directors, the managing director, manager or any other principal officer, or principal officer of a branch of the company.

Apart from this the Board of Directors may delegate all or any of its powers to any person including a person not in employment of the company if the Articles of Association so provides.

Appropriately, in the given case the Board of Directors of XYZ Ltd. may delegate the powers relating to transfer of securities only when the Articles of Association allows delegation of the powers to any of the directors of the company or any person not in employment of the company.

Q.6. Alok, the Managing Director of Yellow Ltd., borrowed a large sum of money and misappropriated the same. Later, when the lender demanded his money, the company refused to repay, contending that the money borrowed by Managing Director was misappropriated by him and the company is not liable for repayment. Decide, giving reasons, whether the lender would succeed in recovering the money from the company.

(4 marks; 2015 - June)

Answer:

1.	**Analysis of the problem in the light of decided case law**	In **V. K. R. S. T Firm V. Oriental Investment Trust Ltd., AIR 1944 Mad 532** under the authority of the company, its managing director borrowed large sums of money and misappropriated it. The company was held liable stating that where the borrowing is within the powers of the company, the lender will not be prejudiced simply because its officer have applied the loan to unauthorized activities provided the lender had no knowledge of the intended misuse.
2.	**Conclusion**	In the given case. Yes, the lender will succeed in this case and recover the money from the company.

180. RESTRICTIONS ON POWERS OF BOARD.(13 QUESTIONS)

Notified Date of Section: 12/09/2013

Q.1. The Board of Directors of GREEN ENVIRON LTD. at a meeting held on 15.1.2012 resolved to borrow a sum of Rs. 50 crores from a Nationalised Bank. Subsequently the said amount was received by the Company. One of the Directors who opposed the said borrowing as not in the interest of the company has raised an issue that the said borrowing Is outside the powers of the Board of Directors. The Company seeks your advice and the following data is given for your information:

(i) Share Capital (Paid-up)	**Rs. 15 crores**
(ii) Reserves and Surplus	**Rs. 20 crores**
(iii) Secured Loans	**Rs. 50 crores**
(iv) Unsecured Loans	**Rs. 15 crores**

Advise the Management of the Company (Green Environ Ltd.). **(5 marks; 2012 - June)**

Answer:

According to the provisions of Section180 (1)(c) of the Companies Act, 2013 there are restrictions on the borrowing powers to be exercised by the Board of Directors. According to that section, the borrowings should not exceed the aggregate of the paid up capital and free reserves. While calculating the limit, the temporary loans obtained by the company from its bankers in the ordinary course of the business will be excluded. However, from the figures available in the present case the proposed borrowing of Rs. 50 crores will exceed the limit mentioned. Thus the borrowing will be beyond the powers of the Board of Directors.

However the shareholders have the power to ratify the act of the Board of Directors, if it is not beyond the powers of the company as laid down in the memorandum of association. In that case the shareholders can rectify as it is intra vires the Company even though it may be beyond the powers of the Board of Directors.

Thus the management of GREENENVIRON LTD., should take steps to convene the annual general meeting and pass a resolution by the members in the meeting as stated in Section 180 (1)(c) of the Companies Act, 2013. Then the borrowing will be valid and binding on the company and its members.

Q.2. The Board of Directors of Kanu Limited by passing a resolution decides to borrow from the company's bankers an additional sum of Rs. 200 Crores, as long term loan in order to finance the new projects to be taken up shortly.

The company gives you the following financial information:

Equity Share Capital	**100 Crores**
Preference Share Capital	**50 Crores**
General Reserve	**25 Crores**

Debenture Redemption Reserve	20 Crores
Provision for Taxation	10 Crores

Existing Long Term Loan is Rs.25 Crores.

Examining the provisions of the Companies Act, 2013, the company seeks your advice about the extent to which the company can borrow from its bankers and also state whether the board of directors' proposal to borrow Rs. 200 Crores is valid. (5 marks; 2015 - June)

Answer:

Section 180 of the Companies Act, 2013 provides that the Board of Directors of a company can exercise certain powers only with the consent of the company accorded by a special resolution passed at the company's general meeting.

Board of Directors of the company can borrow money, where the money to be borrowed, together with the money already borrowed by the company will exceed the aggregate of the company's paid-up share capital and free reserves, apart from temporary loans obtained from the company's bankers in the ordinary course of business, only with the consent of the company accorded by a special resolution " passed at a general meeting. Every such special resolution shall specify the total amount upto which moneys may be borrowed by the Board of Directors.

In the given case, the aggregate of paid-up share capital + free reserves is Rs. 100 crores + Rs. 50 crores + Rs. 25 crores, i.e. Rs. 175 crores i.e. the maximum amount can be borrowed by the directors. As per resolution, the Board wants to borrow additional sum of Rs. 200 crores. Company has already borrowed Rs. 25 crores as existing long term loan. Since, the amount of additional borrowing i. e. Rs. 200 crores is in excess of the above limit of Rs. 175 crores, the Board can borrow only by passing a special resolution passed in the general meeting of the company.

The Board of Directors of the company are, therefore, advised to get a special resolution passed in the company's general meeting and the resolution should also specify the amount that can be borrowed by the Board.

Q.3. The Board of Directors of Stepping Stones Publications Ltd. at a meeting held on 15.01.2014 resolved to borrow a sum of Rs. 15 crores from a nationalized bank. Subsequently the said amount was received by the company. One of the Directors, who opposed the said borrowing as not in the interest of the company has raised an issue that the said borrowing is outside the powers of the Board of Directors. The Company seeks your advice and the following data is given for your information:

(i)Share Capital	Rs. 5 crores
(ii) Reserves and Surplus	Rs. 5 crores
(iii) Secured Loans	Rs. 15 crores
(iv) Unsecured Loans	Rs. 5 crores -

Advise the management of the company. (4 marks; 2017 - Dec)

Answer:

As per Section 180(c) of the Companies Act, 2013 the company needs to pass a special resolution in case of borrowing money where money to be borrowed together with money already borrowed exceeds aggregate of paid up share capital and free reserves.

In the given case, the total money that can be borrowed is (5+5 crores) but company has already borrowed 15 crores, hence for further taking any loan, a special resolution is required.

Q.4. Draft an appropriate resolution to authorise the Board to borrow for company's business upto a limit beyond paid-up share capital and free reserves. Assume facts and figures. (5 marks; 2018 - Dec)

Answer:

Special Business

To consider and, if thought fit, to pass with or without modification(s), the following resolution as Special Resolution:

"RESOLVED THAT pursuant to the provisions of Section 180(3)(c) and other applicable provisions, if any, of the Companies Act, 2013, and subject to such approval as may be necessary, consent

of the company be and is hereby accorded to the Board of directors of the company for borrowing, from time to time, such sum of money as may not exceed ?.....(Rupees .....'.....), for the purpose of the business of the company, notwithstanding that the moneys to be borrowed together with the monies already borrowed (apart from temporary loans obtained from the company's bankers in the ordinary course of business) will exceed the aggregate of the paid-up capital of the company and its f'ee reserves, that is to say, the reserves not set apart for any specific purpose, provided that the total amount upto which the monies may be borrowed by the Board of directors of the company shall not exceed the aggregate of the paid-up capital and free reserves of the company by more than the sum of.....(Rupees.....,.) at any one time.

Resolved further that the Board be and is hereby authorized to do all the acts, deed and things as it may in its absolute discretion deem necessary and appropriate to give effect to the above resolution".

Explanatory Statement

The shareholders of the company had, at the extraordinary general meeting of the company held on..... passed a special resolution under Section 180(3)(c) for borrowing the maximum amount of Rupees....., upto which the Board of directors of the company could borrow funds from financial institutions and banks in excess of the company's paid-up capital and free reserves. However, in view[1] of the increased business activities of the company, the said ceiling of Rupees (.....) has been found to be inadequate. Your directors are of the opinion that the ceiling of borrowings by the Board be raised to rupees.

Therefore, the proposed resolution for consideration and approve a by the members of the company. None of the directors is concerned or interested in the proposed resolution.

Q.5. Ajay Ltd. borrowed Rs. 100 crore from Prem, without the authority conferred on it by the articles of association. Later, the money borrowed by Ajay Ltd. was used by its Board of directors to pay off lawful debts of the company. In this scenario, Prem, the lender seeks your advice for recovery of his money. Advise him.

(5 marks; 2012 - June) [CSEM - II]

Answer:

1.	**Ultra vires borrowing by the company**	**Case Law - T.R Pratt (Bombay) Ltd. v E.D. Sassoon and Co. Ltd.,** In this case, it was held that the borrowing by the company itself was ultra vires.
2.	**General Principle of Law**	As per general principle of law, if any agent borrows money for the principle(s) without authority of principle(s) and principle(s) takes benefit from the borrowed money or when the borrowed money has. gone into the coffers of the principle(s), the law implies a promise to repay.
3.	**A promise to repay**	The lender has given money as a loan not as gift and the principle(s) has taken benefit from the money, therefore the law-implies a promise to repay.
4.	**Position in my opinion**	The position in my opinion, would be that of principle(s) takes benefit of the money whether he has not authorised the agent to borrow. I do not think the company can repudiate its liability to repay on ground that the agents had no authority from companies to borrow.
5.	**Conclusion**	Hence, the money borrowed by Ajay Ltd. from Prem is ultra vires, the company is liable to repay that amount. It is advised to Prem to sue for recovery of moneys.

Q.6. Balance sheet of Duck Ltd. shows a paid-up capital of Rs. 5 crore and free reserves of Rs. 2 crore. Due to heavy financial requirements of the company, it plans to apply for a loan of Rs. 8 crore with XYZ Bank Ltd: Advise the company on the formalities required to be fulfilled. Also advise on the alternative course of action, if any.

(* marks; 2013 - Dec)

Answer:

1.	**Borrowing power of the company, sec.180(1)(c)of Companies Act, 2013**	As per this section, A public company can borrow only up to the aggregate of its paid up capital and free reserves without the approval of shareholders in general meeting.
2.	**Special resolution required in the present case**	**In the present case,** since the loan requirement is over and above the aggregate of the paid-up capital and free reserves. Duck Ltd. will have to convene a general meeting and a special resolution needs to be passed thereat.
3.	**Alternative available**	The alternative course of action is that Duck Ltd. may limit its borrowing only up to Rs. 7 crores, in which ease the special resolution is not necessary.

Q.7. Serious Ltd. is having three factories in Chennai. The company wants to sell one of the factory. Can the company sell its factory? Further, assuming that the company has also borrowed credit facilities from the bank, explain the statutory provisions under the Companies Act, 2013. **(4 marks; 2018 - June)**

Answer:

According to **Sub-Section (1)(a) of Section 180 of the Companies Act, 2013,** the Board of Directors of a company may sell, lease or otherwise dispose of the whole or substantially the whole of the undertaking of the company or where the company owns more than one undertaking, of the whole or substantiality the whole of any of such undertakings only with the consent of the company by a special resolution.

Accordingly the company may sell any of its factory with the consent of the company by a special resolution.

Where the company has credit facility on creating charge on such undertaking, the company may be required to obtain a no-objection-certificate from the bank as per contractual obligation and shall also modify the charge accordingly.

Q.8. The Board of directors of Wood Ltd. are authorised to borrow money upto Rs. 2 crore. The Board of directors got sanctioned a loan of Rs. 30 lakh from a Bank for payment of debt liabilities of the company. But the Board of directors used this amount towards payment of their travelling and tour expenses. Will Wood Ltd. be held liable for prepayment of the loan? Discuss. **(3 marks; 2018 - Dec)**

Answer:

In a clear case of V.K.R.S.T Firm v. Oriental Investment Trust Ltd. under the authority of the company, its managing director borrowed large sums of money and misappropriated it. The company was held liable stating that where the borrowing is within the powers of the company, the lender will not be prejudiced simply because its officer have applied the loan to unauthorized activities provided the lender had no knowledge of the intended misuse.

Applying the principles of the above decided case **in the above case** Wood Ltd. will be held liable for repayment of the loan of Rs. 30 lakhs which well within the sanctioned limits of the company.

Q.9. Big Ben Ltd., a reputed public company had advanced certain sum of money to one of its Directors, namely, Mr. Tanmay on certain terms and conditions and fixing the time limit for repayment thereof. Now, Mr. Tanmay has approached the Cornpany with a request to extend the time limit for repayment of balance of loan amounting to Rs.12.00 lacs by another six months.

You are required to state with reference to the provisions of the Companies Act, 2013, the answer to the following:

(i) Who is authorised to grant the extension as requested by Mr. Tanmay?

(ii) Draft an appropriate notice for the meeting where such extension maybe granted.

(5 marks; 2009-May)

Answer:

(i) As per Sec. 180(1)(d) of the Companies Act, 2013, **the BOD of Big Ben Ltd., a public company cannot give time for the repayment of any debt due by Mr. Tanmay, a director of the company except with the consent of the Company by way of a special resolution passed in a General Meeting.**

In view of this provision of the law, the Company in a General Meeting is authorized to grant the extension as requested by Mr. Tanmay.

(ii)

Notice

Big Ben Ltd.

26/2 Vivekanand Sarani Salt Lake, Kolkata

Notice For Extra Ordinary General Meeting

Notice is hereby given to all the members of the Company, that, an Extra Ordinary General meeting of the members of the company will be held at the Registered office of the Company on Wednesday, the 22nd day of November, 2009, at 2 p.m. to transact the following business:

To Pass,, with or without modification, the following as an Ordinary Resolution:

"**RESOLVED THAT** pursuant to the provision of Sec. 180(1)(d) of the Companies Act, 2013, consent is be and is hereby granted to the Company for extending the time for the repayment of the balance amount of Rs.12.00 Lakhs advanced to Mr. Tanmay, a Director of the Company, by a further period of six months ending on 22nd May, 2010.

FOR & ON BEHALF OF THE BOARD

Dated 2009

Q.10. The Balance Sheet of International Operators Ltd. as at 31-03-2011 disclose the following position:

	Rs. (in crores)
Share Capital	100
Reserves & Surplus	300
Secured Loans	150
Unsecured Loans	100
Current Liabilities	70

Mr. X, the Managing Director of the company approaches the Royal Bank for a secured loan of six hundred crore rupees to finance the new projects to be taken up shortly. The Bank seeks your advice whether it can grant the loan of Rs. 600 crores on the application of Mr. X. Advise the Royal Bank having regard to the provisions of the Companies Act, 2013.

(8 marks; 2011-May)

Answer:

Powers to be exercised by the BOD of a company in General Meeting: **According to** Sec. 180 (1)(c) of the Companies Act, 2013, the BOD of a **company shall exercise the following powers only with the consent of the company by the special resolution to borrow money, where the money to be borrowed, together with the money already borrowed by the company will exceed aggregate of the paid-up share capital, free reserves and securities premium apart from temporary loans obtained from the company's bankers in the ordinary course of business.**

Money to be borrowed	= Rs. 600 Cr.
Money already borrowed	= Rs. 250 Cr.
Share Capital	= Rs. 100 Cr.
Reserves & Surplus	= Rs. 300 Cr.
	= Rs. 400 Cr.

Maximum amount that can be borrowed = 400 - 250 = **Rs.**150 crore. **Thus** Board can borrow only with the Consent of the company by way of special resolution an amount not exceeding Rs. 150 crore.

Q.11. Big Ben Ltd., a reputed public company, had advanced a sum of twenty lakh rupees to one of its directors Mr T on certain terms and conditions and fixing the time limit for repayment thereof. Now Mr T has approached the company with a request to extend the time limit for repayment of outstanding balance loan amounting to ten lakh rupees by another six months. Answer the following having regard to the provisions of the Companies Act, 2013.

(i) Who is authorized to grant the extension as requested by Mr T?

(ii) Draft an appropriate notice for the meeting where such extension maybe granted.

(8 marks; 2012 - May)

Answer:

Please refer 2009 - May

Q.12. One of the Objects Clauses of the Memorandum of Association of Info Company Limited conferred upon the company power to sell its undertaking to another company with identical objects. Company's Articles also conferred upon the directors whereby power was conferred upon them to sell or otherwise deal with the property of the company. At an Extraordinary General Meeting of the company, members passed an ordinary resolution for the sale of its assets on certain terms and authorized the directors to carry out the sale. Directors refused to comply with the wishes of the members where upon it was contended on behalf of the members that they were the principals and directors being their agents, were bound to give effect to their (members') decisions.

Examining the provisions of the Companies Act, 2013 answer the following:

(i) Whether the contention of members against the non-compliance of members' decision by the directors is tenable?

(ii) Whether it is possible for the members usurp the powers which by the Articles are vested in the directors by passing a resolution in the general meeting?

(4 marks; 2015-Nov)

Answer:

Provision

As per **Sec. 180(1)(a) of the Companies Act, 2013,** without the prior consent of the shareholders in general meeting by way of special resolution. Board shall not sell, lease or otherwise dispose of the whole, or substantially the whole, of one or more undertakings of the company. The Sec. has been framed negatively: it states that Board shall not exercise such power without the concurrence of the shareholders in general meeting. It does not imply that a

consent or even a direction by the shareholders would make it obligatory on the Board to exercise such power.

The power to sell the assets of the company is vested in the BOD If in the opinion of the Board, it is not irj the best interest of the company to sell its assets, the Board is not bound to do so, notwithstanding the fact that the company in general meeting has resolved that the assets should be sold [Pothen v Hindustan Trading Corpn. (P) Ltd. (1967) 37 Comp Case 6 (Ker)].

The given problem is answered as follows:

The contention of the shareholders is not tenable.

(i) The Board is the supreme body having the management of the company. The Board has the absolute power to do all things except those that are expressly required to be done by the company in general meeting. The shareholders cannot interfere in the day to day management of the company. The shareholders cannot supersede or usurp the Board powers, or instruct it as to how it shall exercise it powers.

Also, as per Sec. 180(1)(a) of the Companies Act, 2013, the power to sell, lease or otherwise dispose of any undertaking of the company is vested with the Board, though the Board can exercise such power only with the consent of the shareholders in general meeting. Thus, it is evident that a direction by the shareholders does not make it obligatory for the Board to exercise such power.

If in the opinion of the Board, it is not in the best interest of the company to sell its assets, the Board is not bound to do so, notwithstanding the fact that the company in general meeting has resolved that the assets should be sold **[Pothen v Hindustan Trading Corpn. (P) Ltd.]**

(ii) The powers of management are vested in the Board of Directors. The Board alone can exercise such powers. Even a unanimous resolution of the shareholders will not enable the shareholders to exercise the powers of the Board. The shareholders cannot interfere in the day to day management of the company, thus, the shareholders cannot usurp the powers vested in directors.

Q.13. The following information is provided in respect of M/s. Fortune Limited under three different case scenarios on the borrowing powers of the Board of Directors of the company. Mr. Murli, the CFO seeks your advice with explanations as to the nature of resolution which needs to be passed under each of the case scenarios as per the provisions of section 180(1)(c) of the Companies Act, 2013. Detailed workings should form part of your answer. (4 marks; 2019-May)

181.COMPANY TO CONTRIBUTE TO BONA FIDE AND CHARITABLE FUNDS ETC

Notified Date of section: 12/09/2013

(Q) M/S ANAND STEEL LTD. showed a net balance in the Profit and Loss Account for the last five years as follows:

Financial Year 2009-10	Loss	Rs. 125 Lakh (Dr.)
Financial Year 2010-11	Profit	Rs.180 Lakh (Cr.)
Financial Year 2011-12	Loss	Rs. 110 Lakh (Dr.)
Financial Year 2012-13	Profit	Rs. 180 Lakh (Cr.)
Financial Year 2013-14	Profit	Rs.190 Lakh (Cr.)

The Board of Directors of the Company proposes to donate a sum of Rs. 25Lakh to a Social Organization (approved/bonafide) engaged in Education and Health Care of Backward Community in the locality.

Examine with reference to the provisions of the Companies Act, 2013,whether the proposed donation is within the powers of the Board of Directors of the Company.

(2 marks; 2014 - Dec)

Answer:

Section 181 (Company to contribute to bona fide and charitable funds etc.) of the Companies Act, 2013 states that the Board of Directors of a company may contribute to bonafide charitable and other funds, provided that prior permission of the company in

general meeting shall be required for such contribution in case any amount the aggregate of which, in any financial year, exceeds five percent, of its average net profits (calculated as per section 198) for the three immediately preceding financial years. In the given case the Board of Directors is not empowered to contribute to Rs. 25 lakhs as it exceeds 5% of average profits of the preceding three years i.e. Rs. (-110+180+190) x5% = Rs. 13 lakhs. Hence, prior permission of the shareholders is to be obtained by the Board of Directors of Anand Steel Ltd.

(Q) Net profits of PQR Ltd. during the following years as disclosed in the statement of profit and loss are as under:

Financial year ended	Net profits (Rs. in crore)
31st March, 2013	10
31st March, 2014	12
31st March, 2015	08

The Board of Directors of the company at its meeting decides to contribute to a charitable organisation, for charitable purposes, a sum of Rs. 3 crore out of the net profits of the financial year ended 31st March, 2015. This contribution has been made by the Board without seeking approval of shareholders in general meeting.

In the light of the provisions of the Companies Act, 2013, examine the validity of the contribution made by the company. What shall be your answer in case the Board decides to contribute Rs. 1 crore only? **(4 marks; 2015 - Dec)**

Answer:

1.	**Applicability of Section 181 of Companies Act, 2013**	**(i) Bonafide Charity**	Section181 provides that Board of Directors of the company may contribute to 'bonafide' charitable and other funds.
		(ii) Prior Consent of Members	Provided that prior permission of the company in general meeting shall be required for such contribution in case any amount the aggregate of which, in any financial year, exceed 5% **of its average net profits** for the three immediately preceding financial years.
2.	**Average Net Profit in the Given Case**	The average net profit **in the given case** are Rs. 10crores.	
3.	**Conclusion**	Thus, any contribution in excess of Rs. 50 Lacs (5% of average net profits for three immediately preceding financial years) would need members' approval. Board is not empowered to take decisions of contribution in excess of Rs. 50 Lacs. Board's decision is invalid. Further, if the contribution amount was Rs. 1 Crore, then also the company would be required to obtain members' prior approval.	

(Q) Charjee Biotech Private Limited is a two year old company. The Board of Directors of the company wants to contribute 2.8% of its average net profits of the last years to the Prime Minister's National Relief Fund. Referring to the provisions of the Companies Act, 2013, advise the board. **(4 marks; 2017 - June)**

Answer:

Section 181 of the **Companies Act, 2013** states that the Board of Directors " of a company may contribute to bona fide charitable and other funds, provided that prior permission of the company in general meeting shall be required for such contribution in case any amount the aggregate of which, in any financial year, exceed five per cent of its average net profits for the three immediately preceding financial years.

In the given case, Charjee Biotech Private Limited wants to contribute **2.8%** of its net profits of the last two years, as it has been in existence for the last two years only.

Prime Minister's National Relief Fund is a bona fide charitable fund. As the rate of contribution does not exceed 5% of the average net profits, prior permission of members

in general meeting is not required. A resolution passed by the Board of Directors shall suffice for making the said contribution.

(Q) M/s Jai Industries Limited earned net profit for the last three years as under:

Financial Year	Net Profit (Rs.in Crores)
2013-14	30
2014-15	40
2015-16	50

During the financial year 2016-17, the Board of Directors of the company contributed to a Charitable Fund Rs. 1.25 crores in July, 2016. Again in January 2017, the Board of Directors passed resolution to contribute to another Charitable Fund Rs. 1.00 crore.

Decide the validity of the decision of the Board of Directors regarding the contribution on both the occasions with reference to the provisions of the Companies Act, 2013.

(6 marks; 2017 - Nov)

Answer:

Contribution of Charitable Funds

- **As per Sec. 181 of the Companies Act, 2013,** the BOD of a company without obtaining the approval of shareholders in a general meeting, can make, contributions to genuine charitable and other funds upto an amount which, in a financial year, does not exceed five percent of its average net profits during the three financial years immediately preceding the financial year.
- According to above provisions, the BOD of the M/s. Jai Industries Ltd. can make contributions to charitable funds, without obtaining approval of the shareholders in a general meeting, upto an amount calculated as follows:

Net Profit for the year

	Rs. in crore
Particulars	Amt. (Rs.)
Financial Year:' 2013-14	30
2014-15	40
2015-16	50
Total	120
Average of net profits during three preceding F.Y.	40
5% there of	2

- Hence, the maximum amount that can be donated by the BOD to genuine charitable fund by M/s. Jai Industries Ltd. during the financial year 2016-17 will be Rs.2 crore without seeking the approval of the shareholders in a general meeting.
- Here, M/s. Jai Industries Ltd. has already contributed Rs. 1.25 crore in July, 2016 which is within the limit of Rs. 2 crore. So contribution of Rs. 1.25 crore in July, 2016 is valid.
- Further, company wants to contribute Rs. 1 crore to charitable fund. Now, after contributing in July, 2016, the remaining limit left with the company for further contribution isRs. 0.75 crore. So company cannot contribute Rs.1crore to charitable fund in January, 2017. It can only contribute Rs. 0.75 crore instead of Rs.1 crore to charitable fund in January, 2017. So act to further contribution is not valid.

However, if further contribution is made by passing resolution in General Meeting then the act of BOD for contributing donation in excess of limit specified under Sec. 181 shall not deemed to be invalid.

182.PROHIBITIONS AND RESTRICTIONS REGARDING POLITICAL CONTRIBUTIONS

Notified Date of section: 12/09/2013

(Q) LMN LTD. was incorporated on 1st June, 2007. On 1st March 2010 a political party approaches the company for a contribution of Rs. 10 lakhs for political purposes. Your advice is sought with respect to the under mentioned issues:
(i) Is the Company regally authorized to give this political contribution?
(ii) Will it make any difference if the company was in existence on 1st April, 2007?
(2+ 2 = 4 marks; 2010 - June)

Answer:
Political Contributions
According to Section 182(1) of Companies Act, 2013, not withstanding anything contained in any other provision of this Act, a company may contribute any amount directly or indirectly to any political party.
Here," political party" means a political party registered under **Section 29A of the Representation of the People Act, 1951.**
Prohibition: the following companies are not allowed to contribute to any political party:
(i) A Government company: and
(ii) A company which has been in existence for less than three financial years.
Amount of contribution: The aggregate of the amount which may be so contributed by the company in any financial year shall not exceed seven and half percent of its average net profits during the three immediately preceding financial years.
Conditions to be fulfilled: No such contribution shall be made by a company unless a resolution authorising the making of such contribution is passed at a meeting of the Board of Directors and such resolution shall, subject to the other provisions of this section, be deemed to be justification in law for the making and the acceptance of the contribution authorised by it.

(Q) JUPITER TEXTILES LTD. was incorporated on 1st June, 2009. On 1st March, 2012 a political party approaches the company for a contribution of Rs. 12 lakhs for political purpose. Your advice is sought in respect of the under mentioned issues:
(i)Is the company legally authorized under the Companies Act, 2013 to give this political contribution?
(ii) Will it make any difference, if the company was in existence on 1st April, 2009?
(iii) Can the company be penalised for violation of the applicable provisions relating to political contribution?
(iv) What are the disclosure requirements in this regards?
(2+1 +2+2= 7 marks; 2013 - June)

Answer:
Political Donations: Section 182 of the Companies Act, 2013
(i) Only a company which had been in existence for 3 years can make contribution to political parties. Since in the given case, the company has not completed three years of existence on 1st March, 2012, it is not eligible to give political contribution.
(ii) Yes, because in the case, Jupiter Textiles Ltd. shall complete three financial years of its existence, therefore, will be eligible to give political contribution subject to the condition that such a political contribution should not exceed seven and half percent of the Average Net profits (calculated as per section 198) of three immediately preceding financial years and a resolution authorizing such contribution is passed at a meeting of the Board of Directors.
(iii) A company will be eligible to give political contribution subject to the condition that a contravention of the provisions of this section will make a company liable to fine which may extend to five times the amount so contributed.
Further every officer of the company in default would be liable to imprisonment for a term which may extend to six months & also with fine which may extend to 5 times the amount so contributed,

(iv) Section 182 of the Companies Act, 2013 provides to impose an obligation to disclose in its profit and loss account contributions made by it to any political party or for any political purpose.

If a company makes any political contribution in contravention of the provisions of this section, the company shall be punishable with fine which may extend to five times the amount so contributed. Further every officer of the company in default would be liable to imprisonment for a term which may extend to six months and also with fine which may extend to 5 times the amount so contributed.

(Q) State your views on the following with reference to the Drovision of the Companies Act, 2013:

(i) Complex Ltd, a well reputed manufacturing Public Limited Company has made a contribution of Rs. 2.5 Lacs during the financial year ended, 31 -03-13 to a political party for running a school, situated in the village,) Q where most of the workers of the company reside. It is admitted that the benefit of the school is mostly for the children of the workers of the company. The company has hot made any profits in the last four years.

(3 marks; 2014 - June)

Answer:

- Section 182 of the Companies Act, 2013 deals with prohibitions and restrictions regarding political contributions.
- A non Government company which has been in existence for not less than three years may contribute any amount or amounts directly or indirectly to any political party or for any political purpose to any person provided that the aggregate of the amounts which may be so contributed by a company in any financial year shall not exceed 7.5% of its average net profits determined in accordance with the provisions of Section 198 during the three immediately preceding financial years.
- The company in question has not made any profit in last four years and contributed Rs. 2.5 lacs during the year to a political party for running a school.
- This is violation of the provisions of Section 182 of the Companies Act although the children of its workers are benefitted. The auditor would have to qualify his report stating the contravention of the provision of the Companies Act.

(Q) HILTON LTD. was incorporated on 1st January, 2012. On 1st July, 2014 a political party approaches the company for a contribution of Rs. 12 lakh for political purpose.

Advise in respect of the following under Companies Act, 2013,

(i) Is the company legally authorised to give this political contribution?

(ii) Will it make any difference, if the company was incorporated on 1* December, 2010?

(iii) Can the company be penalized for defiance of rules in this regard?

(2 + 2+2 = 6 marks; 2014 - Dec)

Answer:

According to Section 182 of the Companies Act, 2013:

(i) Notwithstanding anything contained in any other provision of this Act, a company may contribute any amount directly or indirectly to any political party. Here 'political party' means of political party registered under Section 29A of the Representation of the People Act, 1951;

(ii) The following companies are not allowed to contribute to any political party:-

a. a Government company;

b. a company which has been in existence for less than three financial years.

In the given case:

(1) HILTON LTD. cannot make any political contribution because the company is not in existence for a period of 3 financial years.

(2) If Hilton Ltd. were incorporated on 01.12.2010 it may make a political contribution as on 01.07.2014 because in such a case it would have been in existence for 3 financial years. However, it shall comply with the following conditions:

(a) The aggregate of the amount which may be so contributed by the company in any financial year shall not exceed seven and half percent of its average net profits during the three immediately preceding financial years.

(b) No such contribution shall be made by a company unless a resolution authorising the making of such contribution is passed at a meeting of the Board of Directors and such resolution shall be deemed to be justification in law for the making and the acceptance of the contribution authorized by it.

(c) The company shall disclose in its profit and loss account any amount or amounts contributed by it to any political party during the financial year to which that account relates, giving particulars of the total amount contributed and the name of the party to which such amount has been contributed. [Section 182 (3)].

(3) If a company makes any contribution in contravention of the provisions in this section, the company shall be punishable with fine which may extend to five times the amount so contributed and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months and with fine which may extend to five times the amount so contributed.

(Q) Explain the prohibitions and restrictions regarding political contributions by a company.
(4 marks; 2014 - June)

Answer:

1.	**Eligible Companies for Political Contribution**	The non-government company or the company which has been in existence less than three financial years may contribute any amount directly or indirectly to any political party.
2.	**Limit of Contribution**	Further, the limit of contribution to political parties is 7.5% of the average net profits during the three immediately preceding financial years. **Note:** **Section 154 of the Finance Act, 2017 amends Section 182 of the Companies Act, 2013. As per the amendment, the limit on the maximum amount that can be contributed by a company to a political party has been removed.**
3.	**Board resolution**	The contribution must be authorised by board in its meeting by resolution and such resolution deemed to be the justification in law for such contribution.
4.	**Direct/Indirect Donation**	The donation may be made directly or Indirectly.
5.	**Expenditure Deemed to be Political Contribution**	• The contribution so made if or likely to affect the public support for a political party deemed to be the contribution for political purpose. • If the expenditure incurred on advertisement in any publication souvenir, brochure, tract, pamphlet or the like is deemed as political contribution if such publication is by or on behalf of political party or if not, then for the advantage to such political party for a political purpose.
6.	**Disclosure**	The company is required to disclose in its profit and loss account any amount or amounts contributed by it to any political party during the financial year and the particular of total* amount contributed and the name of political party to whom the contribution so made.

(Q) In what way does the Companies Act, 2013 regulate the payment made by companies towards contribution to political parties for political purposes? Explain.
(4 marks; 2015 - June)

Answer:

Please refer 2014 - June

(Q) DEF Ltd. has made profit for last 3 consecutive financial years as under:

Year	Rs. in Crore
2017-18	100
2C!6-17	150
2015-16	200

Considering the provisions of Companies Act 2013, state whether:

(i) DEF Ltd. can contribute Rs. 33.75 crore directly to a political party by a bearer cheque?

(ii) What is the limit on the maximum amount that can be contributed by a company to a political party?

(iii) Would your answer be different, if DEF Ltd. is a "Government Company" and donation is given by an "account payee cheque"?

(1+2 + 2 = 5 marks; 2019 - June)

(Q) X Ltd. was registered in the year 2005 under the Companies Act. The management of the company decides to make donation to a recognized political party. Advise the management about the restrictions under which such donation can be made under the said Act. **[Modified] (8 marks;2011-May)**

Answer:

Donation to recognised Political Party:

According to **Sec. 182(1) of the Companies Act,2013,** notwithstanding anything contained in any other provision of this Act, a company may contribute any amount directly or indirectly to any political party.

Here, "Political Party" means a political party registered under Sec. 29A of the Representation of the People Act, 1951.

Prohibition: The following companies are not allowed to contribute to any political party:

(a) A Government Company

(b) A Company in existence for less than three financial year.

Conditions to be fulfilled: No such contribution shall be made by a company unless a resolution authorising the making of such, contribution is passed at a meeting of the BOD and such resolution shall, subject to the other provisions of this Section, deemed to be justification in law for the making of the contribution authorised by it.

Present Case:

Thus X Ltd., in the present case, can contribute to the recognized political party provided it is not a Government Company and it is in existence for more than three financial years at the time of making the donation.

Further, the political donation is required to be authorized by a resolution passed at a Board Meeting.

In addition, as per Sec 182(3) and 182(3A), every company shall disclose in its profit and loss account the total amount contributed by it under this section during the financial year to which the account relates. [182(3)]

Notwithstanding anything contained in sub-section (1), the contribution under this section shall not be made except by an account payee cheque drawn on a bank or an account payee bank draft or use of electronic clearing system through a bank account: [182(3A)]

Provided that a company may make contribution through any instrument, issued pursuant to any scheme notified under any law for the time being in force, for contribution to the political parties.

Section 154 of the Finance Act, 2017 amends Section 182 of the Companies Act, 2013. As per the amendment, the limit on the maximum amount that can be contributed by a company to a political party has been removed.

(Q) The Board of Directors of LM Limited propose to donate three lakh rupees to a school established exclusively for the benefit of children of employees and also donate fifty thousand rupees, to a political party during the Financial year ending 31st March, 2010. The average net profits determined in accordance with the provisions of Sec. 198 and 350 of the Companies Act, 2013 during the three immediately preceding financial years is forty lakh rupees. Examine with reference to the provisions of the Companies Act, 2013 whether the proposed donations are within the powers of the Board of Directors of the Company.

(5 marks; 2009-Nov)

Answer:

Donation to Charitable Fund [Sec 181].

(i) Amount of Borrowings

As per Sec. 180(1)(c) of Companies Act, 2013 without the prior consent of the shareholders in general meeting, by a special resolution the BOD of a company shall not borrow moneys where the borrowings (already made plus proposed) exceed the aggregate of the paid up capital, free reserves and securities premium (Inserted by Companies Amendment Act, 2017). However, temporary loans obtained from the company's bankers in the ordinary course of business shall not be considered as borrowings.

'Free reserves' means those reserves which are not set apart for any specific purpose.

In the given case, paid up capital and free reserves shall be reckoned as per the latest balance sheet, i.e. balance sheet as on 31.3.2008. the aggregate of paid up capital and free reserves comes to Rs. 1,35,00,000 (75,00,000 + 50,00,000 + 10,00,000). Since the company has already borrowed Rs. 30,00,000 (it has been assumed that secured loans of Rs. 30,00,000 is not a temporary loan, i.e., it is not a loan obtained from the company's bankers in the ordinary course of business), the long term borrowings from financial institutions shall not exceed Rs. 1,05,00,000 without the consent of shareholders.

(ii) Contribution to Charitable Funds

As per Sec. 181 of Companies Act, 2013, without the prior consent of the shareholders in general meeting the Board shall not contribute to charitable and other funds not directly relating to the business of the company or the welfare of its employees, if the amounts contributed in a financial year will exceed five percent of average net profits during three immediately preceding financial years.

Present Case:

The average net profits during three immediately preceding financial years comes to Rs. 22,00,000 viz., 1/3rd of (Rs. 12,50,000 + Rs. 19,00,000 + Rs. 34,50,000). 5% of Rs. 22,00,000 comes to Rs. 1,10,000.

Therefore, the Board can make contributions to charitable funds upto one lakh ten thousand rupees during the financial year 2008-09 without seeking any approval in general meeting. For amount more than one lakh ten thousand rupees it has to seek prior approval of the company.

Donation to Political Party

Please refer 2011 - May

Present Case:

Average Net profit = Rs. 40,00,000 5% of Average Net Profit = Rs. 2,00,000 7'/$_2$ of Average Net Profit = Rs. 3,00,000

Thus Company can contribute two lakhs rupees to School and three lakh<u>rupees to a Political Party.</u>

Section 154 of the Finance Act, 2017 amends Section 182 of Companies Act, 2013. As per the amendment, the limit on maximum amount that can be contributed by a company to a political party has been removed.

(Q) Win Ltd. is a company incorporated fifteen years ago andduring the last three consecutive financial years it earned profits, as determined under Sec. 198 of the Companies Act, 2013, of five lakh rupees, eight lakh rupees and eleven lakh rupees. In order to augment its business prospects, it wants to make donations to political parties. State with referehce to the provisions of the Companies Act, 2013 whether the company can make such donations and if yes to what extent. Also state which type of donation, subscription, payment, expenditure is regarded as contribution for political purpose.

(8 marks; 2012-May)

Answer:

Donation to Political Party:

Please refer 2011 - May

Present case:

Based on the provisions of the Companies Act, 2013, Win Ltd. is a company incorporated fifteen years ago and during the last three consecutive financial years it earned profits. As determined under Sec. 198 of the Companies Act,**2013** is:

		Rs.
Total Profit (three years)		24,00,000/-
Average Net Profit		8,00,000/-
Amount of donation to political party	60,000	(7 ½% of 8,00,000)

Therefore, if Win Ltd. wants to make donation to political parties, it can contribute the amount not exceeding sixty thousand rupees.

Section 154 of the Finance Act, 2017 amends Section 182 of Companies Act, 2013. As per the amendment, the limit on maximum amount that can be contributed by a company to a political party has been removed.

(Q) Sewak Cycles Limited is a company incorporated four years ago. It has earned profits amounting five lakh rupees, eight lakh rupees and eleven lakhs rupees respectively during the last three financial years. The Board of Directors of the company propose to donate a sum of fifty thousand rupees to a political party. Examine with reference to the provisions of the Companies Act, 2013, whether the proposed donation is within the powers of the Board of Directors of the company. **(4 marks; 2015-May)**

Answer:

Provision:

Donation to Political Party - Please refer2011 - May [4] (b) on page no. 88 Analysis and Conclusion:

In the given case Sewak Cycles Limited is a company incorporated four years ago.

Average Net Profits of last 3 financial year = 5'00'000 + 8,00 000 +11,00,000/3 = **8,00,000**

7.5 % of Average Net Profit= 8,00,000 x 7.5% = 60,000

Maximum Permissible Political Contribution is Rs. 60,000.

Hence, proposed donation of fifty thousand rupees is within the powers of the Board of Directors of the company.

Section 154 of the Finance Act, 2017 amends Section 182 of Companies Act, 2013. As per the amendment, the limit on maximum amount that can be contributed by a company to a political party has been removed.

183.POWER OF BOARD AND OTHER PERSONS TO MAKE CONTRIBUTIONS TO NATIONAL DEFENCE FUND, ETC.

Notified Date of section: 12/09/2013

184. DISCLOSURE OF INTEREST BY DIRECTOR

Notified Date of Section: 01/04/2014

(Q) Company Y with a paid-up capital of Rs. 50 lakhs entered into a contract with company Z in which a director of Y is holding equity shares of the nominal value of Rs. 50,000. The director did not disclose his interest at the Board Meeting under Section 184 of the Companies Act, 2013. Is the director liable for his act? (3 marks; 2016 - June)

Answer:

As per Section 184(2) of the Companies Act, 2013 the disclosure of the interest by directors do not apply to any contract or arrangement within two companies where any of the directors of one company or two or more of them together holds or hold not more than 2% of the paid up share capital in the other company.

In the present case, the holding of the director of Y in company Z is less than 2% [(50,000/50,00,000) x 100% = 1 %] the director is not liable.

(Q) Comment on the following:
It is mandatory for every director of a company to disclose his interest or nature of his concern in other companies in which he is a director. (5 marks; 2016 - June)

Answer:

1.	**Disclosure of interest by Director (Section 184)**	Yes, it is mandatory for every director of a company to disclose his interest or nature of his concern in other companies in which he is a director. The Act provides for the disclosure by directors relating his concern or interest in any company or companies or body corporate (including shareholding interest), firms or other association of individuals by giving a notice in writing in form MBP 1 (Rule 9(1)) at the first meeting of board after being appointed as director and at first meeting of board of every financial year, in addition to this, any change required to be disclosed in next board meeting.
2.	**Applicability for Disclosure**	**(a)**Every director is required to disclose the nature of his concern or interest ai the meeting of board in which the contract or arrangement is discussed arid he has not to participate in such meeting. **(b)**The abovementioned interest may be direct or indirect and relating io some contract or arrangement or proposed contract or arrangement entered into or to be entered into with a body corporate in which such director or such director in association with other director holds more than two percent shareholding or is a promoter, manager, Chief Executive Officer of that body corporate or with a firm or other entity in which such director is a partner, owner or member as the case maybe. **(c)**If a contract or arrangement entered into by the company without disclosure of interest by director or with participation by a director who is concerned or interested in any way, directly or indirectly, in the contract or arrangement, shall be voidable at the option of the company. **(d)** The contravention of the provisions leads to punishment for a term which may extend to one year or with fine which may extended to one lakh rupees or both. **(e)** Any contract or arrangement entered into or to be entered into between two companies, where any director of any company holds more than two percent of the paid up capital in other company, the provisions of this section shall not apply. **Amended by Companies Act, 2017**

		shall apply to any contract or arrangement entered into or to be entered into between two companies or between one or more companies and one or more bodies corporate where any of the directors of the one company or body corporate or two or more of them together holds or hold not more than two per cent, of the paid-up share capital in the other company or the body corporate.

(Q) A public limited company created a mortgage over its property in respect of a loan given by the brother of one of the Directors of the company. This fact was known to all the Directors of the company but the interested Director neither disclosed his interest nor abstained from voting when the loan transaction was approved at the Board Meeting. Decide the validity of the said transaction under the provisions of the Companies Act, 2013.

(8 marks; 2011-Nov)

Answer:

Disclosure of Interest by Director [Sec. 184]:

Every director shall at the first meeting of the Board in which he participates as a director and thereafter at the first meeting of the Board in every financial year or whenever there is any change in the disclosures already made, then at the first Board meeting held after such change, disclose his concern or interest in any company or companies or bodies corporate, firms, or other association of individuals which shall include the shareholding, in such manner as is prescribed under Rule 9 of Companies (Meetings of Board and its Powers) Rules, **2014 [Sec 184(1)].**

Every director of a company who is in any way, whether directly or indirectly, concerned or interested in a contract or arrangement or proposed contract or arrangement entered into or to be entered into:

(a) with a body corporate in which such director or such director in association with any other director, holds more than two per cent shareholding of that body corporate, or is a promoter, manager, Chief Executive Officer of that body corporate; or

(b) with a firm or other entity in which, such director is a partner, owner or member, as the case may be, shall disclose the nature of his concern or interest at the meeting of the Board in which the contract or arrangement is discussed and shall not participate in such meeting:

Provided that where any director who is not so concerned or interested at the time of entering into such contract or arrangement, he shall, if he becomes concerned or interested after the contract or arrangement is entered into disclose his concern or interest forthwith when he becomes concerned or interested or at the first meeting of the Board held after he becomes so concerned or interested **[Sec 184(2)].**

A contract or arrangement entered into by the company without disclosure under sub-section (2) or with participation by a director who is concerned or interested in any way, directly or indirectly, in the contract or arrangement, shall be voidable at the option of the company. **[Sec 184(3)]**

It has been held that where a director had on earlier occasions disclosed his interest and the whole body of directors was already aware of his interest, non-disclosure at a subsequent occasion did not amount to contravention of Sec. 184 [A. Sivasailem v Registrar (1955) 83 Comp Cas 141]. However, a director of a public company shall in no case vote on a contract in which he is interested.

Present Case

In light of provision of Sec. 184(3) the transaction is voidable at the option of the company.

Therefore, in the given case the contract is not void but voidable at the option of the company. The company has a right to rescind the contract even though the contract is perfectly fair. The right to rescind is given because of the possibility and not the certainty that the company may have been unduly influenced by the director and thereby induced to enter into the contract.

The directors are trustees for the shareholders of the powers committed to them. They occupy a fiduciary position in relation to a company. They must not enter into any contract or

arrangement in which their personal interest conflicts with the interest of the company. Accordingly, a director is required to disclose his interest in a contract or arrangement under section 184 and is prohibited from voting on any such contract in which a director is interested, provided that the director concerned ensures compliance with relevant provisions.

(Q) State the circumstances in which a director of a company is required under the Companies Act, 2013 to disclose his interest in a contract or arrangement to be entered into by the company. Examine whether the validity of the contract is affected by non-disclosure of interest by the director. **(4 marks; 2016-May)**

Answer:

Disclosure of Interest by Directors

Sec. 184 of the Companies Act, 2013 provides for disclosure of interest by director. According to this section whenever any director of a company who is in any way, whether directly or indirectly, concerned or interested in a contract or arrangement or proposed contract or arrangement entered into or to be entered into shall disclose the nature of his concern or interest at the meeting of the Board in which the contract or arrangement is discussed and shall not participate in such meeting.

Following are the circumstances where disclosure is necessary:

Whenever any director of a company who is in any way whether directly or indirectly, concerned or interested in a contract or arrangement or proposed contract or arrangement entered into or to be entered into shall disclose the nature of interest at the meeting of the board when the contract is - (a) with a body corporate in which such director or such director in association with any other director, holds more than two percent shareholding of that body corporate, or is a promoter, manager, Chief Executive Officer of that body corporate; or

(b) With a firm or other entity in which, such director is a partner, owner or member, as the case may be,

If Director does not disclose interest in any contract, then validity of contract is affected and voidable at the option of the company.

(Q) When does a Director required to disclose his/her interest to the Company as per Section 184 of the Companies Act, 2013? What are the consequences of non-disclosure?

(4 marks; 2018-May)

Answer:

As per Sec. 184 of the Companies Act, 2013, Every director shall:

(a) At the first meeting of the Board in which he participates as a director, and

(b) Thereafter, at the first meeting of the Board in every financial year; or

(c) Whenever there is any change in the disclosures already made, then at the first Board Meeting held after such change [Section 184(1)]

Consequences of non disclosure:

(a) Voidable at the option of company:

A contract or arrangement entered into by the company without disclosing or with participation by a director who is concerned or interested in any way, directly or indirectly, in the contract or arrangement, shall be voidable at the option of the company.

(b) Penalty:

If a director of the company contravenes the provisions of sub- section(1) or sub section (2) of Sec. 184, such director shall be punishable with imprisonment for a term may extend to one year or with fine which may extend to one lakh rupees, or with both. **[Section 184(3) & (4)]**

185. LOAN TO DIRECTORS, ETC.

Notified Date of Section: 12/09/2013

(Q) Examine whether the following transactions can be considered as a loan to a director requiring approval of the Central Government under Section 185 of Companies Act, 2013.

(i)A public company secures residential accommodation for the use of its managing director by entering into an arrangement under which the company has to deposit a certain amount with the landlord to secure compliance with the terms of the agreement.

(ii) A public company purchases a flat which is subsequently sold to a director at the prevailing market price out of which the director pays 50% immediately and contracts to pay the balance in 10 equal annual installments. (4 marks; 2013 - Dec)

Answer:

(i) The deposit of the cost of purchase of the property cannot be regarded as a loan or advance to the M .D. or book debt attracting the provisions of Section 185 of The Companies Act, 2013. It is no concern of the M.D. on what terms the company secures premises for residential accommodation for him.

(ii) In a petition in Dr. Fredie Ardeshir Mehta v. Union of India the Bombay High Court came to the conclusion that a company selling one of its flats to one of its directors on receiving half price in cash and agreeing to accept the balance in installments does not give a loan to the director. It is a credit sale. It cannot be described even as an indirect loan. In view of this decision, the transaction in question does not amount to a loan to a director requiring approval of the Central Government.

(Q) AKSHAY LTD. has advanced a loan of Rs. 1,00,000 to one of its Directors in contravention of the provisions of Sec. 185 of the Companies Act, 2013.
State the consequences of such contravention. (3 marks; 2014- Dec)

Answer:

If any loan is advanced or a guarantee or security is given or provided in contravention of the provisions of sub-section (1) of Section 185 of the Companies Act, 2013, the company shall be punishable with fine which shall not be less than Rs. 5 lakhs but which may extend to Rs. 25 lakhs, and the director or the other person to whom any loan is advanced or guarantee or security is given or provided in connection with any loan taken by him or the other person, shall be punishable with imprisonment which may extend, to six/nonths or with fine which shall not be less than Rs. 5 lakhs but which may extend to Rs. 25 lakhs, or with both.

Summary of the punishment u/section 185 (Loan to directors etc.):

Company	: Fine up to rupees five lakhs to twenty five lakhs.
Director taking loan	: Fine upto rupees five lakhs to twenty five lakhs; or
	: Imprisonment up to six months; or
	: Both

(Q) Mr. Birat is a Director of MEGLOW LTD. He intends to construct a residential building for his own use. The cost of construction is estimated at Rs.1.00 Crore which Mr. Birat proposes to finance partly from his own sources to the tune of Rs.50 Lakh and balance Rs.50 Lakh from housing loan, to be obtained from a Housing Finance Company. For the purpose of obtaining the loan, he has approached the housing finance company which has in principle agreed to grant loan, but has put a condition.

The condition put by the housing finance company is that MEGLOW LTD. of which Mr. Birat is a Director should provide the guarantee for repayment of the loan and interest as per terms of the proposed agreement for granting the loan to Mr. Birat. You are required to advise Mr. Birat on the matter keeping in view the relevant provisions of the Companies Act, 2013.

(4 marks; 2015- June)

Answer:

Loans to Directors [Sec. 185 of Companies Act, 2013]

According to Section 185 (1), no company shall, directly or indirectly, advance any loan, including any loan represented by a book debt, to any of its directors or to any other person in whom the director is interested or give any guarantee or provide any security in connection with any loan taken by him or such other person.

Contravention:

If any loan is advanced or a guarantee or security is given or provided in contravention of the provisions of sub-Sec. (1), the company shall be punishable with a fine which shall not be less than Rs.5 lakhs but which may extend to Rs.25 lakhs and the directors or the other person to whom any loan is advanced or guarantee or security is given or provided in connection with any loan taken by him or the other person, shall be punishable with imprisonment which may extend to six months or with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees, or with both.

Present Case:

In view of the provision of Section 185, MEGLOW Ltd. shall not provide guarantee for repayment of loan and interest thereon.

(Q) SHRIJA LTD. secures residential accommodation for the use of its Managing Director by entering into a license arrangement under which the company has to deposit a certain amount with the Landlord to secure compliance with the terms of the license agreement. Can it be considered as a loan to a Director? Discuss with reference to the Companies Act, 2013. **(3 marks; 2015 - Dec)**

Answer:

As per Section 185 of the Companies Act, 2013, no company shall directly or indirectly make any loan to a director.

In the present case, the company has provided the managing director with a housing accommodation. It does not amount to a loan because of the following reasons:

- The company has not given any deposit or advance to the managing director. The amount deposited with the landlord cannot be said to be an indirect loan to the managing director.
- It is a usual practice to give a security deposit to the landlord with whom a rent or lease agreement is entered into. Thus, the company has made the security deposit on account of bonafide business considerations.
- It is of no concern of the managing director as to the terms on which the company secures residential accommodation for him.

It is the company and not the director who has entered into the lease agreement. Therefore, the company can at anytime use the accommodation for any other purpose and the managing director will have to vacate it, as and when desired by the company.

(Q) Mr. X is a director of ABC Ltd. He has approached Housing Finance Co. Ltd. for the purpose of obtaining a loan of Rs. 50 lacs to be used for construction of building of his residential house. The loan was sanctioned subject to the condition that ABC Ltd. should provide the guarantee for repayment of loan instalments by Mr. X. Advise Mr. X.

(3 marks; 2017 - June)

Answer:

According to Section 185 of the Companies Act, 2013, no company shall, directly or indirectly, advance any loan, including any loan represented by a book debt, to any of its directors or to any other person in whom the director is interested or give any guarantee or provide any security in connection with any loan taken by him or such other person.

Thus, Mr. X is not allowed for loan of Rs. 50 Lacs against guarantee by the company ABC Ltd.

(Q) State the provisions of the Companies Act, 2013 relating to loans to directors.
(6 marks; 2012- June) [CSEM - II]

Answer:

Amendment made by Companies (Amendment) Act, 2017 Section 185:

(1)For **Section 185 of the Principal Act,** the following section shall be substituted, namely:

"185.(1) No company shall, directly or indirectly, advance any loan, including any loan represented by a book debt to, or give any guarantee or provide any security in connection with any loan taken by,—

(a)Any director of company, or of a company which is its holding company or any partner or relative of any such director; or

(b)Any firm in which any such director or relative is a partner.

(2)A company may advance any loan including any loan represented by a book debt, or give any guarantee or provide any security in connection with any loan taken by any person in whom any of the director of the company is interested, subject to the condition that—

(a)a special resolution is passed by the company in general meeting: Provided that the explanatory statement to the notice for the relevant general meeting shall disclose the full particulars of the loans given, or guarantee given or security provided and the purpose for which the loan or guarantee or security is proposed to be utilised by the recipient of the loan or guarantee or security and any other relevant fact; and

(b)The loans are utilised by the borrowing company for its principal business activities.

Explanation.—For the purposes of this sub-section, the expression "any person in whom any of the director of the company is interested" means—

(a)any private company of which any such director is a director or member;

(b)any body corporate at a general meeting of which not less than twenty-five per cent, of the total voting power may be exercised or controlled by any such director, or by two or more such directors, together; or

(c)any body corporate, the Board of directors, managing director or manager, whereof is accustomed to act in accordance with the directions or instructions of the Board, or of any director or directors, of the lending company. (3) Nothing contained in sub-sections (1) and (2) shall apply to—

(a)The giving of any loan to a managing or whole-time director—

(i)As a part of the conditions of service extended by the company to all its employees; or

(ii)Pursuant to any scheme approved by the members by a special resolution; or

(b)a company which in the ordinary course of its business provides loans or gives guarantees or securities for the due repayment of any loan and in respect of such loans an interest is charged at a rate not less than the rate of prevailing yield of one year, three year, five year or ten year Government security closest to the tenor of the loan; or

(c)any loan made by a holding company to its wholly owned subsidiary company or any guarantee given or security provided by a holding company in respect of any loan made, to its wholly owned subsidiary company; or

(d)any guarantee given or security provided by a holding company in respect of loan made by any bank or financial institution to its subsidiary company:

Provided that the loans made under clauses (c) and (d) are utilised by the subsidiary company for its principal business activities. (4) If any loan is advanced or a guarantee or security is given or provided or utilised in contravention of the provisions of this section,-

(i)the company shall be punishable with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees,

(ii)every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees; and

(iii) the director or the other person to whom any loan is advanced or guarantee or security is given or provided in connection with any loan taken by him or the other person, shall be punishable with imprisonment which may extend to six months or with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees, or with both."

(Q) The managing director of a public limited company applied for purchasing a company's flat. The price of the flat is Rs. 40 lakh. The managing director suggested that he may be allowed to pay Rs. 20 lakh and the balance of Rs. 20 lakh may be recovered from his salary in 40 installments. Accounts department observed that it will tantamount to providing house building advance to the managing director which is not covered by the rules of the company. Being the Company Secretary of the company, you have been asked by the Board of directors to examine and submit a note stating the rules in this regard and action to be taken for considering the request. **(8 marks; 2011 - Dec) [CSEM - II]**

Answer:

To, Date-.....

The Board of Directors

XYZ Company Limited.

Mumbai

Dear Sir,

Subject - Note regarding Request of The Managing Director for Purchase of A Company Flat.

1.	**Facts of the case**	1. Mr X, Managing Director has applied for purchasing a company flat. The price of flat is Rs. 40 lakh. The Managing Director has requested that he will pay Rs. 20 lakh as initial payment and the balance of Rs. 20 lakh may be recovered from his remuneration at Rs. 50,000, per month for 40months. 2. The company has no scheme for payment of House building advance to its employees.
2.	**Provisions of Section 185-Loans to Directors**	No company shall: • directly or indirectly, • advance any loan, including any loan represented by a book debt, • to any of its directors or • to any other person in whom the director is interested or • give any guarantee or • provide any security in connection with any loan taken by him or such other person **Exceptions:** Section 185 will not applicable in following cases- (a) the giving of any loan to a managing or whole-time director— (i) as a part of the conditions of service extended by the company to all its employees; or (ii) pursuant to any scheme approved by the members by a special resolution; or (b) a company which in the ordinary course of its business provides loans or gives guarantees or securities for the due repayment of any loan and in respect of such loans 'an interest is charged at a rate not less than the bank rate declared by the Reserve Bank of India. **"to any other person in whom director is interested" means-** (a) any director of the lending company, or of a company which is its holding company or any partner or relative of any such director; (b) any firm in which any such director or relative is a partner; (c) any private company of which any such director is a director or member; (d)any body corporate at a general meeting of which not less than twenty five per cent, of the total voting power may be exercised or controlled by

		any such director, or by two or more such directors, together; or (e)any body corporate, the Board of directors, managing director or manager, whereof is accustomed to act in accordance with the directions or instructions of the Board, or of any director or directors, of the lending company.
3.	**Case Law Analysis**	The Bombay High Court in Fridie Ardeshir Mehta (Dr.) Vs. Union of India, came to the conclusion that the company selling one of its flats to one of its directors on receiving half the price in cash and agreeing to accept the balance in instalments does not amount to giving of loans to the director.
4.	**Conclusion**	Hence, the view of the observation of Accounts Department is not Correct that such purchasing of company's flat by Managing Director would tantamount to providing house building advance to Managing Director.

As such Board may like to agree with the request of the Managing Director, submitted.

ABC
Company Secretary

(Q) A housing company has sold a flat to its Managing Director by accepting 50% in cash and balance in installments. Decide whether this transaction attracts the provisions pertaining to loan to directors under section 185. If so, validate the transaction. (4 marks; 2014 - Dec)

Answer:

Amendment made by Companies (Amendment) Act, 2017

1.	**Section 185**	(1) For **Section 185 of the principal Act,** the following section shall be substituted, namely: "185.(1) No company shall, directly or indirectly, advance any loan, including any loan represented by a book debt to, or give any guarantee or provide any security in connection with any loan taken by,— (a) any director of company, or of a company which is its holding company or any partner or relative of any such director; or (b) Any firm in which any such director Or relative is a partner. (2) **A** company may advance any loan including any loan represented by a book debt, or give any guarantee or provide any security in connection with any loan taken by any person in whom any of the director of the company is interested, subject to the condition that— (a) a special resolution is passed by the company in general meeting: Provided that the explanatory statement to the notice for the relevant general meeting shall disclose the full particulars of the loans given, or guarantee given or security provided and the purpose for which the loan or guarantee or security is proposed to be utilised by the recipient of the loan or guarantee or security and any other relevant fact; and (b) The loans are utilized by the borrowing company for its principal business activities. Explanation: For the purposes of this sub-section, the expression "any person in whom any of the director of the company is interested" means— (a) any private company of which any such director is a director or member; (b) any body corporate at a general meeting of which not less than twenty-five percent, of the total voting power may be exercised or controlled by any such director, or by two or more such directors, together; or (c) any body corporate, the Board of directors, managing director or manager, whereof is accustomed to act in accordance with the directions or instructions of the Board, or of any director or directors, of the lending company. (3) Nothing contained in sub-Sections (1) and (2)shall apply to-. (a) the giving of any loan to a managing or whole-time director- (i) as a part of the conditions of service extended by the company to all its employees; or (ii) pursuant to any scheme approved by the members by a special

		resolution; or (b) a company which in the ordinary course of its business provides loans or gives guarantees or securities for the due repayment of any loan and in respect of such loans an interest is charged at a rate not less than the rate of prevailing yield of one year, three year, five-year or ten year Government security closest to the tenor of the loan; or (c) any loan made by a holding company to its wholly owned subsidiary company or any guarantee given or security provided by a holding company in respect of any loan made to. its wholly owned subsidiary company; or (d) any guarantee given or security provided by a holding company in respect of loan made by any bank or financial institution to its subsidiary company: Provided that the loans made under clauses(c) and (d) are utilised by the subsidiary company for its principal business activities. (4) If any loan is advanced or a guarantee or security is given or provided or utilised in contravention of the provisions of this section,- (i)the company shall be punishable with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakhrupees, (ii) every officer of the company who is in "default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees; and (iii) the director or the other person to whom any loan is advanced or guarantee or security is given or provided in connection with any loan taken by him or the other person, shall be punishable with imprisonment which may extend to six months or with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees, prwith both."
2.	**Case Law Analysis**	The facts of this case is similar to a decided case law in **Bombay High Court in Eredie Ardesher Mehta (Dr.) Vs. Union of India (1991) 70 Comp. Case 210 (1991) 1 Comp.** It was held that the company selling one of its flats to one of its directors on receiving half the price in cash and agreeing to accept the balance in instalments does not amount to giving loan.

(Q) Mr. Arnab, one of the Directors of Aim Insurance Company Limited had taken some life insurance policies from the company. He, now, wants to avail a temporary loan from the company. The company refused to grant such loan on the ground that there is a prohibition in this regard. Mr. Arnab, approached you, now, about the matter. Advise him with reference to the Insurance laws Amendment Act, 2015 as well as Section 185 of the Companies Act, 2013, whether such loan can be obtained by him. (4 marks; 2016 - Nov)

Answer:

Provision

As per Sec. 29 of the Insurance Act, 1938, as amended by the Insurance Laws (Amendment) Act, 2015, insurer shall not grant any loan or temporary advances to:

(a) Any director, manager, actuary, auditor or officer

(b) Any other company or firm in which above referred person holds position of director, manage actuary, officer or partner.

Either on hypothecation of property or on personal security or otherwise, except loans on life insurance policies issued by him within their surrender value.

However, any loan can be granted in above case on life insurance policy within its surrender value. When loan is granted to director by insurer based on surrender value of life insurance, Sec. 185 is not applicable.

Present Case:

Here, Aim Insurance Company Limited has given some life insurance policies to Mr. Arnab, one of director of the company. Now, he wants to avail a temporary loan from the company. The company cannot refuse to grant such loan on the ground at there is a prohibition in this regard.

As the

Insurance Act, 1938 provides that where any life insurance policy provided by such company then such company cannot refuse to grant temporary loan on the ground that there is a prohibition in this regard. So, Aim Insurance Company Limited cannot refuse to grant loan on the ground that there is prohibition in this regard.

(Q) Can a holding company advance any loan to its wholly owned subsidiary company? What are the relevant provisions of the Companies Act, 2013 with regard to granting of loans by holding company to its wholly owned subsidiary company? Mention the penalties for the contravention of the provisions of the Companies Act, 2013. **(4 marks; 2016 - Nov)**

Answer:

Loan to Wholly Owned Subsidiary Company

As per Sec. 185(1) of the Companies (Amendment) Act, 2017, no company shall, directly or indirectly, advance any loan including any loan represented by a book debt to, or give any guarantee or provide any security in connection with any loan taken by,-

(a) Any director of company, or of a company which is its holding company or any partner or relative of any such director; or

(b) Any firm in which any such director or relative is a partner.

The above restriction does not apply where any loan made by a holding company to its wholly owned subsidiary company or any guarantee given or security provided by a holding company in respect of any loan made to its wholly owned subsidiary company.

[Sec. 185(3)(c) of the (Amendment) Act, 2017]

Provided that the loans made by the holding company to its wholly owned subsidiary, should be utilized by the subsidiary company for its principal business activities.

Thus, a holding company can grant loan to its wholly owned subsidiary company in accordance with the provisions of Sec. 185 of the Companies (Amendment) Act, 2017.

Penalty for contravention: If any loan is advanced or a guarantee is given or provided in contravention of the provisions of Sec. 185, the following penalties shall be leviable:

(i) On Company: Minimum - Five lakhs and maximum - Twenty Five lakhs

(ii) On defaulting director and the other person to whom any loan is advanced or guarantee or security is given or provided in connection with any loan taken by him or the other person:

Imprisonment - Maximum Six months, or,

Fine - Minimum - Five lakhs and maximum - Twenty Five lakhs, or, Both imprisonment and fine.

(Q) Mr. KMP is director of XLS Ltd. He intends to construct a residential building for his own use. The cost of construction is estimated at one hundred fifty crore rupees, which Mr KMP proposes to finance partly from his own sources to the tune of sixty lakh rupees and the balance ninety lakh rupees from housing loan to be obtained from a housing finance company. For the purpose of obtaining the loan, he has approached the housing finance company which has in principle agreed to grant the loan, but has put a condition. The condition put by the housing finance company is t£iat the Company XLS Ltd. of which Mr. KMP is a director should provide the guarantee for repayment of the loan and interest as per the terms of the proposed agreement for granting the loan to Mr. KMP. You are required to advise Mr. KMP on the matter with reference to the provisions of the Companies Act, 2013

(2.5 marks; 2009-May)

Answer:

Loans to Directors [Sec. 185 of Companies Act, 2013]

As per Sec. 185(1) of the Companies (Amendment) Act, 2017, **no company shall, directly or indirectly, advance any loan including any loan represented by a book debt to, or give any guarantee or provide any security in connection with any loan taken by,-**

(a) Any director of company, or of a company which is its holding company or any partner or

relative of any such director; or

(b) Any firm in which any such director or relative is a partner.

Provision

However: Sec. 185(1) is not applicable to loan given to MD or whole Time Director. [Sec. 185(3)]

Present Case:

In view of the provision of Sec. 185, Company XLS Ltd shall not provide guarantee for repayment of loan and interest thereon since Mr. KMP is not a Managing Director or Whole Time Director.

(Q) Mr. DRT is a director of PCS Ltd. The said company is having sufficient liquid funds and Mr. DRT is in dire need of funds. In order to mitigate the hardship of Mr. DRT the board of directors of PCS Ltd. wants to lend Rs. 5 lakhs to him and Rs. 2 lakhs to his wife. State whether such loans can be given and if so under what conditions. What would be your answer if the company PCS LTD would have been PCS Private Ltd. (4 marks; 2012-May)

Answer:

Loans to Directors [Sec. 185 of Companies Act, 2013]

According to Sec. 185 (1), no company shall, directly or indirectly, advance any loan, including any loan represented by a book debt, to any of its directors or to any other person in whom the director is interested or give any guarantee or provide any security in connection with any loan taken by him or such other person.

Present Case:

1. Mr. DRT and his wife are specified persons u/s 185. Thus no loan can be given.

2. **Sec. 185 shall not apply to a private company**

(a) In whose share capital no other body corporate has invested any money;

(b) if the borrowings of such a company from banks or financial institutions or any body corporate is less than twice of its paid up share capital or fifty crore rupees whichever is lower; and

(c) Such a company has no default in repayment of such borrowings subsisting at the time of making transactions under this section [Notification No. GSR 464(E) dated 5-6-2015]

(Q) Mr. OK is a director of VRS Ltd. He intends to construct a residential building for his own use. The cost of construction is estimated at one crore thirty five lakh, which Mr. OK proposes to finance partly from his own sources to the tune of sixty lakh rupees and the balance seventy five lakh from housing loan to be obtained from a housing finance company. For the purpose of obtaining the loan, he has approached the housing finance company which has in principle agreed to grant the loan, but has put a condition. The condition put by the housing finance company is that the Company VRS Ltd. of which Mr. OK is a director should provide the guarantee for repayment of the loan and interest as per the terms of the proposed agreement for granting the loan to Mr. OK. You are required to advise Mr. OK on the matter with reference to the provisions of the Companies Act, 2013.

(8 marks; 2014 - May)

Answer:

Please refer 2009 – May

(Q) Queen Construction Company Ltd. acquired 60% of the equity paid up share capital of ABC Ltd. Queen Construction Ltd. has planned to expand its operation for which additional fund is required. The Board of Directors decided to avail additional exposure of Rs. 10 crore from the Bank.

The following data is furnished as on 30th June, 2017.

	Rs.in Crores
Authorised Equity Share Capital	25
Issued and Subscribed Equity Share Capital	22
Paid up Equity Share Capital	20
Capital Reserve	2
Revaluation Reserve	1
General Reserve	3
Open cash credit Limit (for working Capital requirement) with the Bank repayable in 3 months.	5
Loan obtained under the Hire Purchase agreement for acquiring vehicles.	1
Long term Borrowing from Banks and other parties:	15

ABC Ltd. approached Queen Construction Ltd. to grant a loan of Rs. 25 Lakhs and stand as guarantor for repayment of loan Rs. 10 Lakhs to be sanctioned by a Bank.

The two loans (25 Lakhs plus 10 Lakhs) will be utilized by ABC Ltd. for its principal business activities.

You being the Financial Advisor of the company, advise the Board of Directors about the procedure to be followed to avail additional exposure of Rs. 10 crore from the Bank. Also evaluate whether the loan/ guarantee given by Queen construction Ltd. to ABC Ltd. is valid according to Section 185 of the Companies Act, 2013. **(8 marks; 2018-May)**

Answer:

- **As per Sec. 180 (1) (c) of the Companies Amendment Act, 2017, the**

Board of Directors of a company, without obtaining the approval of shareholders in a general meeting through a special resolution, can borrow the funds including funds already borrowed unto an amount which does not exceed the aggregate of paid up capital of the company, its free reserves and securities premium Such borrowing shall not include temporary loans obtained from the company's bankers in ordinary course of business.

Free Reserves shall not include the reserves set apart for specific purpose.

According to the above provisions, the Board of Directors of ABC Ltd. can borrow, without obtaining approval of the share holders in a general meeting, unto an amount calculated as follows:

Particulars	Rs.in crores
Paid up Equity Share Capital	20
Capital Reserve (Not a free reserve)	-
Revaluation Reserve	-
General Reserve (free Reserve)	3
Aggregate of Paid up Capital and free reserves	**23**
Total borrowing power of the Board of Directors of the company ie 100% of the aggregate of paid up	**23**
capital and free reserves Less: Amount already borrowed - as long term	**4**
Loan on HP agreement	0)
Long term Borrowings from Bank and other parties	**(15)**

Amount unto which BoD can further borrow without the approval of shareholders in general meeting	7

- Thus, the borrowing of ten crore rupees is beyond the powers of Director of ABC Ltd. Thus, the management of ABC Ltd. should take steps to convene the general meeting and pass a special resolution by the members in the meeting as stated in Sec. 180 (1) (c) of the Companies Act, 2013. Then, the borrowing will be valid and binding on the company and its members.
- As per Sec. 185 of the Companies Act, 2013. No company shall directly or indirectly , advance any loan, including any loan represented by a book debt, to any of its directors or to any other person in whom the director is interested or give any guarantee or provide security in connection with any loan taken by him or such other person.
- The above restriction shall not apply where any guarantee given or security provided by a holding .company in respect of any loan made by any bank or financial institution to its subsidiary. Provided that the loans made are utilized by the subsidiary company for its principal business activity.

In this case, ABC Ltd. is subsidiary of Queen Construction Co. Ltd. and Queen Construction Co. Ltd. has stand as guarantor for payment of loan of ten crore rupees for ABC Ltd. So in light of above provision, the loan is sanctioned by bank to ABC Ltd. a subsidiary Co. So that Queen Construction Co. Ltd. stand as guarantor for that and this loan being used by ABC Ltd. for principal business activities. In light of Section 185, this loan / guarantee given by Queen Construction Ltd. to ABC Ltd. is valid.

186. LOAN AND INVESTMENT BY COMPANY

Notified Date of Section: 01/04/2014

(Q) State the procedure for granting loan by one company to another company.
(6 marks; 2011 - June) [CSEM - II]

Answer:

Procedure relating to inter-corporate loans and investments.

(i) Convene a Board meeting after giving notice to all the directors as per Section 173 of Companies Act, 2013 to approve the proposal for making inter-corporate loans or investments.

(ii) Hold board meeting to consider the proposal to give loan or make investment and-
   a. If the aggregate amount of proposed loan/investment is within the limits specified in the Section 186(1) of the Act, then pass the resolution with all the directors present at the meeting consenting thereto.
   b. If the aggregate amount of proposed loan/investment exceeds the specified limits under Section 186 of Companies Act, 2013 then pass the resolution with all directors present subject to the approval of shareholders in the general meeting.
      i. Fix time, date and venue for holding general meeting to pass the special resolution.
      ii. To authorize to send a notice on the behalf of Board of Directors.

(iii) Issue notice in writing at least twenty-one days before the date of general meeting proposing the special resolution.

(iv) Hold the general meeting and pass the special resolution.

(v) In case of listed company, forward to the stock exchanges where the shares of the company are listed,

(vi) Ensure that approval of the public financial institutions has been obtained before implementing the proposal if the company has taken any term loan from any one of the financial institutions.

(vii) Enter the requisite particulars in respect of every investment or loan made in the register maintained for this purpose within seven days of making of such loan or investment.

(Q) VAIBHAV POLYMERS LTD. has an authorized capital of Rs. 250 lacs. Its paid up capital is Rs. 200 lacs. The free reserves are to the tune of Rs. 120 lacs. The company has advanced to other companies to the tune of Rs. 180 lacs, as on 30th November, 2011. On this date, the Board of directors of the company wants to advance Rs. 35 lacs to Vasudha Textiles Ltd., without the prior permission of the shareholders in a general meeting. Discuss the correctness of the proposal. (6 marks; 2011 - Dec)

Answer:

According to Section 186:

- A company can use 60% of its paid up capital and free reserves and Securities Premium A/c or 100% of its free reserves and Securities Premium A/c whichever is more, as loan to any other company or as guarantee for loan made by any other person or as consideration for acquisition of shares of any other company.
- It is further provided in the same Section 186 that if the limits as provided above is exceeded for any loans, guarantee or investments, such further loans, guarantees or investments should be given only after passing a special resolution in a general meeting authorizing these loans, guarantees or investments.
- Thus worded differently, according to Section 186 the company cannot give loan, provide security, provide guarantee or make investments exceeding 60% of its paid capital and free reserves and Securities Premium A/c or 100% of its free reserves and Securities Premium A/c which ever is more except with the previous authorization of general meeting by a special resolution.
  The approval of members is not required, even if the ceiling or limits as set in Section 186 is exceeded, in the following cases:
  1. Banking company;
  2. Insurance company;
  3. Housing financial company;
  4. Any company whose principal business is acquisition of shares.
- Any investment made in shares acquired as rights as per Section 62 of Companies Act, 2013.
- Any loans made or guarantee given by a holding company to its wholly owned subsidiary company.
  In the present case, the BOD of the company cannot advance Rs. 35 lacs to Vasudha Textiles Ltd. without the prior permission of the shareholders in general meeting.

(Q) VKS TEXTILES PVT. LTD., which is a private company which is not a subsidiary of any public company, does not furnish the details of its investments in Indian companies as required by note (1) Schedule III to the Companies Act, 2013. The company is of the view that Section 186 of the Companies Act, 2013 is not applicable in its entirety to all the companies, i.e. public and private. Is the said view of VKS TEXTILES PVT? LTD. in accordance with law? (3 marks; 2013 - June)

Answer:

Central Government to prescribe accounting standards (Section 133 of the Companies Act, 2013) The Central Government may prescribe the standards of accounting or any addendum thereto, as recommended by the Institute of Chartered Accountants of India, constituted under Section 3 of the Chartered Accountants Act, 1949, in consultation with and after examination of the recommendations made by the National Financial Reporting Authority.

(Q) The power to invest funds of the company is the prerogative of the Board of directors under Section 179. Discuss the limitations on such powers of the Board, if any, relating to inter-corporate loans and investments under Section 186. (6 marks; 2009 - Dec) [CSEM - II]

Answer:

1.	**Powers of Board of Directors**	**Section 179 of the Companies Act, 2013** hasgiven wide powers to the Board of Directors of a company to invest the funds of the company. Every resolution delegating the power referred to in clause (d) of Sub-Section **(1)** shall specify the total amount up to which the funds may be invested, and the nature of the investment which can be made, by the delegate.

2.	**Power to make loan, borrow money is subject to the limit specified in Sec. 186**	**Limits under Sec. 186**	The Board also has the power to make loan, borrow money etc. However, power of board under **Section 179** to make loan, give guarantee or provide security has been restricted under **Section 186 of Companies Act, 2013** which is mentioned hereunder. No company shall directly or indirectly- (a)give any loan to any person or other body corporate; (b)give any guarantee or provide security in connection with a loan to any other body corporate or person; and (c)acquire by way of subscription, purchase or otherwise, the securities of any other body corporate, **Exceeding** • 60%. of its paid-up share capital, free reserves and securities premium account or • 100% of its free reserves and-securities premium account, **whichever is more.**
		Approval by way of special resolution	Where the aggregate of the loan and investment, etc., so far made in all other bodies corporate, along with the investment, loan, guarantee or security proposed to be made or given by the Board of Directors, exceed the aforesaid limits, no investment or loan shall be made or guarantee given or security provided unless previously authorised by a special resolution passed in a general meeting.

(Q) State the procedure for granting loan by one company to another company.

(6 marks; 2011 - June) [CSEM - II]

Answer:

Procedure relating to inter corporate loans and investments		
1.	**Board meeting u/s 173**	Convene a Board meeting after giving notice to all the directors as per **Section 173 of Companies Act, 2013** to approve the proposal for making inter corporate loans or investments.
2.	**Proposal in board meeting**	Hold board meeting to consider the proposal to give loan or make investment and- **1.** If the aggregate amount of proposed loan/investment is within the limits specified in the **Section 186(1)** of the Act, then pass the resolution with all the directors present at the meeting consenting thereto. **2.** If the aggregate amount of proposed loan/investment exceeds the specified limits under **Section 186 of Companies Act, 2013**then pass the resolution with all directors present subject to the approval of shareholders in the general meeting. • Fix time, date and venue for holding general meeting to pass the special resolution. • To authorize to send a notice on the behalf of Board of Directors.
3.	**Notice for General Meeting**	Issue notice in writing at least twenty-one days before the date of general meeting proposing the special resolution.
4.	**General meeting and SR**	Hold the general meeting and pass the special resolution.
5.	**PFI's Approval**	Ensure that approval of the public financial institutions has been obtained before implementing the proposal if the company has taken any term loan from any one of the financial institutions.
6.	**Entry of register of investment**	Enter the requisite particulars in respect of every investment or loan made in the register maintained for this purpose within seven days of making of such loan or investment.

(Q) Your company, which is a public limited company wishes to make investments in shares of a company. The total investment exceeds the statutory, limit stipulated by the Companies Act, 2013. What are the formalities to be complied with in this regard?

(4 marks; 2013 - June) [CSEM - II]

Answer:

1.	**Provisions of Sec. 186**	No Company shall, directly or indirectly: (a)give any loan to any person or other body corporate; (b)give any guarantee, or provide security, in connection with a loan to any other person body corporate or person; and , (c)acquire, by way of subscription, purchase c otherwise the securities of any other body corporate; v • Exceeding 60% of its paid-up share capital, free reserves and securities premium account OR • 100% of its free reserves and securities" premium account, whichever is more unless the same is previously authorised by a special resolution passed in a general meeting.
2.	**Formalities to make investment in excess of the limits as specified u/s 186**	A public limited company wishing to make investments in shares of a company in excess of the above statutory limit provided in **Section 186 of Companies Act, 2013** will have to comply with the following formalities:
	1. General Meeting and SR.	It has to convene a general meeting and pass a special resolution before making the investment.
	2. Contents of notice to GM	Notice of such resolution shall indicate: (i) the specific limits; (ii) the particulars of body corporate in which the investment is proposed to be made; (iii) the purpose of the investment; (iv) specific sources of funding; and (v) any other detail which is material.

(Q) As on 31st March, 2010, the balance sheet of ABC Ltd. shows the following:

	Rs. In Crores
Paid-up share capital	**30**
Reserves and surplus	**40**
Reserve for redemption of debenture	**20**
Capital reserve	**10**

The company made loan/stood guarantee for loans to other companies asbelow:

Loan to DEF Ltd.	**Rs. 15 crore**
Guarantee given on behalf of GHK Ltd.	**Rs. 15 crore**
LKP Ltd. approached ABC Ltd. for loan of an amount of	**Rs. 20 crore**

Advise the management of ABC Ltd. as to whether the company can give loan of Rs. 20 crore to LKP Ltd.

(4 marks; 2011 - June) [CSEM - II]

Answer:

1.	**Provision. Section 186**	As per **Section 1.86 of the Companies Act, 2013,** a company can give loan/ guarantee to company/companies to the extent of 60% of paid -up capital, free reserve and Securities Premium Account or 100% of free reserves and Securities Premium Account whichever is higher with the approval of Board. For any amount beyond these limits approval of the company is required.
2.	**Analysis of the given problem**	The paid up capital of ABC Ltd. is Rs. 30 Cr. and its free reserves is Rs. 40 Cr. Board of Directors of ABC Ltd. therefore, can give loan/guarantee upto. 60% of (30 + 40) crores = 42 crores or 100% of 40 crores = 40 crores whichever is more. Hence, Rs. 42 crores is limit beyond which the company needs shareholders approval for giving loan/guarantee. Existing loans and guarantee-

		Loan to DEF Ltd. Rs. 15 Crores Guarantee to GHK Ltd. Rs. 15 Crores Total Rs. 30 Crores Proposed loan to LKP Ltd. Rs. 20 Crores Total Rs. 50 Crores
3.	**Conclusion**	The amount of Rs. 50 Crores is beyond the authorized powers of the Board hence approval ofthe shareholders by a special resolution is required to be passed in General meeting. In case the' company is a listed company such an approval* should be taken through postal ballot.

(Q) Board of directors of Joy Ltd., by a resolution passed at its meeting, decide to provide a loan of Rs. 50 crore to Happy Ltd.. The paid-up share capital of Joy Ltd. on the date of resolution was Rs. 100 crore and the aggregate balance in the free reserves and securities premium account stood at Rs. 40 crore. Examining the provisions of the Companies Act, 2013, decide whether the Board's resolution to provide a loan of Rs. 50 crore to Happy Ltd. is valid? **(4 marks; 2015 - June)**

Answer:

1.	**Provisions of Sec.186(2)** -	**(a) Limits**	No company shall directly or indirectly - No company shall directly or indirectly — (a) give any loan to any person or other body corporate; (b) give any guarantee or provide security in connection with a loan to any other body corporate or person; and (c) acquire by way of subscription, purchase or otherwise, the securities of any other body corporate, **Exceeding** • 60%. of its paid-up share capital, free reserves and securities premium account or • 100% of its free reserves and securities premium account, Whichever is more unless the same is previously authorised by a special resolution passed in the company's general meeting.
		(b) Unanimous Board resolution for loan/investment	No -loan or investment shall be made or guarantee or security given by the company unless the resolution sanctioning it is passed at a meeting of the Board with the consent of all directors present at the meeting.
2.	**Analysis of the given problem**	**Accordingly, in the given case,** the company can grant a loan of Rs. 50 crore, since the company oari[1] grant a loan up to Rs. 84 crore (i.e. 60% of Rs. 100 crore + Rs. 40 crore i.e. = Rs. 84 or Rs. 40 crore whichever is more) without the approval of the general meeting by a special resolution and the Board meeting with the consent of all the directors present.	
3.	**Conclusion**	Only Board's resolution to provide a loan of Rs. 50 crore to Happy limited without the approval of general meeting by a special resolution is valid.	

(Q) RR Limited- has decided to make investment in other companies for Rs. 50 lakhs, which is in excess of 60% of the company's paid-up share capital, free reserves and securities premium account. Company has 5 directors. Four directors were present in the Board meeting, three directors have given their consent but one director abstained from voting. The decision of the Board was noted in the minutes of Board meeting and decided to make such investment by passing of Board resolution with majority. Referring to the provisions of Companies Act, 2013, examine the validity of the Board's decision.

(4 marks; 2017 - June)

Answer:

In accordance with the provisions of the **Companies Act, 2013,** as contained in **Section 186 (5)**,no investment shall be made or loan or guarantee or security given by the company unless the resolution sanctioning it is passed at a meeting of the Board with the consent of all the

directors present at the meeting and the prior approval of the public financial institution concerned where any term loan is suosisting, is obtained.
Further, under the provisions of **Section 186(2) and 186(3),** the loan amount must not exceed 60% of its paid-up capital, free reserves and securities premium account or 100% of free reserves and securities premium account, whichever is more. In case, the company wishes to exceed the said limit, prior approval of company through special resolution would be acquired.
In the given case, in absence of adequate information, even if we assume that Rs. 50 lakh does not exceed the 100% of free reserves and securities premium account, RR limited has not complied with the provisions of **Section 186** (5) **of the Companies Act, 2013** where consent of all the directors present is required. The resolution of the Board of Directors therefore, is not valid and has no legal effect.

(Q) XYZ Ltd., a company, has a paid up share capital of Rs. 60 crores and free reserves of Rs. 25 crores. It desires to make a loan of Rs. 20 crores to M Ltd. The company XYZ Ltd. has already made investments in many other companies including loans to the extent of Rs. 35 crores. Can the company go ahead with loan toM Ltd. Rs. Please advise the company about the procedure to be followed by it. (4 marks; 2017 - Dec)

Answer:
As per **Section 186 of the Companies Act, 2013** a company shall make investments upto 60 percent of paid up share capital and free reserves or 100 percent of free reserves and securities premium account whichever is more.
In this case, company can make maximum investment of 60% (60+25) = 51 crores.
Since company has already invested 35 crores it can further invest 16 crores only.
To invest upto 20 crores they need to take approval of shareholders through a special resolution.

(Q) Amar Textiles Ltd. is a company engaged in manufacture of fabrics. The Company has investments in shares of other bodies corporate including seventy percent shares in Amar Cotton Co. Ltd. and it has also advanced loans to other bodies corporate. The aggregate of all the investments made and loans granted by Amar Textiles Ltd. exceeds sixty percent of - its paid up share capital and free reserves and also exceeds hundred percent of its free reserves and securities premium A/c. In course of its business requirements, Amar Textiles Ltd. has obtained a term loan from Industrial Development Bank of India and the said loan is still subsisting. Now the Company wants to increase its holding from seventy percent to eighty percent of the equity share capital in Amar Cotton Co. Ltd. by purchase of additional ten percent shares from other existing shareholders.

State the legal requirements to be complied with by Amar Textiles Ltd. under the provisions of the Companies Act, 2013 to give effect to the above proposal. (5 marks; 2009-May)

Answer:

Loans and Investment by Company

Provision:

According to Sec. 186(1), without prejudice to the provisions contained in this Act, a company shall unless otherwise prescribed, make investment through not more than 2 layers of investment companies:

However, the provisions of sub-Sec. (1) shall not affect,-

(a) A company from acquiring any other company incorporated in a country outside India if such other company has investment subsidiaries beyond two layers as per the laws of such country;

(b) A subsidiary company from having any investment subsidiary for the purposes of meeting the requirements under any law or under any rule or regulation framed under any law for the time being in force.

According to Sec. 186 (2) of the Companies Act, 2013, no company shall directly or indirectly:

(a) Give any loan to any person or other body corporate;

(b) Give any guarantee or provide security in connection with a loan to any other body corporate or person; and

(c) Acquire by way of subscription, purchases or otherwise, the securities of any other body corporate, exceeding sixty percent of its paid up share capital, free reserves and securities premium account or hundred percent of its free reserves and securities premium account, whichever is more.

According to sec 186 (3) of the Companies (Amendment) Act, 2017,

Where the aggregate of the loans and investment so far made, the amount for which guarantee or security so far provided to or in all other bodies corporate along with the investment, loan, guarantee or security proposed to be made or given by the Board, exceed the limits specified under **subsection (2),** no investment or loan shall be made or guarantee shall be given or security shall be provided unless previously authorised by a special resolution passed in a general meeting;

Provided that where a loan or guarantee is given or where a security has been provided by a company to its wholly owned subsidiary company or a joint venture company, or acquisition is made by a holding company, by way of subscription, purchase or otherwise of, the securities of its wholly owned subsidiary company, the requirement of this sub-section shall not apply. Provided further that the company shall disclose the details of such loans or guarantee or security or acquisition in the financial statement as provided under **sub-section (4).**

According to rule1 the Companies (Meetings of Board and its Powers) Rules, 2014 where a loan or guarantee is given or where a security has been provided by a company to its wholly owned subsidiary company or a joint venture company, or acquisition is made by a holding company by way of subscription, purchase or otherwise of the securities of its wholly owned subsidiary company, the requirements of sub- Sec. (3) of Sec. 186 shall not apply;

Provided that the company shall disclose the details of such loans or guarantee or security or acquisition in the financial statement as provided under sub-Sec. (4) of Sec. 186.

Rule 13 of the Companies (Meetings of Board and its Powers) Rules, 2014 also provide that:

(a) Where the aggregate of the loans and investment so far made, the amount for which guarantee or security so far provided to or in all other bodies corporate along with the investment, loan, guarantee or security proposed to be made or given by the board exceed the limits specified under Sec. 186, no investment or loan shall be made or guarantee shall be given or security shall be provided unless previously authorised by a special resolution passed in a general meeting.

Explanation: For the purpose of this rule, it is clarified that it would be sufficient compliance if such special resolution is passed within one year from the date of notification of this section.

(b) A resolution passed at a general meeting in terms of sub-Sec. (3) of Sec. 186 to give any loan or guarantee or investment or providing any security or the acquisition under sub Sec. (2) of Sec. 186 shall specify the total amount up to which the BOD is authorised to give such loan or guarantee, to provide such security or make such acquisition: **Provided, that** the company shall disclose to the members in the financial statement the full particulars in accordance with the provision of sub- Sec.

(4) of Sec. 186.

Present Case:

Aggregate of loans and investments already made by Amar Textiles Ltd exceeds the two limits as specified u/s 186 of higher sixty percent of Capital & Free Reserve & Securities Premium Account and hundred percent of Free Reserve and Securities Premium Account. Therefore, the company can make new inter corporate investment only by passing a Special Resolution.

The proposed investment can be made as follows:

1. Resolution can be passed at Board meeting with the consent of all the directors present.

2. A special resolution shall be passed in the general meeting. The notice of special resolution shall indicate clearly the specific limits, the particulars of the body corporate in which the investment is proposed to be made, the purpose for which investment is made, specific source of funding and other similar details.

3. IDBI is a public financial Institution within the meaning of Sec. 2(72). Since, the aggregate investments exceed the limit of sixty percent, prior approval of IDBI shall be obtained.

4. Company is bound to enter the prescribed particulars of the Investment in the Register maintained for this purpose within7 days of making the investment.

5. Company shall ensure that no default in complying with the Sec. 73 & 74 (related to public deposits) is subsisting.

If the company has defaulted in repayment of public deposits, the company cannot make any investments even if special resolution and resolution of Board is passed. The investments can be made only after the default has been made good.

(Q) Amar Textiles Ltd. is a company engaged in the manufacture of fabrics. The company has investments in shares of other bodies corporate including seventy percent shares in Amar Cotton Company Ltd. and it has also advanced loans to other bodies corporate. The aggregate of all the investments made and loans granted by Amar Textiles Ltd. exceeds sixty percent of its paid up share capital and free reserves and securities premium A/c and also exceeds hundred percent of its free reserves and securities premium A/c. In course of its business requirements, Amar Textiles Ltd. has obtained a term loan from Industrial Development Bank of India which is still subsisting. Now the company wants to increase its holding from seventy percent to eighty percent of the equity share capital in Amar Cotton Company Ltd. by purchase of additional ten percent shares from other existing shareholders. State the legal requirements to be complied with by Amar Textiles Ltd. under the provisions of the Companies Act, 2013 to give effect to the above proposal.

(8 marks; 2012 - May)

Answer:

Please refer 2009 - May [7] (b) on page no. 118

(Q) Soft and Secure Lenders Limited, has convened a Board Meeting on 25th October, 2016. One of the items of the agenda is to approve the grant of loan of Rs. 20 crores to Easy Going Industries Limited, for expansion of its business activities. At the Board Meeting, out of the total of six Directors of the lending company, five directors were present and except one director, the remaining four directors approved the grant of loan of Rs.20 crores to Easy Going Industries Limited. The borrowing company has taken loans from a public financial institution and also deposits from public. Examine the loan proposal with reference to the provisions of the Companies Act, 2013. **(4 marks; 2016-Nov)**

Answer:

Provision:

Sec. 186 provides for provisions for inter company loans. As per this section the company shall not directly or indirectly.

(i) make any loan to any person or other body corporate;

(ii) give guarantee or provide security in connection with a loan made by any other person to or to any other person by any body corporate;

(iii) acquire by way of subscription, purchase otherwise the securities of any other body corporate exceeding 60% of its paid up share capital, free reserves and security premium account or 100% of its free reserves and security premium account, whichever is more.

However, if loan given is beyond above limit then company shall:

(i) Require to pass prior special resolution is passed and;

(ii) Prior approval of financial institute is obtained if term loan is subsisting. As per this section company cannot make inter corporate loan, guarantee and security if it has defaulted in payment of deposit or interest thereon till default is continuing.

Present Case:

Facts in the given problem states that Soft and Secure Lenders Limited convened a board meeting and was to approve grant of loan of twenty crore rupees to Easy Going Industries Limited. However, at the Board Meeting, out of the total of six directors of the Soft and Secure Lenders Ltd., five directors were present and except one director, the remaining four directors approved the grant of the loan of twenty crore rupees.

Considering the above mentioned provisions, since the approval for the grant of loan has not been sanctioned by passing of resolution at a meeting of the Board with the consent of all the directors present at the meeting, so loan proposal is not in compliance with the Companies Act, 2013.

187. INVESTMENTS OF COMPANY TO BE HELD IN ITS OWN NAME

Notified Date of Section: 01/04/2014

(Q) Virat, a person of 21 years of age is pursuing MBA (Finance) course at a reputed recognised business school. He is not a shareholder of Grow (Pvt.) Ltd. He wishes to inspect the register of investments in securities not held in company's name and annual return of Grow (Pvt.)Ltd. He also wants to take copies thereof. Examining the relevant provisions of the Companies Act, 2013, advises Virat whether he would be successful in this regard.

(4 marks; 2016 - June)

Answer:

1.	**Section 187**	**Section 187** read with Rule 14 of Companies (Meetings of Board and its Powers), Rules, and 2014provides that every company shall maintain Register of Investment in securities hot held in company's name in Form MBP-3. Sub-**section 3** of the section provides that such register shall be open to inspection by any member or debenture holder of the company without any charge during business hours subject. to such reasonable restrictions as the company may by its articles or in general meeting impose.
2.	**Conclusion**	**Thus, in the given case** Virat who is not a member of the company is not eligible to inspect the Register of Investment in securities not held in company's name.
3-	**Section 94**	**Section 94** provides that copies of annual return filed under **Section 92** shall be kept at registered office-of the company. Further the copies of all the returns shall be open for inspection by any member, debenture holder, other security holder or beneficial owner during business hours without payment of fees and by any other person on payment of such fees as may be prescribed under **Companies (Registration Office and Fee) Rules, 2014.** Further he may take a copy of the return on payment of such fees as may be prescribed in above said rules.
4.	**Conclusion**	Hence, Virat may inspect and take copy of Annual Return and not the Register of Investment in securities not held in company's name.

188. RELATED PARTY TRANSACTIONS

Notified Date of Section: 01/04/2014

(Q) Distinguish between the 'Related Party' and 'Relative' as defined and applied under the Companies Act, 2013.

(4 marks; 2017 - Dec)

Answer:

According to **Section 2(76) of Companies Act, 2013, "related party",** with reference to a company, means:

(i) A director or his relative:

(ii) A key managerial personnel or his relative;

(iii) A firm, in which a director, manager or his relative is a partner;

(iv) A private company in which a director or manager or his relative is . a member or director;

(v) A public company in which a director or manager is a director and holds along with his relatives, more than two per cent (2%) of its. paid-up share capital;

(vi) anybody corporate whose Board of Directors, managing director or manager is accustomed to act in accordance with the advice, directions or instructions of a director or manager;

(vii) any person on whose advice, directions or instructions a director or manager is accustomed to act: Provided that nothing in sub-clauses (vi) and (vii) shall apply to the advice, directions or instructions given in a professional capacity;

(viii) Any company which is—
- a holding, subsidiary or an associate company of such company; or
- A subsidiary of a holding company to which it is also a subsidiary;
  According to Notification no. GSR 464(E), dated 05/06/2015 in case of Private Companies this sub clause shall not apply with respect to Section 188.

(ix) such other person as may be prescribed; **Rule 3 of the Companies (Specification of Definitions Details) Rules, 2014** prescribes, a director other than an independent director or key managerial personnel of the holding company or his relative with reference to a company, shall be deemed to be a related party.

According to Section 2(77), 'relative' with reference to any person means anyone who is related to another, if: (i) they are members of a HUF; (ii) they are husband and wife; or (iii) one person is related to the other in such manner as may be prescribed. According to **Rule 4 of the Companies (Specification of Definitions Details) Rules, 2014,** a person shall be deemed to be the relative of another, if he or she is related to another in the following manner, namely:
(1) Father: Provided that the term "Father" includes step-father.
(2) Mother: Provided that the term "Mother" includes the stepmother. .
(3) Son: Provided that the term "Son" includes the step-son.
(4) Son's wife.
(5) Daughter.
(6) Daughter's husband.
(7) Brother: Provided that the term "Brother" includes the stepbrother;
(8) Sister: Provided that the term "Sister" includes the step-sister.

(Q) What transactions are considered as 'related party-transactions' under the provisions of the Companies Act, 2013? Explain. (4 marks; 2015 - June)

Answer:

Provisions of Companies Act Regarding Related Party Transaction		
1.	**Meaning of related party. Sec. 2(76) of Companies Act, 2013**	With reference to company, the term 'related party' means and includes the following: • a director or his relative, • KMP or their relative, • a firm in which a director, manager or his relative is a partner, • a private company in which a director or manger is a director or members, • a public company in which a director or Manager is a director or holds along with his relatives more than 2% of its paid-up share capital. • a person on whose advice, directions or' instruction (except given in professional capacity) a director or manager is accustomed to act, a holding/ subsidiary or associate company, subsidiary's subsidiary, and such person as would be prescribed.
2.	**Related Party Transaction Sec. 188**	The scape of dealing with related party transaction has been given in **Companies Act, 2013,** stating as the contracts or arrangements with above mentioned related party which comes with respect to the following shall be covered under the scope of the provision: (a)Sale, purchase or supply of any goods or materials; (b)Selling or otherwise disposing of, or buying, property of any kind; (c)Leasing of property of any kind; (d)Availing or rending of any services; (e)Appointment of any agent for purchase or sale of goods, materials, services or property; (f)Such, related party's appointment to any office or place of profit in the company, its subsidiary company or associate company; and

		(g)'Underwriting the subscription of any securities or .derivatives thereof, of the company.
3.	**Ordinary Resolution**	**(a)**Provided that no contract or arrangement, in the case of a company having a paid-up share capital of not less than such amount, or transactions not exceeding such sums, as may be prescribed, shall be entered into except with the prior approval of the company by a ordinary resolution. (b)Provided further that no member of the company shall vote on such ordinary resolution, to approve any contract on arrangement which may be entered into by the company, if such member is a related party. (This proviso is not applicable on private company)

4.	**When Prior Approval of**	**Transaction**		**When Ordinary Resolution is Required**	
	Company by Ordinary Resolution Required for Related Party Transactions [Rule 15 of Companies (Meeting of Board and its Powers) Rules, 2014] -	1.	Sale, purchase or supply of any goods or materials, directly or through appointment of agent.	1.	Exceeding ten percent of the turnover of the company or rupees one hundred crore, whichever is lower.
		2.	Selling or otherwise disposing of or buying property o(any kind, directly or through appointment of agent.	2.	Exceeding ten percent of net worth of the company or rupees one hundred crore, whichever is lower.
		3.	Leasing of pro-perty of any kind	3.	Exceeding ten percent of the net worth of the company or ten percent, of turnover of the company or rupees one hundred crore, whichever is lower
		4.	Availing or rendering of any services, directly or through appointment of agent	4.	Exceeding ten percent, of the turnover of the company or rupees fifty crore, whichever is lower
		5.	Is for appointment to any office or place of profit in the company, its subsidiary company or associate company	**5.**	At a monthly remuneration exceeding two and half lakh rupees
		6.	Is for remuneration for underwriting the sub-scription of any securities or derivatives thereof, of the company	6.	Exceeding one percent of the net worth.

(Q) Who is a "related party" as defined in Section 2(76)? (3 marks; 2019 - June)

(Q) Barkha Ltd. has four directors on its Board. A Board meeting was convened which was attended by only two directors, where Rekha was appointed as an additional director. Rekha is related to both the directors. Referring to the provisions of the Companies Act, 2013, examine the validity of the appointment. (4 marks; 2016 - Dec)

Answer:

1	**Section 188 of Companies Act, 2013**	**Section 188 of Companies Act, 2013** provides that except with the consent of the Board of Directors given by way of resolution at a meeting of the Board and subject to such conditions as may be prescribed, no company shall enter into any contract or arrangement with a related party with respect to appointment of such related party or any office or place of profit in the company.
2	**Conclusion**	Under the given case both the present directors were related to Ms. Rekha who was appointed as additional director at the meeting. Wherein the

		transaction is at Arm's length basis the appointment stands valid.

(Q) Under the provisions of the Companies Act, 2013, examine the validity of the following appointments made by Board of VMR Ltd.

(i) ABC Ltd. is a subsidiary company of VMR Ltd. Y is a Director of ABC Ltd. Y has been appointed as Manager Research & Development in V.M.R. Ltd. on a monthly salary of two lacs rupees per month with effect from 1st April, 2010.

(ii) What would be your answer in case VMR Ltd. is a subsidiary of ABC Ltd.?

(8 marks; 2010-Nov)

Answer:

Provision

According to Sec. 188 of the Companies Act, 2013, except with the consent of the company accorded by a resolution:

(a) No director of a company shall hold any office or place of profit, and

(b) no partner or relative of such director, no firm in which such director, or a relative of such director, is a partner, no private company of which such director is a director or member, and no director or manager of such a private company, shall hold any office or place of profit carrying a total monthly remuneration of such sum as may be prescribed, except that of managing director or manager, banker or trustee for the holders of debenture of the company:

(i) Under the company; or

(ii) Under any subsidiary of the company unless the remuneration received from such subsidiary in respect of such office or place of profit is paid over to the company or its holding company.

Present Case:

(i) ABC is subsidiary of VMR Ltd. Mr. Y is a director of ABC Ltd. In this case appointment of Mr. Y as manager - R & D in VMR Ltd. does not attract Sec. 188. Sec. 188 does not cover a situation where a director of a subsidiary company is appointed at an office or place of profit in its holding company. Hence, such appointment can be made without passing a resolution.

(ii) In case VMR Ltd. was subsidiary of ABC Ltd. then resolution would be required for appointment of Y as Manager - R & D.

(Q) Discuss "Related Party Transactions" under the Companies Act, 2013, with specific reference to the nature of transactions which fall under the purview of the Companies Act, 2013. **(4 marks; 2016 - Nov)**

Answer:

As per Sec. 2(76) of the Companies (Amendment) Act, 2017, Related Party with reference to a company means:

(i) A director or his relative;

(ii) A key managerial personnel or his relative;

(iii) A firm in which a director, manager or his relative is a partner;

(iv) A private company in which a director or manager or his relative is a member or director;

(v) A public company in which a director or manager is a director and holds along with his relatives more than two percent of its paid up share capital;

(vi) Anybody corporate whose BOD, MD or manager is accustomed to act in accordance with the advice, directions, or instructions of a director or manager;

(vii) Any person on whose advice, directions or instruction a director or manager is accustomed to act;

(viii) Anybody corporate which is:

(a) A holding, subsidiary or an associate company of such company or;

(b) A subsidiary of a holding company to which it is also a subsidiary;

(c) An investing company or the ventures 'of the company. (Where investing company or

the venturer of the company means a body corporate whose investment in the company would result in the company becoming an associate company of the body corporate.

(ix) A director other than independent director or key managerial personnel of the holding company or his relative;

On the consent of the BOD given by a resolution at a meeting of the Board and subject to such conditions prescribed in the Companies (Meetings of Board and its Powers) Rules, 2014, company shall enter into any contract or arrangement with a related party with respect to:

(i) Sale, purchase or supply of any goods or material;

(ii) Selling, or otherwise disposing of, or buying property of any kind;

(iii) Leasing of property of any kind;

(iv) Availing or rendering of any services;

(v) Appointment of any agent for purchase or sale of goods, materials, services or property;

(vi) Appointment to any office or place of profit in the company, its subsidiary company or associate company; or

(vii) Underwriting the subscription of any securities or derivatives thereof of the company.

However, where in above transactions, limits as prescribed in Companies (Meetings of Board and its Powers) Rules, 2014 is exceeding, there in such case a company shall enter into a transaction/transactions only on the prior approval of the company by a resolution.

[First proviso to Sec. 188(1)].

Provided further that no member of the company shall vote on such resolution, to approve any contract or arrangement which may be entered into by the company, if such member is a related party:

[2nd Proviso]

Provided also that nothing contained in the second proviso shall apply to a company in which ninety per cent or more members, in number, are relatives of promoters or are related parties:

[3rd Proviso]

Provided also that nothing in this sub-section shall apply to any transactions entered into by the company in its ordinary course of business other than transactions which are not on an arm's length basis:

[4th Proviso] Provided also that the requirement of passing the resolution under first proviso shall not be applicable for transactions entered into between a holding company and its wholly owned subsidiary whose accounts are consolidated with such holding company and placed before the shareholders at the general meeting for approval.

[5<h Proviso]

Explanation: It is hereby clarified that the limits specified in Companies (Meetings of Board and its Powers) Rules, 2014 shall apply for transaction or transactions to be entered into either individually or taken together with the previous transactions during a financial year.

(Q) Sweet Tea Limited wants to sell its tea by entering into contract with the following parties:

1. Tea Bros, a partnership firm in which a director of Sweet Tea Limited is a partner.

2. R & T Private Limited in which one of the director of Sweet Tea Limited is a member.

3. Strong Tea Limited in which one of the directors of Sweet Tea Limited is a director holding three percent of the paid up capital of Strong Tea Limited.

Advise the steps that should be taken by Sweet Tea Limited taking into account the relevant provisions of the Companies Act, 2013 for entering into contracts in which the directors are interested. **(8 marks; 2014-May)**

Answer:

Sec. 188 is attracted if the following conditions are satisfied:

1. Nature of contracts: The contract relates to either of the following matters:

(a) Sale, purchase or supply of any goods or material;

(b) Selling or otherwise disposing of, or buying, property of any kind;

(c) Leasing of property of any kind;

(d) Availing or rendering of any services;

(e) 'appointment of any agent for purchase or sale of goods, materials, services or property;

(f) Such related party's appointment to any office or place of profit in the company, its subsidiary company or associate company; and

(g) Underwriting the subscription of any securities or derivatives thereof, of the company:

2. Nature of parties to the contract: The contract is entered into between the company and any of the following persons:

(i) A director of the company

(ii) A relative of any director

(iii) A firm in which such a director or relative is a partner

(iv) A private company of which the director a manager is a member or director

(v) A public company in which a director or manager is a director or holds^along with his relatives more than two percent of paid up shares capital

(vi) A KMP.

- Every contract covered under Sec. requires the consent of the Board. The consent of the Board shall be obtained only by means of resolution passed at a Board meeting.
- If the paid-up capital of the company is one crore rupees or more, previous approval of the Central Government shall also be obtained.

Present Case:

All the three parties are covered in the specified persons u/s 188.

As per Sec. 188

- Every contract or arrangement entered into under sub-Sec. (1) shall be referred to in the Board's report to the shareholders along with the justification for entering into such contract or arrangement.
- Where any contract or arrangement is entered into by a director or any other employee, without obtaining the consent of the Board or approval by a resolution in the general meeting under sub-Sec.(1) and if it is not ratified by the Board or, as the case may be, by the shareholders at a meeting within three months from the date on which such contract or arrangement was entered into, such contract or arrangement shall be voidable at the option of the Board or as the case may be of the shareholders and if the contract or arrangement is with a related party to any director, or is authorised by any other director, the directors concerned shall indemnify the company against any loss incurred by it.
- Without prejudice to anything contained in sub-section (3) it shall be open to Ihe company to proceed against a director or any other employee who had entered into such contract or arrangement in contravention of the provisions of this section for recovery of any loss sustained by it as a result of such contract or arrangement.
- 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:

  (i) in case of listed company, be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees, or with both; and

  (ii) in case of- any other company, be punishable with fine which shall not be less than twenty-five thousands rupees but which may extend to five lakh rupees.

As per Rule 6A of Companies (Meeting of Board and its Powers) Second Amendment Rules, 2015, All related party transactions shall require approval of the Audit Committee and the Audit Committee may make omnibus approval for related party transactions proposed to be entered

into by the company subject to the following conditions, namely:

(1) The Audit Committee shall, after obtaining approval of the Board of Directors, specify the criteria for making the omnibus approval which shall include the following, namely:-

(a) Maximum value of the transactions, in aggregate, which can be allowed under the omnibus route in a year;

(b) The maximum value per transaction which can be allowed;

(c) Extent and manner of disclosures to be made to the Audit Committee at the time of seeking omnibus approval;

(d) Review, at such intervals as the Audit Committee may deem fit, related party transaction entered into by the company pursuant to each of the omnibus approval made;

(e) Transactions which cannot be subject to the omnibus approval by the Audit Committee.

(2) The Audit Committee shall consider the following factors while specifying the criteria for making omnibus approval, namely:-

(a) Repetitiveness of the transactions (in past or in future);

(b) Justification for the need of omnibus approval.

(3) The Audit Committee shall satisfy itself on the need for omnibus approval for transactions of repetitive nature and that such approval is in the interest of the company.

(4) The omnibus approval shall contain or indicate the following:-

(a) Name of the related parties;

(b) Nature and duration of the transaction;

(c) Maximum amount of transaction that can be entered into;

(d) The indicative base price or current contracted price and the formula for variation in the price, if any;

(e) Any other information relevant or important for the Audit Committee to take a decision on the proposed transaction:

Provided that where the need for related party .transaction cannot b.e foreseen and aforesaid details are not available, audit committee may make omnibus approval for such transactions subject to their value not exceeding rupees one crore per transaction.

(5) Omnibus approval shall be valid for a period not exceeding one financial year and shall require fresh approval after the expiry of such financial year.

(6) Omnibus approval shall not be made for transactions in respect of selling or disposing of the undertaking of the company.

(7) Any other conditions as the Audit Committee may deem fit.

(Q) M/s. Tristar Ltd. (an unlisted public limited company) with the annual turnover of Rs. 700 crores entered into a contract of purchasing of raw material from M/s. PTC Pvt. Ltd. during the year 2018. M/s. Tristar Ltd. appointed Mr. Sudhir, a Director of the Company, to act in this deal of transaction on behalf of the company. Mr. Sudhir is also one of the member of M/s. PTC Pvt. Ltd. Mr. Sudhir settled the said transaction of purchase for Rs. 85 crores and entered into the contract. After a few transactions executed under the contract, the Board of M/s. Tristar Ltd. finds degradation in the quality of the raw material supplied. Further, in a board meeting this contract was challenged considering it as a related party transaction and in contravention to section 188(1) of the Companies Act, 2013 read with rules framed thereunder. During the period Mr. Sudhir was appointed as director in a newly incorporated company M/s. Raaga Limited.

In the light of the given facts, examine the following situations as per the Companies Act, 2013.

(i) What is the legal position of the contract entered between M/s. Tristar Ltd. through its director Mr. Sudhir, and M/s. PTC Pvt. Ltd.?

(ii) Is there any contravention of section 188-(1)? If yes, then state the liability of the wrongdoer. .

(iii) Comment upon the appointment of Mr. Sudhir as a Director in M/s. Raaga Limited.

(6 marks; 2019-May)

189. REGISTER OF CONTRACTS OR ARRANGEMENTS IN WHICH DIRECTORS ARE INTERESTED

Notified Date of Section: 01/04/2014

(Q) P, son of A, who is the Managing Director of ABC Limited, proposes to give his flat on lease to the company. The paid-up share capital of ABC Limited is Rs. 10 crores. Advise the company explaining the restrictions, if any, under the Companies Act, 2013.

(5 marks; 2008- Nov)

Answer:,

As per Sec. 2(76) of the Companies (Amendment) Act, 2017, **Related Party with reference to a company means:**

(i) a director or his relative;

(ii) a key managerial personnel or his relative;

(iii) a firm in which a director, manager or his relative is a partner;

(iv) a private company in which a director or manager or his relative is a member or director;

(v) a public company in which a director or manager is a director and holds along with his relatives more than two percent of its paid up share capital;

(vi) any body corporate whose BOD, MD or manager is accustomed to act in accordance with the advice, directions, or instructions of a director or manager;

(vii) any person on whose advice, directions or instruction a director or manager is accustomed to act;

(viii) any body company which is:

(a) a holding, subsidiary or an associate company of such company or;

(b) a subsidiary of a holding company to which it is also a subsidiary;

(c) an investing company or the ventures of the company. (Where investing company or the venturer of the company means a body corporate whose investment in the company would result in the company becoming an associate company of the body corporate.

(ix) a director other than independent director or key managerial personnel of the holding company or his relative;

On the consent of the BOD given by a resolution at a meeting of the Board and subject to such conditions prescribed in the Companies (Meetings of Board and its Powers) Rules, 2014, company shall enter into any contract or arrangement with a related party with respect to:

(i) Sale, purchase or supply of any goods or material;

(ii) Selling, or otherwise disposing of, or buying property of any kind;

(iii) Leasing of property of any kind;

(iv) Availing or rendering of any services;

(v) Appointment of any agent for purchase or sale of goods, materials, services or property;

(vi) Appointment to any office or place of profit in the company, its subsidiary company or associate company; or

(vii) Underwriting the subscription of any securities or derivatives thereof of the company.

However, where in above transactions, limits as prescribed in Companies (Meetings of Board and its Powers) Rules, 2014 is exceeding, there in such case a company shall enter into a transaction/transactions only on the prior approval of the company by a resolution. **[First proviso to Sec. 188(1)]. Provided further** that no member of the company shall vote on such resolution, to approve any contract or arrangement which may be entered into by the company,

if such member is a related party: **[2nd Proviso] Provided also** that nothing contained in the second proviso shall apply to a company in which ninety per cent or more members, in number, are relatives of promoters or are related parties: **[3rd Proviso]**

Provided also that nothing in this sub-section shall apply to any transactions entered into by the company in its ordinary course of business other than transactions which are not on an arm's length basis: **[4th Proviso] [Provided also** that the requirement of passing the resolution under first proviso shall not be applicable for transactions entered into between a holding company and its wholly owned subsidiary whose accounts are consolidated with such holding company and placed before the shareholders at the general meeting for approval. **[5m Proviso]**

Explanation: It is hereby clarified that the limits specified in Companies (Meetings of Board and its Powers) Rules, 2014 shall apply for transaction or transactions to be entered into either individually or taken together with the previous transactions during a financial year.

Present Case:

The transaction is with a Related Party, hence Board resolution is required under Sec. 188.

Again prior approval of shareholders is required through a resolution if transaction value exceeds least of ten percent of turnover or hundred crore rupees or ten percent of net worth.

As per Rule 6A of Companies (Meeting of Board and its powers) Second Amendment Rules, 2015, All related party transactions shall require approval of the Audit Committee and the Audit Committee may make omnibus approval for related party transactions proposed to be entered into by the company subject to the following conditions, namely:

(1) The Audit Committee shall, after obtaining approval of the Board of Directors, specify the criteria for making the omnibus approval which shall include the following, namely:-

(a) maximum value of the transactions, in aggregate, which can be allowed under the omnibus route in a year;

(b) The maximum value per transaction which can be allowed;

(c) Extent and manner of disclosures to be made to the Audit Committee at the time of seeking omnibus approval;

(d) Review, at such intervals as the Audit Committee may deem fit, related party transaction entered into by the company pursuant to each of the omnibus approval made;

(e) transactions which cannot be subject to the omnibus approval by the Audit Committee.

(2) The Audit Committee shall consider the following factors while specifying the criteria for making omnibus approval, namely:-

(a) Repetitiveness of the transactions (in past or in future);

(b) Justification for the need of omnibus approval.

(3) The Audit Committee shall satisfy itself on the need for omnibus approval for transactions of repetitive nature and that such approval is in the interest of the company.

(4) The omnibus approval shall contain or indicate the following:-

(a) Name of the related parties;

(b) Nature and duration of the transaction;

(c) Maximum amount of transaction that can be entered into;

(d) The indicative base price or current contracted price and the formula for variation in the price, if any;

(e) any other information relevant or important for the Audit Committee to take a decision on the proposed transaction:

Provided that where the need for related party transaction cannot be foreseen and aforesaid details are not available, audit committee may make omnibus approval for such transactions subject to their value not exceeding rupees one crore per transaction.

(5) Omnibus approval shall be valid for a period not exceeding one financial year and shall require fresh approval after the expiry of such financial year.

(6) Omnibus approval shall not be made for transactions in respect of selling or disposing of the undertaking of the company.

(7) Any other conditions as the Audit Committee may deem fit.

(Q) The register of contracts or arrangement under Section 189 of the Companies Act, 2013 is maintained at the Registered office of Fortune Ltd. under the custody of the Company Secretary. The AGM was held in different place but in the same town where the registered office- is situated. Mr. Semar, a shareholder of the company and Mr. Raj, proxy of a shareholder insisted for producing the said register at the commencement of the AGM for inspection. The Company Secretary refused to produce the register stating that being the statutory register it has to be maintained at the registered office only. Examine whether Mr. Semarand Mr. Raj will succeed in their attempt under the provisions of the Companies Act, 2013?

Also identify the particulars to be disclosed to the members of a company to pass a resolution approving any payment by way of compensation for loss of office of a director as per the provisions of Section 191 of the Companies Act, 2013 read with Rule 17 of the Companies (Meetings of Board and its Powers) Rules, 2014. **(8 marks; 2018-May)**

Answer:

- **A s per Sec. 189(4) of the Companies Act, 2013,** the register shall also be produced at the commencement of every annual meeting of the company and shall remain open and accessible during the continuance of the meeting to any person having the right to attend the meeting. Thus, even a proxy has the right to inspect the Register.

Present Case:

- In this case, Mr. Semar, a shareholder of the company and Mr. Raj, a prox-y of a shareholder insisted for producing the said register at the commencement of the AGM for inspection. The Company Secretary refused to produce the register stating that being the statutory register it has to be maintained at the registered office only. So as per above provision, the decision of Company Secretary for not to produce the register to proxy and shareholder is not valid. So Mr. Semar and Mr. Raj will succeed in their attempt as per Sec. 189(5) of the Companies Act, 2013.
- **According to Rule 17(1) of the Companies (Meetings of Board and its Powers) Rules, 2014,** No director of a company shall receive any payment by ways of compensation in connection with any event mentioned in sub - section (1) of Sec. 191 unless the following particulars are disclosed to the members of the company and they pass a resolution at a meeting approving the payment of such amount:

  (a) Name of the director;

  (b) Amount proposed to be paid;

  (c) Event due to which compensation become payable;

  (d) Date of Board meeting recommending such payment;

  (e) Basis for the amount determined;

  (f) Reason or justification for the payment;

  (g) Manner of payment - whether payable in cash or otherwise and how;

  (h) Sources of payment; and

  (i) Any other relevant particulars as the Board may think fit.

190. CONTRACT OF EMPLOYMENT WITH MANAGING OR WHOLE-TIME DIRECTORS

Notified Date of Section: 01/04/2014

191. PAYMENT TO DIRECTOR FOR LOSS OF OFFICE, ETC., IN CONNECTION WITH TRANSFER OF UNDERTAKING, PROPERTY OR SHARES

Notified Date of Section: 01/04/2014

192. RESTRICTION ON NON-CASH TRANSACTIONS INVOLVING DIRECTORS.

Notified Date of Section: 12/09/2013

(Q) Board of Directors of Divine Ltd. decides to enter into a contract whereby Manish, a director of the company shall acquire certain assets from the company for consideration other than cash, without seeking approval of the company in its general meeting. Certain shareholders of the company object to the said decision of the Board. Referring to the provisions of the Companies Act, 2013, examine the validity of the Board's decision and state whether the contention of the shareholders shall be tenable. (4 marks; 2015 - Dec)

Answer:

1.	**Provisions of Section 192 of Companies Act, 2013**	**Section 192 of the Companies Act, 2013** restricts companies from transacting any non-cash transaction involving directors. It provides that no company can enter into an arrangement by which: (a)director of the company or its holding, subsidiary Or associate company or a person connected with him acquires or is to acquire assets for consideration, other than cash, from the company; or (b)the company acquires or is to acquire assets for consideration other than cash, from such director or person so connected. However, it is further provided that a company can enter into an arrangement only if the prior approval for such arrangement is accorded by a resolution of the company in general meeting.
2.	**Conclusion**	Considering the above provisions, **in the present case,** decision of the Board of Divine Ltd. is not valid. Hence, the contention of shareholders is tenable.

(Q) In what way does the Companies Act, 2013 restricts the non-cash transactions involving directors of a public limited company? Explain. (8 marks; 2014-Nov)

Answer:

Sec. 192 of the Companies Act, 2013 provides for restrictions on non-cash transactions involving director. Accordingly:

As per Sec. 192(1) no company shall enter into an arrangement by which

(a) a director of the company on its holding, subsidiary/associate company or a person connected with him acquires / is to acquire assets for consideration other than cash, from the company or,

(b) the company acquires/is to acquire assets for consideration other than cash from such director/person so connected, unless prior approval for such arrangement is accorded by a resolution of the company in general meeting and if the director/connected person is a director of its holding company, approval shall also be required to be obtained by passing a resolution in general meeting of holding company.

Further as per Sec. 192(2) the notice for general meeting shall include particulars of arrangement along with the value of assets involved in such arrangement duly calculated by a registered valuer.

(Q) Mr. K, is making an arrangement-to acquire some stock- in-trade from BL Limited for consideration of some furniture lying with him. He is a Director of JS Limited, which is the holding company of BL Limited. Advise him on the basis of provisions of Companies Act, 2013. What will be the position of the arrangement if there is a contravention of the applicable provisions of the Companies Act, 2013? (6 marks; 2016 - Nov)

Answer:

Provision:

Sec. 192 of the Companies Act, 2013 provides for restriction on noncash transactions involving directors.

According to this section:

(i) **No company shall enter into an arrangement by which:**

(a) a director of the company or its holding, subsidiary or associate company or a person connected with him acquires or is to acquire assets for consideration other than cash, from the company; or

(b) the company acquires or is to acquire assets for consideration other than cash, from such director or person so connected, unless prior approval for such arrangement is accorded by a resolution of the company in general meeting and if the director or connected person is a director of its holding company, approval shall also be required to be obtained by passing a resolution in general meeting of the holding company.

(ii) The notice for approval of the resolution by the company or holding company in general meeting shall include the particulars of the arrangement along with the value of the assets involved in such arrangement duly calculated by a registered valuer.

Present case: Mr. K (Director of JS Limited, holding company of BL Limited) can follow the above procedure for making an arrangement to acquire some stock-in-trade from BL Limited for consideration of some furniture lying with him.

(iii) Any arrangement entered into by a company or its holding company in contravention of tfne provisions of this section shall be voidable at the instance of the company unless:

(a) The restitution of any money or other consideration which is the subject-matter of the arrangement is no longer possible and the company has been indemnified by any other person for any loss or damage caused to it; or

(b) Any rights are acquired bona fide for value and without notice of the contravention of the provisions of this section by any other person.

193. CONTRACT BY ONE PERSON COMPANY

Notified Date of Section: 01/04/2014

194. PROHIBITION ON FORWARD DEALINGS IN SECURITIES OF COMPANY BY DIRECTOR OR KEY MANAGERIAL PERSONNEL.

195. PROHIBITION ON INSIDER TRADING OF SECURITIES

Notified Date of Section: 12/09/2013

APPOINTMENT AND REMUNERATION OF MANAGERIAL PERSONNEL

196. APPOINTMENT OF MANAGING DIRECTOR, WHOLE-TIME DIRECTOR OR MANAGER(10 QUESTIONS)

Notified Date of Section: 01/04/2014

Q.1. X was appointed as Managing Director for life by the Articles of Association of a private company incorporated on 1st June, 2014. Examine in this connection.
(A) Can 'X' be appointed for life as Managing Director?
(B) Is it possible for the company in general meeting to remove 'X' from his office of directorship during his life time? **(4 marks; 2017 - Dec)**

Answer:
(A) No the appointment can only be made for a term of five years at a time and no reappointment be made earlier than one year before the expiry of the term.
Hence, 'X' cannot be appointed as Managing Director for life in a private company.
(B) Section 169(1) of the Companies Act, 2013 empowers the company to remove a director, by ordinary resolution before the expiry of his period of office after giving him an opportunity of being heard. This section applies to both public and private companies. It applies to all directors except a director appointed by the Tribunal under section 242 of the Act. The above provision applies to the Managing Director also as he is a director of the company and the member of its Board of Directors. Hence, it is possible for the company in general meeting to remove 'X' before the expiry of his term of office by an ordinary resolution.

Q.2. There are four directors in Shine Paper Limited. Mr. Madhav, being the director in station, has been authorized to draw and endorse cheque or other negotiable instruments on account of the company and also to direct registration of transfer of shares and signing the share certificates etc. Evaluate whether he will be treated as Managing Director of the company. Also recommend the procedure of appointment of Managing Director in a company in the light of the Companies Act, 2013.
(6 marks; 2018 - June)

Answer:
Section 2(54) of the Companies Act, 2013, defines 'managing director'. It stipulates that a "managing director" means a director who, by virtue of the articles of a company or an agreement with the company or a resolution passed in its general meeting, or by its Board of Directors, is entrusted with substantial powers of management of the affairs of the company and includes a director occupying the position of managing director, by whatever name catted.

The explanation to Section 2(54) excludes administrative acts of a routine nature when so authorised by the Board such as the power to affix the common seal of the company to any document or to draw and endorse any cheque on the account of the company in any bank or to draw and endorse any negotiable instrument or to sign any certificate of share or to direct registration of transfer of any share, from the substantial powers of management.

In the given situation Madhav has been authorised to draw an indoors negotiable instruments on behalf of the company as well as sign cheques on behalf of the company. And share certificates on behalf of the company. In the light of the above mentioned provision the duties entrusted to Madhav are merely administrative in nature hence he cannot be called as the managing director of the company.

Procedure of appointment of a Managing Director [Section 196(4)]
1. Subject to the provisions of Section 197 and Schedule V, a managing director shall be appointed, and the terms and conditions of such appointment and remuneration payable be approved by the Board of Directors at a meeting.
2. The terms and conditions and remuneration approved by Board of Directors as above shall be subject to the approval of shareholders by a resolution at the next general meeting of the company.

3. In case such appointment is at variance to the conditions specified in the Schedule V of the Companies Act, 2013, the appointment shall be approved by the Central Government.
4. The notice convening Board or general meeting for considering such appointment shall include the terms and conditions of such appointment, remuneration payable and such other matters including interest, of a director or directors in such appointments, if any.
5. A return in the prescribed form (Form No. MR.1) along with the prescribed fee shall be filed with the Registrar within sixty days of such appointment.

Q.3. Fashion Ltd. holds a general meeting for passing a special resolution regarding appointment of Shyamal aged 72 years as Managing Director of the company. Out of the 50 members present in the meeting 25 voted in favour, 15 against and 10 members did not cast their vote. Can company appoint Shyamal as Managing Director of the company? Discuss. **(4 marks; 2018 - Dec)**

Answer:

Under section 196(3) of the Companies Act, 2013, no company shall appoint or continue the employment of any person as managing director, whole-time director or manager who is below the age of twenty-one years or has attained the age of seventy years. Further appointment of a person who has attained the age of seventy years may be made by passing a special resolution in which case the explanatory statement annexed to the notice for such motion shall indicate the justification for appointing such person. In case where no such special resolution is passed but votes cast in favour of the motion exceed the votes, if any, cast against the motion and the Central Government is satisfied, on an application made by the Board that such-appointment is most beneficial to the company, the appointment of the person who has attained the age of seventy years may be made. A person who has attained the age of seventy may be appointed as the managing director of the company after passing special resolution. **In the present case** the special resolution was not passed. Mr. Shyamal may be appointed as the Managing Director since the votes cast in favour exceed the vote cast against the resolution and Central Government approval may be obtained by the Board of Directors of the Company to appoint him as managing director. If the Central Government is satisfied the approval may be granted.

Q.4. Distinguish between 'Managing director' and 'whole-time director'. **(4 marks; 2013 - June) [CSEM - II]**

Answer:

1.	**Whole Time Director**	A Whole time director has not been defined in the Act. He may be defined as a director who devotes all his time and attention in carrying on such of the affairs of the company, as may be assigned to him by the Board of Directors and thereof, he is virtually a Managing Director though not so designated. He is also known as whole time director of company. **(Section 2 (94) of Companies Act, 2013)**
2.	**Managing Director**	A Managing Director as a director who by virtue of an agreement with the company or a resolution passed by the company in general meeting or by its Board of Directors, or by virtue of its memorandum or articles of association, is entrusted with substantial powers of management which would not otherwise be exercisable by him. **[Section 2 (54) of Companies Act, 2013]** Both differ as under:

Basis	Managing Director	Whole time Director
1. Powers	A Managing Director is entrusted with substantial powers of management	Where as a whole-time director is just an ordinary employee of the company having no discretionary powers to take decisions on policy matters regarding pricing of products, buying and selling policy etc.
2. No. of Companies	A Managing Director can be a managing director of more than one company.	But a whole-time director is a full-time employee and he cannot hold office at a time in more than one company.
3. Appointment	A Managing Director and a	Where as a whole-time director can be

with manager	manager cannot be appointed simultaneously in any company.	appointed in a company having a manager.

Q.5. Distinguish between 'Key-managerial personnel' and 'Managing Director'.
(4 marks; 2017 - June)

Answer:
'Key-managerial personnel' and 'Managing Director'

Key-Managerial Personnel	Managing Director
As per **Section 2(51)** of the **Companies Act, 2013,** "key managerial personnel", in relation to a company, means- (i)the Chief Executive Officer or the managing director or the manager; (ii)the Company Secretary; (iii)the whole-time director; (iv)the Chief Financial Officer; and (v)Such other officer as may be prescribed. **Amendment made by Companies (Amendment) Act, 2017** **Revised Section 2(51)-** "Key managerial personnel" in relation to a company, means— (i) the Chief Executive Officer or the managing director or the manager; (ii) the company secretary; (iii) the whole-time director; (iv) the Chief Financial Officer; (v) such other officer, not more than one level below the directors who is in whole-time employment, designated as key managerial personnel by the Board; and (vi) such other officer as may be prescribed;" 'Key managerial personnel' (KMP) is a broader term and it includes managing director and other specified officers of a company. For being designated as KMP vesting of substantial power is not necessary. For example, a CFO or a Company Secretary may or may not have substantial power of management; still they may be designated as KMP.	According to **Section 2(54)** of the **Companies Act, 2013,** "managing director" means a director who, by virtue of the articles of a company or an agreement with the company or a resolution passed in its general meeting, or by its Board of Directors, is entrusted with substantial powers of management of the affairs of the company and includes a director occupying the position of managing director, by whatever name called. A Managing Director (MD) can be KMP but it is not mandatory that a KMP shall be MD. The Managing Director must have substantial power of management.

Q.6. Kapil is branch head of a limited company. The company proposes to elevate Kapil to the Board. Enumerate the steps involved in such a proposal.
(4 marks; 2013 - June) [CSEM - II]

Answer:

1.	**Approval of Central Government**	• Kapil, the branch head is apparently a whole-time employee of the company. When the company proposes to appoint him as a director, he will be in the position of a whole time director of the company and the appointment would require the approval of the Central Government under **Section 196 of the Companies Act, 2013** if it is not in accordance with Schedule V to the Act. • In that case, an application seeking approval to the appointment of whole-time director shad be made to the Central Government in e-Form No. MR - 2.
2.	**When Approval of**	• However, approval of the Central Government is not necessary

	CG is not required?	if the appointment is made in accordance with the conditions specified in Schedule V and a return in e- Form No. MR- **1** is filed with Registrar within **60** days from the date of such appointment.

Steps for the Appointment of Whole- time Director

S. No.	Appointment of Whole-time Director as per Schedule V	Appointment of Whole-time Director with the prior approval of Central Government
1	Convene a Board Meeting to appoint to Whole-time Director of the Company.	Convene a board Meeting to appoint Whole-time Director of the Company.
2	fix date, time and place of the General Meeting in the General Meeting in order to take the approval of the shareholders to appoint "Whole-time Director" of the company.	Fix date, time and place of the General Meeting in the General Meeting in order to take the approval of the shareholders to appoint "Whole-time Director" of the Company.
3	Convene Extra-ordinary General Meeting of the Company and take shareholders approval for the appointment of Whole-time Director of the company.	Convene Extra-ordinary General Meeting of the Company and take shareholders approval for the appointment of Whole-time Director of the company.
4	Not Applicable	Application is made in Form No. MR.**2,** within **90** days of appointment FOR CG approval.
5	File e-form DIR - **12** within **30** days from the date of general meeting.	File e-form DIR-**12** within **30** days from the date of general meeting for whole-time Director of the company.
6	File e-form MR-**1** (Return of Appointment) within **60** days of the date of appointment in the board meeting with regard to the appointment of whole-time Director.	File e-form MR **-1** (Return of Appointment) within **60** days of the date of appointment in the board meeting with regard to the appointment of whole-time Director.

Q.7. In a limited company, the Managing Director terminated an employee on the charge of various misconducts. The aggrieved employee filed a writ petition before the High Court challenging the dismissal contending that the Managing Director had no power to do so and the proper authority was the Board of Directors. During the pendency of writ, the Board of Directors passed a resolution ratifying the action of the Managing Director. The High Court while setting aside the Managing Director's dismissal order, allowed the writ petition. Managing Director appealed to the Supreme Court. Decide the case having regard to the judicial pronouncements in the matter. (8 marks; 2014 - Dec)

Answer:

1.	Case Law Analysis	Maharashtra State Mining Corporation v. Sunil (2006) 5 SCC 96.
		Managing Director terminated the services of an employee for various misconducts. The respondent filed a writ petition before High Court, on the ground that the MD had no authority to do so. The High Court, however, while setting aside the impugned order, allowed respondent's writ petition. Appellant appealed to the 'Supreme Court. According to the Supreme Court, the High Court was right when it held that an act by an incompetent authority was invalid. But it was entirely wrong Hn holding such an invalid act cannot be subsequently rectified by ratification by the competent authority$_r$ ft means making valid an act already done. Since the order of managing director was admittedly ratified by the Board of Directors and the Board had the power to terminate the services of the respondent, such ratification order related back to the date of the order and validated it. Therefore the dismissal order was upheld.
2.	Conclusion	The termination order against the employee on the charge of various misconducts is also considered valid.

Q.8. Sand Ltd. wants to appoint River as Managing Director of the company for a period of three years with effect from 1st August, 2018. River has given a written statement to the company that he has paid rupees one thousand to the prescribed authorities for a conviction df an offence under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 on 30th June, 2018. State whether River can be appointed as Managing Director of the company under the Companies Act, 2013.

(4 marks; 2018 - June)

Answer:

According to Schedule V of the Companies Act, 2013, no person shall be eligible for appointment as a managing or whole-time director or a manager of a company, if he has been detained for any period under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974.

In the present case Mr. River has only paid fine of Rs. 1,000 to the prescribed authorities for a conviction of an offence under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. Since it is only conviction and he was not detained, he can be appointed as Managing Director of the company.

Q.9. On 4th September, 2018 Varun was appointed as Managing Director of Astha Ltd. by the Board of directors subject to the approval of the members at the next general meeting. On 10th September, 2018 Varun in the capacity of managing director executed an agreement with Shabeer to purchase some machines. On 3rd October, 2018 members in the general meeting did not approve the appointment of Varun. Later on company refuses to accept delivery of machines from Shabeer on the ground that agreement was executed by Varun whose appointment is not approved by the members. Is refusal of company valid on the said ground? Examine. (4 marks; 2018 - Dec)

Answer:

According to Section 196(5) of Companies Act, 2013 where an appointment of a managing director, whole-time director or manager is not approved by the company at a general meeting, any act done by him before such approval shall not be deemed to be invalid.

In accordance with above express provision in the given case the contention of refusing to accept delivery of goods on the grounds that the appointment of managing director was not approved at the general meeting and agreement was signed prior to general meeting and after appointment by the Board does not stand valid.

Q.10. There are four directors in Two Squares Ltd. Mr. Rao, being the director in station, has been authorized to draw and endorse cheque or other negotiable instruments on account of the company and also to direct registration of transfer of shares and signing the share certificates etc. Whether as per provisions of the Companies Act, 2013, he will be treated as managing director of the company? Also narrate the procedure of appointment of a managing director in a company. (8 marks; 2017 - May)

Answer:

Explanation to Sec. 2(54) of the Companies Act, 2013, clarifies that substantial powers of the management shall not be deemed to include the power to do such administrative acts of a routine nature when so authorised by the Board such as:

(i) The power to affix the common seal of the company to any document; or

(ii) To draw and endorse any cheque on the account of the company in any bank; or

(iii) . To draw and endorse any negotiable instrument; or

(iv) To sign any certificate of share; or .

(v) To direct registration of transfer of any share.

According to above explanation Mr. Rao will not be treated as MD of the company as he is authorised to do administrative acts.

Procedure for appointment of a MD [(Sec. 196(4)].

1. Subject to the provisions of Sec. 197 and Schedule V, a MD shall be appointed and the terms and conditions of such appointment and remuneration payable be approved by the BOD at

Meeting.

2. The terms and conditions and remuneration approved by Board of Directors as above shall be subject to the approval of shareholders by a resolution at the next general meeting of the company.

3. In case such appointment is at variance to the conditions specified in the Schedule V of the Companies Act, 2013, the appointment shall be approved by the CG.

4. The notice convening Board or General Meeting for-considering such appointment shall include the terms and conditions of such appointment, remuneration payable and such other matters including interest, a director or directors in such appointments, if any.

5. A return in prescribed form (MR -1) along with prescribed fees shall be filed with the Registrar within sixty days of such appointment.

197. OVERALL MAXIMUM MANAGERIAL REMUNERATION AND MANAGERIAL REMUNERATION IN CASE OF ABSENCE OR INADEQUACY OF PROFITS(20 QUESTIONS)

Notified Date of Section: 01/04/2014

Q.1. Write a brief note on personal expenses of Directors. (3 Marks; 2014- June)

Answer:

Reimbursement of personal expenses of Director:

- All payments to Directors as remuneration or perquisites whether in the case of a public or private company are required to be authorized both in accordance with the Companies Act and Articles of Association of the company.
- Articles may provide that such remuneration require sanction of the shareholders either by ordinary or special resolution while in some cases it may require only approval of Directors.
- If the terms of appointment of a Director include payment of expenses of a personal nature, then such expenses can be incurred by the company, otherwise, no such expense can be incurred or reimbursed by the company.

Q.2. Mr. Balu is a CEO in a public company. State whether the limits on managerial remuneration under section 197 of the Companies Act, 2013 and schedule V apply to Mr. Balu. (2 marks; 2018 - Dec)

Answer:

Section 197 applies with regard to remuneration of directors including MD/WTD and Manager.
Schedule V provides conditions with regard to appointment and remuneration of MD/WTD and Manager.
Hence, the provisions related to the managerial remuneration are not applicable on all KMP's i.e. to CEO, CFO or CS but they are applicable only to MDA/VTD and Manager. Therefore, Section 197 and Schedule V, shall not apply to Mr. Financer.

Q.3. M/S. MEDICA HEALTH SERVICES LTD. owns a Multi-specialty Hospital in Chennai. DR. MILTON a practicing Heart Surgeon, has been appointed by the company as its non-executive ordinary director and it wants to pay him fee, on case to case basis, for surgery performed on the patients at the hospital. A question has arisen whether payment of such fee to him would amount to payment of managerial remuneration to a director subject to any restriction under the Companies Act, 2013. Advise the company, which seeks to ensure that the same does not contravene any provision of the Companies Act, 2013. (3 marks; 2012 - Dec)

Answer:

Section 197 states the manner in which profit of the company relevant for computing managerial remuneration u/s 197 can be computed. Section 197 also states that remuneration to a director will not form part of managerial remuneration if the following conditions are satisfied:

(i) The given service is of professional nature; and

(ii) In the opinion of Central Government, the director possesses the requisite qualifications for giving such services.

In the present case, the company is advised to seek the permission of Central Government providing it with necessary documents proving that Dr. Milton has the necessary qualification for giving such services.

Q.4. Write short note on Managerial remuneration (4 marks; 2009 - June) [CSEM - II]

Answer:

1.	**Meaning of Managerial Personnel, Sec. 197 of Company Act, 2013**	According to **Section 197of the Companies Act, 2013,** the term managerial personnel includes managing director, manager and whole-time director of a company, enjoying substantial powers.
2.	**Meaning of Managerial Remuneration**	Managerial remuneration is a remuneration paid to the Directors including: (a)Managing director; (b)Whole time director; (c)Managers of a company.
3.	**Overall limit to Managerial Remuneration, Sec. 197 of Company Act, 2013**	• According to **Section 197,** in the case of public company or a private company which is subsidiary of public company total managerial remuneration payable to directors, managing director or manager in respect of any financial year should not exceed **11** % of the net profits of that year. • Net profit for the purposes of determining directors remuneration shall be computed in the manner laid down in **Section 198 of the Companies Act, 2013** except that remuneration to directors shall not be deducted from the gross profit but income tax paid or payable should be deducted. • Further the Company in general meeting may, with the approval of Central Government authorise the payment of remuneration exceeding **11** % of net profits of the company subject to provision of Schedule V.
4.	**Ceiling of Managerial Remuneration**	A director who is either in' the whole time employment of the company or a managing director may be paid remuneration either- (a)By way of monthly payment, or (b)At a specified percentage of the net profit of the company; or (c)Partly by one way and partly by the other.
		But such remuneration shall not exceed 5% of the annual net profits. For one such director, and if there is more than one such director, **10%** for all of them together. **[Section 309 (3)].**

Note:

Amendment made by Companies (Amendment) Act, 2017: Revised First Proviso to Section 197(1)-

"Provided that the company in general meeting may, with the approval of the Central Government, authorise the payment of remuneration exceeding eleven per cent, of the net profits of the company, subject to the provisions of Schedule V:"

Revised Second Proviso to Section 197(1)-

"Provided further that, except with the approval of the company in general meeting by a special resolution,—

(i) the remuneration payable to any one managing director; or whole-time director or manager shall not exceed five per cent, of the net profits of the company and if there is more than one such director remuneration shall not exceed ten per cent, of the net profits to all such directors and manager taken together;

(ii) the remuneration payable to directors who are neither managing directors nor whole-time directors shall not exceed,—

(A) one per cent, of the net profits of the company, if there is a managing or whole-time director or manager; ˙jJB) three per cent, of the net profits in any other case.

Third Proviso to Section 197(1)-

"Provided also that, where the company has defaulted in payment of dues to any bank or public financial institution or non-convertible debenture holders or any other secured creditor, the prior approval of the bank or public financial institution concerned or the non -convertible debenture holders or other secured creditor, as the case may be, shall be obtained by the company before obtaining the approval in the general meeting."

Important:

As per Companies (Amendment) Ordinance 2019.

Penalty for contravention of Section 197 in respect of managerial remuneration.

Section 197 makes provisions in respect of managerial remuneration. If any person makes any default in complying with the provisions of **Section 197,** he shall be liable to a penalty of one lakh rupees anywhere any default has been made by a company, the company shall be liable to a penalty of five lakh rupees **Section 197(15) of Companies Act, 2013** amended vide the Companies (Amendment) Ordinance, 2019 w.e.f. 2.11.2018. Till 2.11.2018, the section provided for fine which could be imposed only by Court. Now, penalty can be imposed by RoC or RD who is authorized for this purpose.

Even earlier, the offense was compoundable. However, procedure of compounding had to be complied with. Now, directly penalty can be imposed after issuing Show Cause Notice.

Q.5. A managing director of a company stood as surety for the repayment of loan taken by it for which he was paid guarantee commission. Does this commission amount to managerial remuneration? Support your answer with decided case law, if any,

(5 marks; 2009 - June) [CSEM - II]

Answer:

1.	**Concerned case law**	[Suessen Textile Bearings Ltd. V Union of India **[1984] 55** com. case **492** (Delhi)].
2.	**Provisions of Sec. 197 of C. A. 2013**	• According to **Section 197 of the Companies Act, 2013** Guarantee Commission paid to directors for giving guarantee against loans on credit facilities availed by the company from, financial institutions is not a remuneration for any professional services. • The director giving surety does not render any clerical, technical or administrative services to the company. • The commission which he gets is for the risk undertaken which is his personal liability and it has nothing to do with his directorship.
3.	**Conclusion**	Hence, in view of the above case law, the managerial remuneration will not amount to the guarantee commission paid to a Managing Director of a company.

Q.6. A whole-time director of a company made an invention during the course of his employment with the company. He patented the invention in his own name and appropriated the benefits to himself. Can he do so? Cite case law, if any.

(5 marks; 2009 - June) [CSEM - II]

Answer:

1.	**Liability**	Taking the advantage of their position as directors, they are liable to the company for all personal profits or gain made by them.
2.	**Case Law Analysis**	During the invention made in the course of the employment with the company, a director was held liable when a director patented and exploited in his own name **[Cranleigh Precision Engineering Ltd. V Bryant (1954) AIIER 289]**
3.	**Conclusion**	Thus, the whole time director can get the invention patented in his own name and appropriate the benefits to himself but he is liable to

		the company for all the personal gains he made with the help of the patented invention.

Q.7. Heal Ltd. owns a chain of hospitals in Mumbai. Dr. Aman, a practicing surgeon, has been appointed by the company as its non-executive ordinary director and wants to pay him fees on case-to-case basis or surgeries performed by him on patients at hospital. Advise the company, whether payment of such fees to him would amount to payment of managerial remuneration to a director under the Companies Act, 2013.

(4 marks; 2014- Dec)

Answer:

1.	**Remuneration for professional services not to be part of managerial remuneration**	Under the proviso to **Section 197 of the Companies Act, 2013** the remuneration paid to a director for the services rendered by them shall not be part of managerial remuneration if the services rendered are of professional nature and in the opinion of the Nomination and Remuneration Committee, if the company is covered under Section 178 (1) of the Act, or the Board of Directors in other cases, the director possesses the requisite qualification for the practice of the profession.
2.	Conclusion	The company is accordingly advised to obtain opinion of the Nomination and Remuneration Committee, or the Board of Directors, as the case may be that Dr. Aman, who is a qualified Surgeon possesses the requisite qualification to practice the profession of surgery.

Q.8. Ms. Jyoti is the Managing Director of Wise (India) Ltd., incorporated under the Companies Act, 2013. Board of Directors of the company presents the following financial data extracted from the company's financial statements as at 31st March, 2015:

Particulars	Rs. (In crore)
Authorised equity share capital	60
Paid-up equity share capital	10
Debenture redemption reserve	10
Securities premium account	20
Profit and loss (loss)	(10)
Revaluation reserve	20

Due to losses in the financial year 2014-15, the company is not in a position to pay any remuneration to Ms. Jyoti, Managing Director of the company. As per the agreement of service between Ms. Jyoti and the company, in case of losses or inadequacy of profits in any financial year, she is to be paid remuneration on the basis of 'effective capital' of the company. Based on the provisions of the Companies Act, 2013, decide the maximum remuneration payable to Ms. Jyoti for the financial year 2014-15 without the approval of the Central Government. **(4 marks; 2015 - Dec)**

Answer:

"Effective Capital" means the aggregate of the paid-up share capital (excluding share application money or advances against shares); amount, if any for the time being standing to the credit of share premium account; reserves and surplus (excluding revaluation reserve); long-term loans and deposits repayable after one year (excluding working capital loans, overdrafts, interest due on loans unless funded, bank guarantee, etc., and other short-term arrangements) as reduced by the aggregate of any investments (except in case of investment by an investment company whose principal business is acquisition of shares, stock, debentures or other securities), accumulated losses and preliminary expenses not written off.

Computation of effective capital for managerial remuneration

Particulars	Rs. in Crores
Paid-up capital	10
Debenture redemption reserve (not specifically excluded by definition of 'effective capital')	10
Securities premium account	20
Profit and loss account	(10)
Revaluation reserve (specifically excluded by definition of 'effective capital')	-

Effective Capital	- 30

Remuneration payable by companies having no profit or inadequate profit without Central Government approval [Section II of the Part II of the Schedule V]: Where in any financial year during the currency of tenure of a managerial person, a company has no profits or its profits are inadequate, it may, without Central Government approval, pay remuneration to the managerial person not exceeding the limits given below: Remuneration based on effective capital:

Where the effective capital is	Limit of yearly remuneration payable shall not exceed ?
Negative or less than 5 Crores	60 Lakhs
5 Crores and above but less than 100 Crores	84 Lakhs
100 Crores and above but less than 250 Crores	120 Lakhs
250 Crores and above	120 lakhs plus 0.01% of the effective capital in excess of Rs. 250 crores

The above limits shall, be doubled if the resolution passed by the shareholders is a special resolution.

If a period less than one year, the limits shall be pro-rated.

Considering the above provisions, Ms. Jyoti, Managing Director of Wise (India) Ltd. can be remunerated in following ways without approval of Central Government:

- As company's effective capital' is between Rs. 5 Crores to 100 Crores"; Ms. Jyoti can be paid annual remuneration of Rs. 84 Lakhs i.e. monthly Rs. 7 Lakhs.
- If company pass special resolution, remuneration can be doubled i.e. Rs. 1 Crore 68 lakhs annum i.e. Rs. 14.00 Lakhs per month can be paid.

Amendment made by Companies (Amendment) "Act, 2017

Revised First Proviso to Section 197(1)-

"Provided that the company in general meeting may, with the approval of the Central Government, authorise the payment of remuneration exceeding eleven per cent, of the net profits of the company, subject to the provisions of Schedule V:"

Revised Second Proviso to Section 197(1)-

"Provided further that, except with the approval of the Company in general meeting by a special resolution,—

(i) the remuneration payable to any one managing director; or whole-time director or manager shall not exceed five percent, of the net profits of the company and if there is more than one such director remuneration shall not exceed ten per cent, of the net profits to all such directors and manager taken together;

(ii) the remuneration payable to directors who are neither managing directors nor whole-time directors shall not exceed,—

a. one per cent, of the net profits of the company, if there is a managing or whole-time director or manager;
b. Three per cent, of the net profits in any other case.

Third Proviso to Section 197(1)-

"Provided also that, where the company has defaulted in payment of dues to any bank or public financial institution or non-convertible debenture holders or any other secured creditor, the prior approval of the bank or public financial institution concerned or the non -convertible debenture holders or other secured creditor,, as the case may be, shall be obtained by the company before obtaining the approval in the general meeting.

Important:

As per Companies (Amendment) Ordinance 2019.

Penalty for contravention of Section 197 in respect of managerial remuneration

Section 197 makes provisions in respect of managerial remuneration. If any person makes any default in complying with the provisions of Section 197, he shall be liable to a penalty of one lakh rupees and where any default has been made by a company, the company shall be liable to a penalty of five lakh rupees - Section 197(15) of Companies Act, 2013 amended vide the Companies (Amendment) Ordinance, 2019 w.e.f. 2.11.2018. Till 2.11.2018, the section provided for fine which could be imposed only by Court. Now, penalty can be imposed by RoC or RD who is authorized for this purpose.

Even earlier, the offense was compoundable. However, procedure of compounding had to be complied with. Now, directly penalty can be imposed after issuing Show Cause Notice.

Q.9. It has been found that Mrs. Shweta director of a company, has drawn remuneration in excess of the prescribed limits. The Chief Financial Officer of the company has sought your advice in the matter. As the Secretary of the company, advise the Chief Financial Officer, the -course of action that may be taken in this regard. (4 marks; 2016 - Dec)

Answer:

1.	**Provisions of Section 197(9) of Companies Act, 2013**	According to **Section 197(9),** if any director draws or receives, directly or indirectly, by way of remuneration any such sums in excess of the limit prescribed or without the prior sanction of the Central Government, where it is required, he shall refund such sums to the company and until such sum is refunded, hold it in trust for the company. Further as per **sub section 10 of Section 197,** the company shall not waive the recovery of any sum refundable to it under **sub-section 9,** unless the same is permitted by the Central Government.
2.	**Conclusion**	As a Secretary of the Company it is recommended that Mrs. Shweta should refund such excess sum to the company and until such sum is refunded, she shall hold the same in trust for the company.

Q.10. Mrs. Beautiful, aged 40 years, is the Managing Director of Beauty Care Products Limited. She has received contribution to superannuation fund and leave encashment during her tenure with the company during the financial year ending 31st March, 2017. The Manager (Accounts) of the company is not very confident, if these perquisites are to be included in the computation of ceiling on remuneration specified in the Companies Act, 2013. Referring to the provisions of the Act, advise the Manager (Accounts). (4 marks; 2017 - June)

Answer:

The matter given in the question needs to be solved in the light of the provisions as contained in Section IV of Part II to Schedule V of the Companies Act, 2013. A managerial person shall be eligible for the following perquisites which shall not be included in the computation of-the ceiling on remuneration specified in Section II and III:

(a) Contribution to provident fund, superannuation fund or annuity fund to the extent these either singly or put together are not taxable under the Income-Tax Act, 1961;

(b) Gratuity payable at a rate not exceeding half a month's salary for each completed year of service; and

(c) Encashment of leave at the end of the tenure.

Therefore, applying the provisions as stated above, contribution -to superannuation fund received by Mrs. Beautiful, Managing Director shall not be included in the computation of managerial remuneration ceiling. But she has received leave encashment during the tenure of her service and not at the end of her tenure and thus it should be included in the calculation of ceiling of managerial remuneration under the provisions of the Companies Act, 2013.

The Manager (Accounts) is accordingly advised.

Q.11. SRM Ltd. has paid Rs. 15 lakh as an insurance premium on behalf of its Company Secretary and Managing Director for indemnifying any of them against any liability in respect of any negligence, default, misfeasance, breach of duty or breach of trust for which they may be guilty in relation to the company. Can the company pay such insurance premium? Discuss referring to the provisions of the Companies Act, 2013. (4 marks; 2018 - Dec)

Answer:

Under section 197(13) of Companies Act, 2013, where any insurance is taken by a company on behalf of its managing director, whole-time director, manager, Chief Executive Officer, Chief Financial Officer or Company Secretary for indemnifying any of them against any liability in respect of any negligence, default, misfeasance, breach of duty or breach of trust for which

they may be guilty in relation to the company, the premium paid on such insurance shall not be treated as part of the remuneration payable to any such personnel.

Further it has been provided that if such person is proved to be guilty, the premium paid on such insurance shall be treated as part of the remuneration. In accordance with above express provision in the given case the company can pay the insurance premium of Rs. 15.00 lakhs for company secretary and managing director for indemnifying any of them against any liability in respect of any negligence, default, misfeasance, breach of duty or breach of trust for which they may be guilty in relation to the company, and such shall not be treated as remuneration.

Q.12. ABC Corporation Ltd. has no managerial person acting in professional capacity. During the current financial year the company sustained a loss. How can the company remunerate their non-professional managerial personnel in such a situation?

(4 marks; 2019 - June)

Q.13. A company wants to include the following clause in its Articles of Association:

"Each director shall be entitled to be paid out of the funds of the company for attending meetings of the Board or a Committee thereof including adjourned meetings such sum as sitting fees as shall be determined from time to time by the Directors but not exceeding a sum of Rs. 30,000 for each such meeting to be attended by the Director."

You are required to advise the company as to the validity of such a clause and the correct legal position under the provisions of the Companies Act, 2013. (5 marks; 2009 - May)

Answer:

Sitting fees to Directors (Sec. 197(5))

Please refer 2008 - Nov [2] (b) on page no. 67

Present Case:

The sitting fees is decided by Board. Thus the clause in AOA is valid as the maximum sitting fees is one lakh rupee per meeting.

Q.14. Non-executive Directors of ABC Limited, who are neither in the whole time employment of the company nor Managing Directors have been given the following remuneration —

(i) Guarantee Commission has been paid to them-for having guaranteed the term loans obtained from a Financial institution.

(ii) Commission payable to them is calculated on the basis of book-profits arrived at after providing for depreciation as per straight line method, Examine the validity of these payments in the light of the provisions of the Companies Act, 2013. (5 marks; 2010 - May)

Answer:

(i) **Guarantee Commission:** All payment made to the directors are not necessarily managerial remuneration. If a director of a company gives guarantee on the behalf of the company, he has given personal service to the company other than the one normally required of a director.

In Suessen Textile Bearings Ltd. v Union of India, it was held that guarantee commission paid by a company to its director for standing surety for loans and credit facilities taken by the company was not remuneration for services rendered within the meaning of Sec. 197. The director giving a guarantee does not render manual, clerical, technical, supervisory or administrative service. He gets the commission for the risk which he bears and that has nothing to do with his directorship, guarantee commission received by the director is for personal liability which he undertakes.

Therefore, when a director guarantees an advance made by a bank, he renders service to the company in his individual capacity and not in his capacity as a director. In view of the above, the commission payable by the company to its directors for guaranteeing the overdraft and cash credit limits obtained by the company cannot be treated as remuneration payable to the directors for services rendered by them within the meaning of Sec. 197.

Therefore, such commission will not form part of the managerial remuneration and not be

subject to the provisions of Sec. 197 of the Act. Accordingly, guarantee commission (for having guaranteed the term loans obtained from a financial institution) can be paid to a non executive director and such payment shall be in addition to the remuneration to which he is entitled under the companies Act.

(ii) The managerial remuneration is calculated on the basis of 'Net Profits' computed in the manner laid down under Sec. 198 except that remuneration paid to directors shall not be deducted from gross profit (Sec. 197).

As per Sec. 198(4)(k), depreciation to the extent specified in Sec. 123 shall be deducted while calculating net profits. The amount of depreciation to be deducted is the amount of depreciation on assets as shown by the books of the company at the end of the preceding financial year. Depreciation is calculated by considering useful life of asset cost and residual value. Schedule II specifies a list of useful life according to life of asset and the residual value applicable to the two methods of depreciation, namely, written down value method and straight-line method.

Thus, it is permissible for a company to charge depreciation on any of the two methods, viz., the straight line method or the written down value method. In other words, where a company has charged depreciation on straight line method, it is not required to recalculate depreciation as per written down value methods. The Profits calculated after deducting depreciation as per straight line method shall be the basis for calculating remuneration under Sec. 197.

Therefore, the remuneration paid to non-executive directors is in order even though it has been paid on the basis of book profit arrived at after providing depreciation as per straight line method.

Q.15. X, a Director of MJV Ltd., was appointed on 1st April, 2009, one of the terms of appointment was that in the absence of adequacy of profits or if the company had no profits in a particular year, he will be paid remuneration in accordance with Schedule V. For the financial year ended 31st March, 2010, the company suffered heavy losses. The company was not in a position to pay any remuneration but he was paid Rs. 50 lacs for the year, as paid to other directors. The effective capital of the company is Rs. 150 crores. Referring to the provisions of Companies' Act, 2013, as contained in Schedule V, examine the validity of the above payment of remuneration to X. (8 marks; 2010-Nov)

Answer:

Provision

Where the effective capital is	Limit of yearly remuneration payable shall not exceed (Rupees)
Negative or less than five crores	Sixty lakh rupees
Five crores and above but less than one hundred crore rupees	Eighty Four lakh rupees
One hundred crore rupees and above but less than two hundred fifty crore rupees	One hundred twenty lakh rupees
Two hundred fifty crore rupees and above	One hundred twenty lakhs rupees plus 0.01% of the effective capital in excess of two hundred fifty crores rupees.

Provided that the-above limits shall be doubled if the resolution passed by the shareholders is a special resolution.

Present Case:

In the given case, the effective capital of the company is one hundred fifty crores rupees. As per the scale given in the Schedule V yearly remuneration payable should not exceed one hundred twenty lakh rupees. The remuneration given to X is fifty lakh rupees for the whole year, which is less than the ceiling. Therefore, payment of fifty lakh rupees is in order.

Q.16. Nee much Pharma Limited having an "Effective Capital" of Rs. 4 crore as on 31st March, 2012 raised Rs. 2 crore by way of issue of right shares in May, 2012 during the current Financial Year 2012-2013. The company is managed by Mr. Chandrasekhar, the Managing Director, and he is getting a minimum remuneration of Rs. 80,000 per month. The company proposes to appoint two whole-time Directors in July, 2012 on a consolidated minimum salary of Rs. 60,000 per month to each of them.

What is the "Effective Capital" for the purpose of determining the minimum remuneration payable to the proposed Whole-time Directors? State the requirements to be complied with under Schedule V to the Companies Act, 2013 to give effect to the proposed appointments.

(8 marks; 2012 - Nov)

Answer:

Effective Capital:

Under Part II of Schedule V to the Companies Act, 2013 the remuneration payable to a managerial personnel is linked to effective capital of the company.

Effective capital shall be computed as follows:

Items to be added

- Paid up share capital (excluding share application money or advances against shares)
- Securities Premium Account.
- Reserves and Surplus (excluding Revaluation Reserve)
- Long term loans and deposits repayable after one year (excluding working capital loans, over drafts, interest due on loans unless funded, bank guarantee etc. and other short term arrangements)

Items to be deducted

- Investments (except in case of an investment company)
- Accumulated losses
- Preliminary expenses not written off

Quantum of Managerial Remuneration as per Schedule V. as amendec

Where the effective capital is	Limit of yearly remuneration payable shall not exceed (Rupees)
Negative or less than five crores	Sixty lakh rupees
Five crores and above but less than hundred crores	Eighty four lakh rupees
Hundred crores and above but less than two hundred fifty crores	One hundred twenty lakh rupees
Two hundred fifty crores and above	One hundred twenty lakh plus 0.01% of the effective capital in excess of two hundred fifty crore rupees:

Present case:

In this case, the Effective Capital on 31st March, 2012 (i.e. the last date of the preceding financial year) is Rs. 4 crores. The right issue of shares in May, 2012 is not relevant here for the purpose of ascertaining effective capital. According to Schedule V, if the effective capital is less than Rs. 5 crore, monthly remuneration payable shall not exceed Rs. 5,00,000. This ceiling shall apply for each Managing Director and/or whole-time director. In the given case, the proposed minimum remuneration for each of the whole time directors is Rs. 60,000 p.m. and also Mr. Chandrasekhar, the existing Managing Director is only Rs. 80,000 p.m. i.e. within the ceiling laid down above requirements to be complied with under Schedule V to the Companies Act, 2013 to give effect to the proposed appointments.

The limits specified under this section shall apply, if:

1. payment of remuneration is approved by a resolution passed by the Board and, in the case of a company covered under sub-Sec.(1) of Sec. 173 also by the Nomination and Remuneration

Committee;

2. the company has not made any default in repayment of any of its debts (including public deposits) or debentures or interest payable thereon for a continuous period of thirty days in the preceding financial year before the date of appointment of such managerial person;

3. a special resolution has been passed at the general meeting of the company for payment of remuneration for a period not exceeding three years;

4. a statement along with a notice calling the general meeting referred to in clause 3 is given to the shareholders containing the following information, namely:

(i) General Information:

(a) Nature of industry

(b) Date or expected date of commencement of commercial production.

(c) In case of new companies, expected date of commencement of activities as per project approved by financial institutions appearing in the prospectus

(d) Financial performance based on given indicators

(e) Foreign investments or collaborations, if any.

(ii) Information about the appointee:

(a) Background details

(b) Past remuneration

(c) Recognition or awards

(d) Job profile and his suitability

(e) Remuneration proposed

(f) Comparative remuneration profile with respect to industry, size of the company, profile of the position and person (in case of expatriates the relevant details would be with respect to the country of his origin).

(g) Pecuniary relationship directly or indirectly with the company, or relationship with the managerial personnel, if any.

(iii) Other information:

(a) Reasons of loss or inadequate profits

(b) Steps taken or proposed to taken for improvement

(c) Expected increase in productivity and profits in. measurable terms.

(iv) Disclosures:

The following disclosures shall be mentioned in the Board of Director's report under the heading "Corporate Governance", if any, attached to the financial statement:

(a) all elements of remuneration package such as salary, benefits, bonuses, stock options, pension, etc., of all the directors;

(b) details of fixed component and performance linked incentives along with the performance criteria;

(c) service contracts, notice period, severance fees;

(d) stock option details, if any, and whether the same has been issued at a discount as well as the period over which accrued and over which exercisable.

Q.17. International Technologies Limited, a listed company, being managed by a Managing Director proposes to pay the following managerial remuneration:

(i) Commission at the rate of five percent of the net profits to its Managing Director, Mr. Kamal.

(ii) The directors other than the Managing Director are proposed to be paid monthly remuneration of Rs. 50,000 and also commission at the rate of one percent of net profits of the company subject to the condition that overall remuneration payable to ordinary directors including monthly remuneration payable to each of them shall not exceed two

percent of the net profits of the company. The commission is to be distributed equally among all the directors.

(iii) The company also proposes to pay suitable additional remuneration to Mr. Bhatt, a director, for professional services rendered as software engineer, whenever such services are utilized.

You are required to examine with reference to the provisions of the Companies Act, 2013 the validity of the above proposals. **(8 marks; 2016-May)**

Answer:

International Technologies Limited, a listed company, being managed by a MD proposes to pay the following managerial remuneration:

(i) Commission at the rate of five percent of the net profits to its Managing Director, Mr. Kamal is valid:

As per part (i) of the second proviso to Sec. 197(1), except with the approval of the company in general meeting, the remuneration payable to any one MD or whole time director or manager shall not exceed five percent of the net profits of the company and if there is more than one such director then remuneration shall not exceed ten percent of the net profits to all such directors and manager taken together.

Present case: Since the International Technologies Limited is being managed by a MD, the commission at the rate of five percent of the net profit to Mr. Kamal, the MD is allowed and no approval of company in general meeting is required.

(ii) Not Valid:

Part (ii) of the second proviso to Sec. 197(1) provides that except with the approval of the company in general meeting by a special resolutions the remuneration payable to directors who are neither managing directors nor whole time directors shall not exceed-

(A) One percent of the net profits of the company, if there is a managing or whole time director or manager;

(B) Three percent of the net profits in any other case.

Present case: The maximum remuneration allowed for directors other than managing or whole time director is one percent of the net profits of the company because the company is having a managing director also. Hence, if the company wants to fix their remuneration at not more than two percent of the net profits of the company, the approval of the company in general meeting is required.

(iii) The company also proposes to pay suitable additional remuneration to Mr. Bhatt, a director, for professional services rendered as software engineer, whenever such services are utilized:

(1) According to Sec. 197(4), the remuneration payable to the directors of a company, including any managing or whole-time director or manager, shall be determined, in accordance with and subject to the provisions of this section, either

(i) By the articles of the company, or

(ii) By a resolution or,

(iii) If the articles so require, by a special resolution, passed by the company in general meeting, and

(2) The remuneration payable to a director determined aforesaid shall be inclusive of the remuneration payable to him for the services rendered by him in any other capacity.

(3) Any remuneration for services rendered by any such director in other capacity shall not be so included if—

(i) The services rendered are of a professional nature; and

(ii) In the opinion of the Nomination and Remuneration Committee, if the company is covered under sub-section (1) of Section 178, or the Board of Directors in other cases, the director possesses the requisite qualification for the practice of the profession.

Hence, in the present case, **the additional remuneration** to Mr. Bhatt, a director for professional services rendered as software engineer **will not be included in the maximum**

managerial remuneration and is allowed but opinion of Nomination and Remuneration Committee is to be obtained.

Also, the International Technologies Limited (a listed company) shall disclose in the Board's report, the ratio of the remuneration of each director to the median employee's remuneration and such other details as may be prescribed under the Companies (Appointment and Remuneration of Managerial personnel) Rules, 2014.

Q.18. Mr. Smart, a technocrat aged 71 years and reputed to be a specialist in reviewing sick companies is being considered to be appointed as Managing Director of Downhill Industries Limited. The company has been incurring losses for the past several years and its "effective capital" is Rs. 500 crore. Referring to the provisions of the Companies Act, 2013, discuss:

(i) Can Mr. Smart be appointed as Managing Director of the company despite being over 70 years of age? If so, what is the process to be followed to enable this?

(ii) What is "effective capital" as per Schedule IV of the Act?

(iii) What is the maximum permissible remuneration under the Companies Act, 2013?

(8 marks; 2016-Nov)

Answer:

(i) **As per Sec. 196(3) of Companies Act, 2013,** a person who has attained the age of seventy years may be appointed as MD, whole .time director or manager if:

(i) Such appointment is made by passing a special resolution and

(ii) The explanatory statement annexed to the notice shall indicate the justification for appointing such person.

Part I of Schedule V also provides that the appointment of a person who has attained the age of seventy years, as a managerial person requires the approval by a special resolution.

As per proviso to Sec. 196(3)(a), where no such special resolution is passed but votes cast in favour of the motion exceed the votes, if any, cast against the motion and the Central Government is satisfied, on an application made by the Board, that such appointment is most beneficial to the company, the appointment of the person who has attained the age of seventy years may be made.

Present Case:

In this case, Mr. Smart has completed seventy years thus, the conditions required to be fulfilled by Mr. Smart are described as follows:

(a) If Mr. Smart fulfills all the conditions contained in Part I of Schedule V and also a special resolution is passed in the general meeting approving his appointment no approval of the Central Government is required and therefore, Mr. Smart may be appointed as a managing director for five years.

The company shall file a return with the registrar in Form No. MR1 within 60 days of such appointment.

(b) If Mr. Smart does not fulfill any conditions contained in Part I of Schedule V, he may be appointed as a managing director only with the approval of Central Government. In such a case, if special resolution is not passed, the votes cast in favour of the motion should exceed the votes cast against the motion. Also the Central Government should be satisfied, on an application made by the Board, that such appointment is most beneficial to the company.

(ii) Effective Capital:

As per Schedule V, effective capital means the aggregate of the paid- up share capital (excluding share application money or advances against shares) amount if any for the time being standing to the credit of share premium account: reserves and surplus (excludingrevaluation reserve), long term loans and deposits repayable after one year (excluding working capital loans, overdrafts, interest due on loans unless funded, bank guarantee, etc. and other short

term arrangements) as reduced by the aggregate of any investments (except in case of investment by an investment company whose principal business is acquisition of shares, stock debentures or other securities accumulated losses and preliminary expenses not written off.

(iii) **Maximum permissible remuneration:** According to Sec. II of Part II of Schedule V, where in any financial year a company has no profits or its profits are inadequate, it may, without Central Government approval pay remuneration to the managerial person not exceeding sixty lakhs plus 0.01 % of the effective capital in excess of two hundred fifty crores rupees in case where the effective capital is two hundred fifty crores rupees and above.

Hence, the maximum permissible remuneration shall be sixty lakhs plus 0.01 % of two hundred fifty crores rupees [five hundred crore - two hundred fifty crores rupees]:

sixty lakhs rupees + two hundred fifty thousands rupees is Rs. 62.5 lakhs.

[Assumption: Mr. Smart reputed to be a specialist in reviewing sick companies is being considered to be appointed as Managing Director of Downhill Industries Limited and the company has been incurring losses for the past several years, it may also be assumed that Downhill Industries Limited is a sick company. So, in that case, the company may pay remuneration upto two times the amount permissible under Sec. II (provided under Sec. Ill of part II of Schedule V)].

Q.19. Venus Limited is a widely held, listed company having two executive directors who are technocrats. The company has suffered losses in the last four years. The company wants to enhance the remuneration of the executive directors to Rs.6,00,000 per month from existing remuneration of Rs. 4,00,000. The audited balance sheet as on 31st March, 2016 reveals that by the shareholders is a special resolution.

	(1)	(2)
	Where the effective capital is:	Limit of yearly remuneration payable shall not exceeds (Rs.)
(i)	Negative or less than five crore	Sixty lakhs
(ii)	Five crore and above but less than hundred crore rupees	Eighty four lakhs
(iii)	Hundred crore and above but less than two hundred fifty crore rupees	One hundred twenty lakhs
(iv)	Two hundred crore rupees and above	One hundred twenty lakhs plus 0.01 % of the effective capital in excess of two hundred fifty crore rupees

• Provided that above limits shall be doubled if the resolution passedthe paid up capital of the company is Rs. 15 crores, accumulated losses Rs.11 crores and secured long term borrowings Rs. 5 crores. Besides, the company has long term investments of Rs. 11 crores. The company's remuneration committee has recommended the proposal and the company is regular in repayment of its debts. Analyse the proposition with reference to the provisions of the Companies Act, 2013. **(6 marks; 2017-Nov)**

Answer:

As per Section 197 (3), where in any financial year during the currently of tenure of a managerial person, a company has no profit or its profits are inadequate, pay remuneration to the managerial person, not exceeding higher of the limits of under (A) and (B) given below (As per schedule V). **(A)**

(B) In the case of a managerial person who is not a security holder holding securities of the company of nominal value of Rs. 5 lakhs or more or an employee or a director of the company or not related to any director or promoter at any time during the two years prior to his appointment as a managerial person - 2.5% of the current relevant profit.

- Provided, that if the resolution passed by the shareholders is a special resolution, this limit shall be doubled.

- For this, effective capital include paid up share capital, resources, long term borrowing as reduced by long term investment and accumulated losses.
- So, in this case effective capital of Venus Ltd. can be calculated as follows:

Particulars	Amt. (Rs.) in crore
Paid up share capital	15
+ Long term Borrowings	5
(-) Long term investments	(11)
(-) Accumulated losses	(11)
Effective capital	(2)

- Venus Ltd. has a negative effective capital so as per above provisions yearly remuneration payable shall not exceed sixty lakhs rupees. So, here company wants to pay six lakhs rupees p.m. to director as remuneration. So by this yearly remunerable comes to Rs.6 lakhs x 12 months = 72 lakhs. So company cannot pay remuneration of Rs.6 lakhs per month. However, existing per month remuneration of Rs. 4 lakhs can be paid.
- So, proposal of remuneration committee is not tenable. However, Venus Ltd. can pay monthly remuneration of Rs.6 lakhs with prior approval of the Central Government as per schedule V.

Q.20. The Articles of Association of a listed company provides for fixed payment of sitting fee for each meeting of Directors subject to maximum of, Rs. 30,000. In view of the increased responsibilities of Independent Directors of listed Companies, the Company proposes to increase the sitting fee to Rs. 45,000 per meeting. Advise the Company about the requirement under the Companies Act, 2013 to give effect to the proposal.

(4 marks; 2018-Nov)

Answer:

- **Sec. 197(5) of the Companies Act, 2013,** provides that a director may receive remuneration by way of fee for attending the Board / Committee meetings or for any other purpose as may be decided by the Board, provided that the amount of such fees shall not exceed the amount as may be prescribed. The Central Government through rules prescribed that the amount of sitting fees payable to a director for attending meetings of the Board or committees thereof may be such as may be decided by the Board of Directors or the Remuneration Committee thereof which shall not exceed the sum of Rs.1 lakh per meeting of the Board or Committee thereof. Further, the Board may decide different sitting fee payable to independent and non-independent directors other than whole-time directors.
- From the above, it is clear that fee to independent directors can be increased from Rs. 30,000 to Rs. 45,000 per meeting by passing a resolution in the Board Meeting and alternating the Articles of Association by passing special Resolution.

198. CALCULATION OF PROFITS

Notified Date of Section: 01/04/2014

199. RECOVERY OF REMUNERATION IN CERTAIN CASES

Notified Date of Section: 01/04/2014

200. CENTRAL GOVERNMENT OR COMPANY TO FIX LIMIT WITH REGARD TO REMUNERATION

Notified Date of Section: 01/04/2014

201. FORMS OF, AND PROCEDURE IN RELATION TO, CERTAIN APPLICATIONS

Notified Date of Section: 01/04/2014

202. COMPENSATION FOR LOSS OF OFFICE OF MANAGING OR WHOLE-TIME DIRECTOR OR MANAGER. (5 QUESTIONS)

Notified Date of Section: 12/09/2013

Q.1. Under what circumstances a Managing Director or whole time Director is not entitled to compensation for loss of office under the Companies Act, 2013?

(5 marks; 2014 - Dec)

Answer:

Compensation for Loss of Office of Managing or Whole- time Director or Manager (Section 202)

Section 202 (Compensation for loss of office of managing or whole time director) of the Companies Act, 2013 provides that a company may make payment to a managing or whole-time director or manager, but not to any other director, by way of compensation for loss of office or as consideration for retirement from office or in connection with such loss or retirement. However, No payment shall be made in the following cases:

(a) where the director resigns from his office as a result of the reconstruction/amalgamation of the company and is appointed as the managing or whole-time director, manager or other officer of the reconstructed company/of resulting company from the amalgamation;

(b) Where the director resigns from his office otherwise than on the reconstruction/ amalgamation of the company;

(c) Where the office of the director is vacated due to disqualification;

(d) Where the company is being wound up due to the negligence or default of the director;

(e) Where the director has been guilty of* fraud or breach of trust or gross negligence or mismanagement of the conduct of the affairs of the company or any subsidiary company or holding company; and

(f) Where the director has instigated or has taken part directly or indirectly in bringing about, the termination of his office.

Q.2. Can a Company pay compensation to its Directors for loss of office? Explain briefly the relevant provisions of the Companies Act, 2013 in this regard.

(8 marks; 2017 - June)

Answer:

- A company can pay compensation to its directors for loss of office as provided in Section 202 of the Companies Act, 2013. Under Section 202, such compensation can be paid only to managing director, director holding the office of the manager and to a whole time director but not to others.
- The compensation payable shall be on the basis of average remuneration actually-earned by such director for three years, or such shorter period as the case may be, immediately preceding the ceasing of holding of such office and shall be for the unexpired portion of his term or for three years whichever is shorter.
- No such payment can be made, if winding up of the company is commenced before or commences within 12 months after he ceases to hold office if the assets of the company on the winding up, after deducting expenses thereof, are not sufficient to repay to the shareholders the share capital (including the premium, if any) contributed by them.
- However, no payment of compensation can be made in the following cases:

No payment of compensation shall be made in the following cases:

(1) Where the director resigns from his office as a result of the reconstruction of the company, or of its amalgamation with any other body corporate or bodies corporate, and is appointed as the managing or whole-time director, manager or other officer of thd reconstructed company or of the body corporate resulting from the amalgamation.

(2) Where the director resigns from his office otherwise than on the reconstruction of the company or its amalgamation as aforesaid.

(3) Where the office of the director is vacated under sub-section (1) of Section 167.

(4) Where the company is being wound up, whether by an order of the Tribunal or voluntarily, provided the winding up was due to the negligence or default of the director.

(5) where the director has been guilty of fraud or breach of trust in relation to, or of gross negligence in or gross mismanagement of, the conduct of the affairs of the company or any subsidiary company or holding company thereof, and

(6) Where the director has instigated, or has taken part directly or indirectly in bringing about, the termination of his office.

Q.3. Mr. Biron was appointed as the Managing Director of NIVA LTD. for a period of 5 years w.e.f. 1st January, 2014. Since his work was found unsatisfactory, his services were terminated from 20th October, 2015 by paying compensation for the loss of office as provided in the agreement entered into by the company. Later, the company discovered that during his tenure of office Mr. Biron was guilty of many corrupt practices and that he should have been removed without payment of compensation. Advise the company whether the services of Managing Director can be terminated without payment of compensation as provided in the agreement and whether the company can recover the amount already paid to Mr. Biron. (5 marks; 2016 - June)

Answer:

According to Section 202 of the Companies Act, 2013 a Managing Director is entitled to be paid compensation for loss of office. However, Section 202(2)(e) of the Companies Act, 2013 provides that no compensation is payable if the director concerned has been guilty of fraud or breach of trust or of gross negligence in or gross mismanagement in the conduct of the affairs of the Company.

However, in the present case, compensation amount was paid and subsequently the misconduct on the part of Mr. Biron was noticed by the company. In the case of Bell -Vs-Lever Bros (1932), Lever Bros removed their Managing Director of a subsidiary by paying them compensation. It was afterwards discovered that during his tenure of office he had been guilty of so many breaches of duty and corrupt practices that he could have been removed without compensation. As action was then commenced to recover back the compensation money. It was held that Bell was not bound to refund the compensation money and to disclose any breach of his fiduciary obligation so as to give the company an opportunity to dismiss him. Thus, in normal circumstances, the company (NIVA Ltd.) is entitled to terminate the services of Mr. Biron as Managing Director without payment of compensation as he was guilty of many corrupt practices. In the present case, however, the company will not be able to recover the compensation money already paid to Mr. Biron, Managing Director.

Q.4. Mr. Raman is a Managing Director of X company. He resigns from his office as a result of amalgamation of the X company with the other body corporate. Further he is appointed as the Managing Director of the body corporate resulting from the amalgamation. State in the light of the Companies Act, 2013 whether in this situation, is company liable towards Managing Director to compensate for the loss of office after his resignation. (5 marks; 2016 - Dec)

Answer:

According to Section 202 of the Companies Act, 2013, a company may make payment to a managing or whole-time director or manager, but not to any other director, by way of compensation for loss of office, or as consideration for retirement from office or in connection with such loss or retirement.

However, in certain situations, no compensation shall be made by the company. As per the situation given in Section 202(2)(a), where the director resigns from his office as a result of the reconstruction of the company, or of its amalgamation with any other body corporate or bodies corporate, and is appointed as the managing or whole-time director, manager or other officer of the reconstructed company or of the body corporate resulting from the amalgamation; no company shall make payment by way of compensation for loss of office to a managing or whole-time director or manager. Hence, in the above case Mr. Raman, a Managing Director of X company resigns from his office as a result of amalgamation of the said company with the other

body corporate. He is appointed as Managing Director of the Body Corporate resulting from the amalgamation. So accordingly, as per the above stated provision, company shall not make compensation to Mr. Raman for the loss of office due to his resignation on account of amalgamation of the company with other body corporate.

Q.5. Mr. Gopi is the Managing Director of LGB Limited. The Company wants to vacate the post of Managing Director on March 31,2018 and appoint Mr. Lakshmikant in place of Mr. Gopi due to hands on experience and better track records. The tenure of appointment of Mr. Gopi is upto 30th June, 2022 with the condition that he will get compensation in case of early vacation of his office due to the Company's requirements. Mr. Gopi was drawing following remuneration during the last five financial years:

Financial Year	Remuneration (Rs.in Lakhs)
2013-14	30
2014-15	35
2015-16	40
2016-17	45
2017-18	50

Mr. Gopi approaches you to know the amount of compensation he will be eligible to get from LGB Limited as per the provisions of the Companies Act, 2013. Advise.

What will be your answer if a person is only an ordinary director but neither the Managing Director nor a whole time director nor a manager of the Company? (8 marks; 2018-Nov)

Answer:

- **As per Sec. 202 of the Companies Act, 2013,** a company may make payment to a managing or whole time director or manager, but not to any other director by way of compensation for loss of office, or as consideration for retirement from office or in connection with such loss or retirement.
- The compensation payable to such managing director or whole-time director or manager shall not exceed the remuneration he would have earned if he would have been in office for the reminder of his term earned by him during a period of three years immediately preceding the date on which he ceases to hold such office, or where he held the office of less than three years, then for such shorter period.

Present Case:

- In this case, Mr. Gopi, the Managing Director of LGB Ltd. has been removed by the company on 31st March, 2018. The tenure of Mr. Gopi expires on 30th June, 2022. So, as per above provisions Mr. Gopi can claim compensation for loss of office as follows :

The period for which he will receive compensation

= remaining term of Mr. Gopi 30th June, 2022

or

Three years from cessations = 31st March, 2021 whichever is shorter.

So, Mr. Gopi will receive the compensation for the loss of office for next 3 years.

Calculation of Compensation:

Avg. Remuneration earn during 3 previous years = (40 lakhs + 45 lakhs + 50 lakhs / 3)

= Rs. 45 lakhs

= 45 lakhs x 3 years

= Rs. 135 lakhs

- Mr. Gopi can claim compensation for loss of office of Rs. 135 lakhs from LGB Ltd.

As this Section does not allow payment of compensation to other director other than a managing, whole-time director or manager, ordinary director who is neither the Managing Director nor a whole time director nor a manager cannot receive compensation for the loss of office under this Section.

203. APPOINTMENT OF KEY MANAGERIAL PERSONNEL (9 QUESTIONS)

Notified Date of Section: 01/04/2014

Q.1. Mr. X is a Whole Time Director (WTD) in a Super Ltd. He is also Whole Time Director (WTD) in its subsidiary company. Discuss the validity of Mr. X as WTD in its subsidiary company. (2 marks; 2018 - Dec)

Answer:

According to Section 203(2) of the Companies Act, 2013, every whole-time key managerial personnel of a company shall be appointed by means of a resolution of the Board containing the terms and conditions of the appointment including the remuneration. A whole-time key managerial personnel shall not hold office in more than one company at the same time except in its subsidiary company [Section 203(3)]. Therefore, accordingly. Mr. X can validly hold the position of Whole time Director in the subsidiary of Super Ltd.

Q.2. Explain the concept of KMP (Key Managerial Personnel) as introduced by the Companies Act, 2013. (2 marks; 2019 - June)

Q.3. Distinguish between 'Whole-time chairman' and 'part-time chairman'. (4 marks; 2010 - June) [CSEM-II]

Answer:

Distinction between whole-time Chairman and part-time Chairman which are chaired by managing directors who are known as Chairman-cum-managing director. We have also on Board, are chaired by directors who are not whole time directors. A Chairman-cum-managing director is some times called a whole-time chairman.

Whereas a Chairman, who is not a whole time director of the company, is called part time Chairman.

Q.4. Distinguish between 'Chief Executive Officer and Managing Director'. (4 marks; 2018 - June)

Answer:

Section 2(1**8**) of the Companies Act, 2013, has defined "Chief Executive Officer' so as to mean an officer of a company, who has been designated as such by it.

Section 2(54) of the Companies Act, 2013, "Managing Director" means a director who, by virtue of the articles of a company or an agreement with the company or a resolution passed in its general meeting, or by its Board of Directors, is entrusted with substantial powers of management of the affairs of the company and includes a director occupying the position of managing director, by whatever name called.

Q.5. Explain the meaning of the term 'key managerial personnel' in relation to a company as introduced by the Companies Act, 2013 and also state the manner in which they are appointed. (4 marks; 2015 - June)

Answer:

1. Appointment of Key Managerial Personnel	**Enacting provisions -** Section 203 of Companies Act, 2013 read with Rule 8 of Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014	**Section 203 of the Companies Act, 2013** read with Rule 8 of Companies (Appointment and Remuneration of Managerial Personnel) Rules 2014, mandates the appointment of Key Managerial Personnel and makes it obligatory for a listed company and every other public company having a paid-up share capital of rupees ten crores or more, to appoint following whole-time key managerial personnel: (i)Managing Director, or Chief Executive Officer or Manager and in their absence, a whole-time director; (ii)Company Secretary; and (iii)Chief Financial Officer.
2. Appointment	Rule 8 A	A company other than a company covered under rule

of Company Secretary in companies not covered under Rule 8		8 which has a paid-up share capital of five crore rupees or more shall have a whole-time company secretary.
3. Appointment through board re-solution	Every whole-time key managerial personnel of a company shall be appointed by means of a resolution of the Board containing the terms and conditions of the appointment including the remuneration.	
4. Holding of office	A whole-time key managerial personnel shall not hold office in more than one company except in its subsidiary company at the same time. However, he can hold such other directorship with the permission of the Board.	
5. Vacancy of whole time key managerial per-sonnel	If the office of any whole-time key managerial personnel is vacated, the resulting vacancy shall be filled-up by the Board at a meeting of the Board within a period of six months from the date of such vacancy.	

Q.6. Who are key managerial personnels (KMPs)? State the manner in which they can be appointed in a company. (4 marks; 2015 - Dec)

Answer:

Please refer 2015 - June

Q.7. 'S' is. a member of Institute of a Company Secretaries of India. He has defaulted in payment of annual subscription and his name is removed from the Register of Members by ICSI on 31st December, 2018.

(i) Can he be appointed as "Company Secretary" by 'M' Ltd. with a paid up share capital of Rs. 10 crore on 1st January, 2019? (4 marks; 2019 - June)

(ii) If M Ltd. has paid up share capital of Rs. 2 crore and it has appointed as a company secretary on part time basis, is it valid? (4 marks; 2019 - June)

Q.8. Explain the concept of KMP (Key Managerial Person) as introduced by the Companies Act, 2013. Explain the classes of companies which are required to appoint whole time Key Managerial Person under the provisions of the said Act. (4 marks; 2015 - May)

Answer:

Key Managerial Personnel (KMP)

As per Sec. 2(51), of the Companies Act, 2013, "Key Managerial Personnel", in relation to a company, means:

- The Chief Executive Officer or the Managing Director or the Manager;
- The Company Secretary;
- The whole-time Director;
- The Chief Financial Officer
- Such other officer, not more than one level below the direction who is in whole-time employment designated as key managerial personnel by the Board; and'
- Such other officer as may be prescribed;

[Inserted by Companies (Amendment) Act, 2017]

Companies required to appoint KMP

Sec. 203 of the Companies Act, 2013 read with Rule 8 provide the appointment of Key Managerial Personnel and makes it compulsory for a listed company and every other public company having a paid-up share capital of ten crores rupees or more, to appoint following whole-time key managerial personnel:

• Managing Director, or Chief Executive Officer on Manager and in their absence, a whole-time Director;

• Company Secretary; and

• Chief Financial Officer.

Further, as per the Companies (Appointment and Remuneration of Managerial Personnel) Amendment Rules, 2014, a company other than a company covered under Rule 8 above, which has a paid up share capital of five crores rupees or more shall have a whole-time company secretary. With the insertion of Rule 8A to the above rules, it is now mandatory for every other company to have a whole-time company secretary, if its paid up share capital is five crores rupees or more.

Q.9. Explain when a Public Limited Company is necessarily required to appoint a Managing Director under the Companies Act, 2013. Draft a Board resolution for the appointment of Mr. Intelligent as the Managing Director of Smart Limited on a salary of five lakhs rupees per month along with other usual perquisites. (8 marks; 2011-May)

Answer:

Appointment of Managing Director:

As per Sec. 2(51), of the Companies Act, 2013, "Key Managerial Personnel", in relation to a company, means:

- The Chief Executive Officer or the Managing Director or the Manager;
- The Company Secretary;
- The whole-time Director;
- The Chief Financial Officer
- Such other officer, not more than one level below the direction who is in whole-time employment designated as key managerial personnel by the Board; and'
- Such other officer as may be prescribed;

[Inserted by companies (Amendment) Act, 2017]

Companies required to appoint KMP

Sec. 203 of the Companies Act, 2013 read with Rule 8 provide the appointment of Key Managerial Personnel and makes it compulsory for a listed company and every other public company having a paid-up share capital of ten crores rupees or more, to appoint following work'-time key managerial personnel:

- Managing Director, or Chief Executive Officer on Manager and in their absence, a whole-time Director;
- Company Secretary; and
- Chief Financial Officer.

Draft Board Resolution

"Resolved that pursuant to the provisions of Section 197,198 and 203 read with Schedule V and other applicable provisions, if any, of the Companies Act, 2013, (including any statutory modifications or re-enactment(s) thereof, for the time being in force). The consent of the Board of Directors be and is hereby accorded for the appointment of Mr. Intelligent as Managing Director of the Company for a period of 5(five) years effective from 01st April, 2011 and that he may be paid remuneration as follows:

(i) Salary: Five Lakh Rupees Only per month plus annual increment of two hundred fifty lakh rupees.

(ii) Commission: One percent of the net profits of the company subject to maximum of ten lakhs rupees.

(iii) Perquisites: Housing, car, etc. as applicable to the Senior Executive of the Company.

Resolved further that the Company Secretary of the Company be and is hereby authorized to do all such acts, deeds, matters and things as may be deemed necessary to give effect to this resolution"

204. SECRETARIAL AUDIT FOR BIGGER COMPANIES (4 QUESTIONS)

Notified Date of Section: 01/04/2014

Q.1. Distinguish between 'Internal Audit' and 'Secretarial Audit'. (4 marks; 2017 - June)

Answer:

Internal Audit	Secretarial Audit
Governed by the provisions of **Section 138.**	Governed by the provisions of **Section 204.**
Applicable on every Private Company having: (i) turnover of Rs. 200 crore rupees or more during the preceding financial year; or (ii) outstanding loans or borrowings **from** banks or PFIs exceeding Rs. 100 crore or more at any point of time during the preceding financial year.	Not Applicable on Private Companies.
The auditor may be a Chartered Accountant or a Cost Accountant, or a Company Secretary or a firm thereof or any employee of the company, as may be decided by the Board to conduct internal audit of the functions and activities of the company.	The audit is conducted by a Company Secretary in Practice.
The audit committee or Board shall in consultation with the internal auditor formulate the scope, functioning, periodicity and methodology for conduct of internal audit.	If there is qualification or adverse remark in the audit report, the Board of directors have to comment on the same in their report to members. The format of the Secretarial Audit Report shall be in Form No. MR.3. Every listed company and a comDanv beloncinatoother class of companies shall annex with its Board's report made in terms of **sub-section (3) of Section 134,** a secretarial audit report, given by a Company Secretary in practice.

Q.2. Explain the provisions of the Companies Act, 2013 '"relating to 'secretarial audit'. State whether 'secretarial audit' is mandatory for all companies. (4 marks; 2015 - June)

Answer:

1.	**To Which Companies Secretarial Audit is Mandatory?**	As per Section 204 of the Companies Act, 2013 mandates every listed company and such other classes of prescribed companies to annex a Secretarial Audit Report, given by a Company Secretary in practice with its Board's report. • Every listed company • Every public company having a paid-up share capital of Fifty Crore rupees or more • Every public company having a turnover of Two Hundred Fifty Crore rupees or more
2.	**Duty of the company for all assistance to PCS**	It shall be the duty of the company to give all assistance and facilities to the company secretary in practice, for auditing the secretarial and related records of the company.
3.	**Importance of Secretarial Audit**	Secretarial Audit is an independent, objective assurance intended to add value and improve an organisation's operations. It helps to accomplish the organisation's objectives by bringing a systematic, disciplined approach to evaluate and improve effectiveness of risk management, control, and governance processes. No, the secretarial audit is not mandatory to all companies.
4.	**Conclusion**	Hence it is clear that, the secretarial audit is not mandatory to all companies.

Q.3. Explain with reference to the provisions of the Companies Act, 2013, the meaning and importance of 'secretarial audit'. Which companies are required to get the 'secretarial audit' conducted? (4 marks; 2015 - Dec)

Answer:

1.	**What is meant by Secretarial audit**	Secretarial Audit is a compliance audit and it is a part of total compliance management in an organisation. The Secretarial Audit is an effective tool for corporate compliance management. It helps to detect non-compliance and to take corrective measures.
2.	**A mechanism to monitor compliance**	Secretarial Audit is a process to check compliance with the provisions of various laws and rules/ regulations/procedures, maintenance of books records etc., by an independent professional to ensure that the company has complied with the legal and procedural requirements and also followed the due process. It is -essentially a mechanism to monitor compliance with the requirements of stated laws.
3.	**To Which Companies Secretarial Audit is Mandatory**	Considering the increasing requirement of corporate governance, Section 204 of the Companies Act, 2013 read with Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014, mandates following companies to annexe a 'Secretarial Audit Report', given by an independent practicing company secretary, with its board report in MR 3 e- form. • Every listed company • Every public company having a paid-up share capital of Fifty Crore rupees or more • Every public company having a turnover of Two Hundred Fifty Crore rupees or more

Q.4. Who will appoint Secretarial Auditor of the company: Board of Directors or Shareholders? What is the duty of Board of Directors towards secretarial auditor and audit report? (4 marks; 2018 - June)

Answer:

According to Section 204, every listed company and every public company having paid up share capital of fifty crore rupees or more; or public company having a turnover of two hundred fifty crore rupees or more shall attach a Secretarial Audit Report given by Practicing Company Secretary (PCS). As per Section 179 of the Companies Act, 2013 read with Rule 8 of the Companies (Meeting of Board and its Powers) Rules, 2014, the Board of Directors, only by means of resolutions, passed at meetings of the Board, shall appoint a Secretarial Auditor.

It shall be the duty of the company to give all assistance and facilities to the Company Secretary in Practice (Secretarial Auditor), for auditing the secretarial and related records of the company. (Section 204(2))

The Board of Directors, in their report shall explain in full any qualification or observation or other remarks made by the company secretary in practice in his report.

205. FUNCTIONS OF COMPANY SECRETARY (1 QUESTION)

Notified Date of Section: 01/04/2014

Q.1. Write a note on Statutory duties of a Company Secretary under the Companies Act, 2013. (4 marks; 2014 - June)

Answer:

1.	**Duties of Company Secretary Sec. 205 (1)(c) read with Rule 10 of Companies Appointment and Remuneration of Managerial**	The company secretary has following duties as per Section **205(1)** and Rule **10**	
		a. Guidance to directors	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;
		b. Facilitate the convening of meeting	to facilitate the convening of meetings and attend Board, committee and general meetings, and maintain the minutes of these meetings

	Personnel Rules, 2014	**c. Obtaining approvals**	to obtain approvals from the Board, general meetings, the Government and such other authorities as required under the provisions of the Act
		d. Representation	to represent before various regulators, Tribunal and other authorities under the Act in connection with discharge of various functions under the Act;
		e. Assisting the board	to assist the Board in the conduct of the affairs of the
		f. Advising board for good corporate governance	to assist and advise the Board in ensuring good corporate governance and in complying with the corporate governance requirements and best practices; and
		g. Other duties	to discharge such other duties as may be assigned by the Board from time to time;
		h. Other duties as prescribed under the act and rules	such other duties as have been prescribed under the Act and Rules.
2.	**Duties and functions of BOD, chair-person etc.**	**Section 205(2)** provides that the provisions contained in **Section 204 and Section 205** shall not affect the duties and functions of the Board of Directors, Chairperson of the company, managing director or whole- time director under this Act, or any other law for the time being in force.	

INSPECTION, INQUIRY AND INVESTIGATION

206. POWER TO CALL FOR INFORMATION, INSPECT BOOKS AND CONDUCT INQUIRIES (1 QUESTION)

Notified Date of Section: 01/04/2014

Q.1. Write short note on the following:
Inquiry by the Registrar [(Section 206(4)] (4 marks; 2018 - Dec)

Answer:

Inquiry by the Registrar [Section 206(4)]

(1)The Registrar may call on the company to furnish in writing any information or explanation on matters specified in the order within such time as **he** may specify therein and carry out such inquiry as he deems fit after providing the company a reasonable opportunity of being heard, if the Registrar is satisfied :

(a) On the basis of information available with or furnished to him, or

(b) On a representation made to him by any person that the business of a company is being carried on for a fraudulent or unlawful purpose or not in compliance with the provisions of this Act, or

(c) The grievances of investors are not being addressed.

(2) Prior calling the company to furnish in writing any information or explanations and carrying out inquiry, the Registrar has to inform the company of the allegations made against it by a written order.

(3) The Central Government may, if it is satisfied that the circumstances so warrant, direct the Registrar or an Inspector appointed by it for the purpose to carry out the inquiry under this sub-section.

(4) It is further provided that where business of a company has been or is being carried on for a fraudulent or unlawful purpose, every officer of the company who is in default shall be punishable for fraud in the manner as prescribes in Section 447.

207. CONDUCT OF INSPECTION AND INQUIRY (2 QUESTIONS)

Notified Date of Section: 01/04/2014

Q.1. Mr. Ramesh and his supporters hold more than fifty percent of the equity share capital of Progressive Realtors Ltd. Dissatisfied with the performance of the company, Mr. Ramesh sends a notice to the Board of Directors about his intention to inspect the account books of the company. Explain the provisions of the Companies Act, 2013 regarding the persons who can inspect the books of account and the right of Mr. Ramesh in this matter. (5 marks; 2010-May)

Answer:

Inspection of Books of Account Provision:

According to Sec. 207 of the Companies Act, 2013, the following persons can inspect the books of account of a company.

(i) Directors of the company (Sec. 128)

(ii) Registrar of Companies

(iii) Such Inspector of Government as may be authorized by the Central Government in this behalf.

Present Case:

Mr. Ramesh cannot exercise the power to carry out the inspection even though he and his supporters hold more than fifty percent of the equity share capital of the company. It is, however, possible for Mr. Ramesh and his group to come into the management by occupying the posts of directors by virtue of shareholdings and then inspect the books of account of the company.

Q.2. XYZ Ltd. was registered in the year 2005 under Companies Act, 1956. There are allegations that the three directors who manage the affairs of the company are siphoning the funds of the company. The company has not declared any dividends on the ground that company is incurring losses. Mr. A, who controls fifty one percent of the share capital of the company sends a notice to the management that he will inspect the books of account to verify the allegations. Examine the right of Mr. A to carry out the inspection. State the persons who have the right to carry out the inspection under the Companies Act, 2013. **(5 marks; 2011-May)**

Answer:

Inspection of Books of Accounts Provision:

According to Sec. 207 of the Companies Act, 2013, the following person can inspect the books of account of a company.

(i) Directors of the company (Sec. 128)

(ii) Registrar of the company

(iii) Such Inspector of the Central Government as may be appointed by the Central Government in this behalf.

Present Case:

Mr. A has no right to carry out an inspection of the books of accounts of the company despite the fact that he holds fifty one percent of the share capital of the company and can be called the owner of the company.

208. REPORT ON INSPECTION MADE

Notified Date of Section: 01/04/2014

209. SEARCH AND SEIZURE (3 QUESTIONS)

Notified Date of Section: 01/04/2014

Q.1. Can the Registrar of Companies seize the books and documents of a company? Explain. **(4 marks; 2012- Dec) [CSEM - II]**

Answer:

The statement is correct:

According to **Section 209 (Search and seizure) of the Companies Act, 2013,** if the Registrar has reasonable ground to believe that books and papers of or relating to, any company or other body corporate or Managing Director or Manager of such company may be:

(i) Altered;
(ii) Destroyed;
(iii) Mutilated;
(iv) Falsified; and
(v) Secreted,

Note: The Registrar may make an application to the magistrate having jurisdiction for an order for the seizure of such books and papers. The magistrate after considering the application and hearing the Registrar, if necessary, may, by order, authorise to Registrar to enter which such assistance as may be required, the place or places where such books and papers are kept, search the place and seize such books and papers as he considers necessary.

Q.2. A group of creditors of a company lodged a complaint with the Registrar of Companies alleging that the Directors of the company are engaged in falsification and destruction of account books and records of the company and urged the Registrar to seize the account books and records of the company. Discuss whether the Registrar can exercise such powers under the provisions of the Companies Act, 2013.

(8 marks; 2011-Nov)

Answer:

Search and Seizure

As per Sec 209(1) of the Companies Act, 2013, where, upon information in his possession or otherwise, the Registrar or Inspector has reasonable ground to believe that the books and papers of a company, or relating to the key managerial personnel or any director or auditor or company secretary in practice if the company has not appointed a company secretary, are likely to be destroyed, mutilated, altered, falsified or secreted, he may, after obtaining an order from the Special Court for the seizure of such books and papers,—

(a) Enter, with such assistance as may be required, and search, the place or places where such books or papers are kept; and

(b) Seize such books and papers as he considers necessary after allowing the company to take copies of, or extracts from, such books or papers at its cost.

Further as per Sec. 209(2), the Registrar or inspector shall return the books and papers seized under sub-section (1), as soon as may be, and in any case not later than one hundred and eightieth day after such seizure, to the company from whose custody or power such books or papers were seized: **Provided that** the books and papers may be called for by the Registrar or inspector for a further period of one hundred and eighty days by an order in writing if they are needed again:

Provided further that the Registrar or inspector may, before returning such books and papers as aforesaid, take copies of, or extracts from them or place identification marks on them or any part thereof or deal with the same in such other manner as he considers necessary.

Also as per Sec. 209(3), the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) relating to searches or seizures shall apply, mutatis mutandis, to every search and seizure made under this section.

Q.3. A group of creditors of Mac Trading Limited makes a complaint to the Registrar of Companies, Hyderabad alleging that the management of the company is indulging in destruction and falsification of the accounting records of the company. The complainants request the Registrar to take immediate steps to seize the records of the company so that the management may not be allowed to tamper with the records. The complaint was received at 10 A.M. on 1st July 2015 and the ROC entered the premises at 10.30 A.M. for the search. Examine the powers of the Registrar to seize the books of the company.

(4 marks; 2016-May)

Answer:

Provision:

Sec. 209 of the Companies Act, 2013 provides that where upon information in his possession or otherwise, the Registrar or inspector has reasonable ground to believe that the books and papers of -

(i) A company, or

(ii) Relating to the key managerial personnel, or

(iii) Any director, or

(iv) Auditor, or

(v) company secretary in practice if the company has not appointed a company secretary, are likely to be destroyed, mutilated, altered, falsified or secreted, he may, after obtaining an order from the Special Court for the seizure of such books and papers,—

(1) Enter, with such assistance as may be required, and search, the place or places where such books or papers are kept; and

(2) Seize such books and papers as he considers necessary after allowing the company to take copies of, or extracts from, such books or papers at its cost.

Following powers are given to Registrar to seize the books of the company.

- Enter and search the places.

- Seize such books and papers as he considers necessary.
- Make copies/extracts.
- Place identification marks.
- Deal with the books and papers in such manner as may be consider necessary.

Present Case:

ROC has power to enter, search and seize the documents, but only after obtaining order from special court. Immediate entry for search and seizure after half an hour of complaint is not proper.

210. INVESTIGATION INTO AFFAIRS OF COMPANY (4 QUESTIONS)

Notified Date of Section: 01/04/2014

Q.1. List out the kind of investigations carried out under the Companies Act, 2013.
(4 Marks; 2011 - June) [CSEM - II]

Answer:

The **Companies Act, 2013** provides for carrying out the following kinds of investigations:

(i) According to **Sections 210 and 213** investigation of the affairs of the company whose business is being conducted in fraudulent or irregular manner.

(ii) According to **Section 219** investigation of the affairs of related companies.

(iii) According to **Section 216** investigation of ownership of the company for the purpose of determining the true persons who are or have been able to control or materially influence the policy of the company or who are or have been financially interested in the success or failure, whether real or apparent of the company.

Q.2. Shareholders of Hide and Seek Ltd. are not satisfied about performance of the company. It is suspected that some activities being run in the name of the company are not in the interest of the company or its members. 101 out of total 500 shareholders of the company have made an application to the Central Government to appoint an inspector to carry out investigation and find out the true picture.
With reference to the provisions of the Companies Act, 2013, mention whether the shareholders' application will be accepted. Elaborate. (6 Marks; 2017 - Dec)

Answer:

According to the Companies Act, 2013, the Central Government under section 210(1) may order an investigation into the affairs of the company, if it is of the opinion that it is necessary to do's:

(a)On the receipt of a report of the Registrar or Inspector under section 208;

(b)On intimation of a special resolution passed by a company that the affairs of the company ought to be investigated;

(c) In public interest. According to Section 210 (3) of the Companies Act, 2013, the Central Government may appoint one or more persons as inspectors to investigate into the affairs of the company and to report thereon in such manner as the Central Government may direct. The shareholders' application will not be accepted as under 210 of the Companies Act, 2013, Central Government may order an investigation into affairs of the company on the intimation of a special resolution passed by a company that the affairs of the company ought to be investigated and then may appoint the inspectors. Here, 101 out of total 500 shareholders of the company have made an application to the Central Government to appoint an inspector to carry out investigation but it is not sufficient as the company has not passed the special resolution.

Q.3. Shareholders of Hide and Seek Ltd. are not satisfied about performance of the company. It is suspected that some activities being run in the name of the company are not in the interest of the company or its members one hundred one out of total five hundred shareholders of the company have made an application to the Central Government to appoint an inspector to carry out investigation and find out the true picture.

With reference to the provisions of the Companies Act, 2013, mention whether the shareholders' application will be accepted? Elaborate. (4 marks; 2015-Nov)

Answer:

Investigation of Affairs of a Company Provision:

The provisions relating to investigation of the affairs of a company whose business is being conducted in fraudulent or unlawful manner or in a manner oppressive of any member are contained in Sec. 210 of Act 2013. In the present case, following options are open.

1. Passing a Special Resolution: The company may pass a special resolution declaring that the affairs of the company ought to be investigated. Then, the Central Government shall order an investigation of the affairs of the company **[Sec. 210(1)].**

2. Petition to the NCLT: The directors may make a petition to the NCLT in this regard. The Central Government shall order investigation of the affairs of the company if the Court, by order, declares that the affairs of the company ought to be investigated. **[Sec. 210(2)]**

3. Appointment of Inspector: For the purpose of this section, the Central Government may appoint one or more persons as inspectors to investigate into the affairs of the company and to report thereon in such manner as the Central Government may direct. **[Sec. 210(3)]**

According to Rule 5 of the Companies (Inspection, investigation and inquiry) Rules, 2014:

(a) The CG may before appointing an inspector under sub-section (3) of Section 210, require the applicant to give a security not exceeding Rupees Twenty Five Thousand for payment of the costs and expenses of investigation as per the criteria given in the said rule.

	Turnover as per previous year Financial Statement	Amount of Security
1.	Upto fifty crore rupees	Ten thousand rupees
2.	More than fifty crore rupee and upto two hundred crore rupees	Fifteen thousand rupees
3.	More than two hundred crore rupees	Twenty five thousand rupees

(b) Further, the above referred security shall be refunded to the applicant if the investigation results in prosecution.

Q.4. The shareholders of Kumar Ltd. passed a special resolution that the affairs of the Company ought to be investigated. The Company submitted the special resolution to the Central Government. Examine, explaining the relevant provision of the Companies Act, 2013, whether the power of the Central Government to order an investigation is mandatory or discretionary?

(ii) Enumerate the procedures to be followed by the Serious Fraud Investigation Office to arrest a person who has been found guilty of An offence committed under Section 447 of the Companies Act, 2013. (7 marks; 2018-Nov)

Answer:

(i) **Sec. 210 of the Companies Act, 2013** provides for Investigation into affairs of company.

According to Sub-section (1) of Section 210, where the Central Government is of the opinion that it is necessary to investigate into the affairs of a company,:

(a) On the receipt of a report of the Registrar or inspector under Section 208;

(b) On intimation of a special resolution passed by a company that the affairs of the company ought to be investigated; or

(c) In public interest,

It may order an investigation into the affairs of the company.

As per the above it is clear that investigation carried at the opinion of Central Government and it may or may not order for investigation even on the receipt of special resolution passed by the company. So, the power of the Central Government to order an investigation is discretionary and not mandatory.

(ii) The Serious Fraud Investigation office shall follow following procedures to arrest a person who has been found guilty ofan offence committed under Section 447 of the Companies Act, 2013.

(i) Central Government consider it necessary to investigate into affairs of company by SFIO may by order assign its investigation to SFIO:

- On receipt of report of Registrar or inspector u/s 208
- On intimation of SR by the company
- In public interest
- On request from any department of Central Government or State Government.

(ii) On receipt of such order, SFIO may designate inspectors.

(iii) If investigation is pending with other investigating agency, such concerned agency shall transfer the relevant documents and records to SFIO.

(iv) SFIO shall conduct the investigation according to Chapter XIV and submit its report to CA within such period as specified in order.

(v) The Investigating Officer shall have the power of the inspector u/s 217.

(vi) The company and its officers and employees shall be responsible to provide assistance to Investigation Officer as may be required.

(vii) Offences covered u/s 447 shall be cognizable and person accused* shall not be released on bail or on bond except under certain circumstances:

(viii) The concerned officers of SFIO may arrest the guilty person if has reason to believe and inform him of the grounds for such arrest.

(ix) The concerned officers of SFIO shall immediately after arrest forward a copy of order to SFIO.

(x) Every person arrested shall within 24 hours be taken to JM or MM having jurisdiction.

(xi) Submission of interim report and investigation report to CG.

(xii) CG may order the SFIO to initiate prosecution against the company and its officers and employees.

211. ESTABLISHMENT OF SERIOUS FRAUD INVESTIGATION OFFICE (1 QUESTION)

Notified Date of Section: 01/04/2014

Q.1. State briefly the composition of SERIOUS FRAUD INVESTIGATION OFFICE (SFIO) under the Companies Act, 2013. **(3 marks; 2018 - June)**

Answer:

Composition of SFIO [Section 211 (2)] The SFIO shall be:

(1)Headed by a Director, and

(2)Consist of such number of experts from the following fields to be appointed by the Central Government from amongst persons of ability, integrity and experience in:

(a)Banking
(b)Corporate affairs
(c)Taxation
(d)Forensic audit
(e)Capital market
(f)Information technology
(g)Law; or
(h)Such other fields as may be prescribed.

212. INVESTIGATION INTO AFFAIRS OF COMPANY BY SERIOUS FRAUD INVESTIGATION OFFICE (1 QUESTION)

Notified Date of Section: 01/04/2014

Q.1. Who shall be the competent authority for all decisions pertaining to arrest as per the provision of the Companies (Arrests in connection with investigation by serious Fraud Investigation office) Rules, 2017? (1 Mark; 2019 - June)

213. INVESTIGATION INTO COMPANY'S AFFAIRS IN OTHER CASES (1 QUESTION)

Notified Date of Section: 01/06/2016

Q.1. The business of Weak Fabrication Limited is conducted fraudulently and the management activities are not in the interests of the Company. The paid up capital of the company is one crore rupees. A group of shareholders numbering 110 members representing 1/9 of total voting power decided to approach Tribunal (NCLAT) to carryout investigation into the Company's affairs under the provisions of the Companies Act, 2013. They seek your advice in the following matters, stating the relevant provisions of the Companies Act, 2013.

(1) Whether the group can make valid application?

(2) Other than member, can any other person make application?

(3) Are the applicants required to furnish security for payment of cost and expenses of Investigation? (7 marks; 2018-May)

Answer:

Provision:

As per **Sec. 213, of the Companies Act, 2013,** the tribunal may on an application made by:

(i) not less than one hundred members or members holding not less than one-tenth of the total voting power, in the case of a company having share capital; or

(ii) not less than one-fifth of the person on the company's register of members, in the case of a company having no share capital and supported by such evidence as may be necessary for the purpose of showing that the applicants have good reasons for seeking an order for conducting an investigation into the affairs of the company, or on an application made to it by any other person or otherwise if it is satisfied that there are circumstances suggesting that:

(i) The business of the company is being-conducted with intent to defraud its creditors, members or any other person or otherwise for a fraudulent or unlawful purpose, or in a manner oppressive to any of its members or that the company was formed for any fraudulent or unlawful purpose;

(ii) persons concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards the company or towards any of its members; or

(iii) The members of the company have not been given all the information with respect to its affairs which they might reasonably expect, including information relating to the calculation of the commission payable to a managing or other director, or the manager, of the company.

Order, after giving a reasonable opportunity of being heard to the parties concerned, that the affairs of the company ought to be investigated by an inspector or inspectors appointed by the Central Government and where such an order is passed, the Central Government shall appoint one or more competent persons as inspectors to investigate into the affairs of the company in respect of such matters and to report thereupon to it in such manner as the Central Government may direct:

Providedthat if after investigation it is proved that:

(i) The business of the company is being conducted with intent to defraud its creditors, members or any other persons or otherwise for a fraudulent or unlawful purpose, or that the company was formed for any fraudulent or unlawful purpose; or

(ii) any person concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud then every officer of the company who is in default and the person or persons concerned in the formation of the company or the management of its affairs shall be punishable for fraud in the manner as provided in section 447.

Present Case:

In this case business of Weak Fabrication Ltd. is conducted fraudulently. A group of shareholders numbering 110 members representing 1/9 of total voting power decided to approach Tribunal (NCLT) to carry out investigation into the affair of the company. So, in light of provision of Sec. 213, of the Companies Act, 2013, answers to questions are given below:

1. As application made by 110 members representing 119 of total voting power decided to approach NCLT. So it is over and above 100 members as per Sec. 213.

So here the application made by group of shareholders is valid application.

2. Yes, a person other than member can also make application to NCLT.

3. As per Sec. 214 of the companies Act, 2013, where an investigation is ordered by the Central Government in pursuance of Clause (b) of Subsection (1) of Sec. 210, or in pursuance of an order made by the Tribunal under Sec. 213, the Central government may before appointing an inspector under sub sec. (3) of Sec. 210 or Clause (b) of Sec. 213, requires the applicant to give such security not exceeding twenty five thousand rupees as may be prescribed, as it may think fit, for payment of the costs and expenses of the investigation. Such security shall be refunded to the applicant if the investigation results in prosecution.

- In this case, matter under consideration is of Sec. 213. So, the applicants require to furnish security not exceeding twenty five thousand rupees for the payment of The costs and expenses of the investigation.

214. SECURITY FOR PAYMENT OF COSTS AND EXPENSES OF INVESTIGATION(1 QUESTION)

Notified Date of Section: 01/04/2014

Q.1. Greater DINA Investors Association made a complaint by an informal letter to the Central Government that Management of Secret Limited has been indulging in fraudulent activities causing loss to the shareholders and that an investigation should be carried out to find out the whole truth. On receipt of the letter, the Central Government directed the Association to approach them formally after complying with the provisions of the Companies Act, 2013. Advise the Association. (4 marks; 2016-Nov)

Answer:

According to Sec. 210(1) of the Companies Act, 2013, where the CG is of the opinion, that it is necessary to investigate into the affairs of a company,:

(a) On the receipt of a report of the Registrar or inspector under Sec. 208;

(b) On intimation of a special resolution passed by a company that the affairs of the company ought to be investigated; or

(c) In public interest,

It may order an investigation into the affairs of the company.

According to Sec. 214,

(i) The GG.may before appointing an inspector under Sec. 210, require the applicant to give a security not exceeding twenty five thousand rupees for payment of the costs and expenses of investigation as per the criteria given in the Companies (Inspection, Investigation and Inquiry) Rules, 2014.

(ii) Further, the above referred security shall be refunded to the applicant if the investigation results in prosecution.

As stated in the question that Central Government directing the association to approach them formally after complying with the provision of the Companies Act, 2013 is not required in view of the above stated provisions because Central Government can act in public interest.

215. FIRM, BODY CORPORATE OR ASSOCIATION NOT TO BE APPOINTED AS INSPECTOR

Notified Date of Section: 01/04/2014

216. INVESTIGATION OF OWNERSHIP OF COMPANY

Notified Date of Section: 01/04/2014

217. PROCEDURE, POWERS, ETC., OF INSPECTORS

Notified Date of Section: 01/04/2014

218. PROTECTION OF EMPLOYEES DURING INVESTIGATION (4 QUESTIONS)

Notified Date of Section: 01/06/2016

Q.1. What are the provisions available in the Companies Act, 2013 for protection of employees during investigation? (3 marks; 2014-June)

Answer:

(a) Notwithstanding anything contained in any other law for the time being in force, if:

1.during the course of any investigation of the affairs and other matters of or relating to a company, other body corporate or person under Section 210, Section 212, Section 213 or Section 219 or of the membership and other matters of or relating to a company, or the ownership of shares in or debentures of a company or body corporate, or the affairs and other matters of or relating to a company, other body corporate or person, under Section 216, or

2.During the pendency of any proceeding against any person concerned in the conduct and management of the affairs of a company under Chapter XVI,such company, other body corporate or person proposes:

(a)To discharge or suspend any employee; or

(b)To punish him, whether by dismissal, removal, reduction in rank or otherwise; or

(c)To change the terms of employment to his disadvantage,the company, other body corporate or person, as the case may be, shall obtain approval of the Tribunal of the action proposed against the employee and if the Tribunal has any objection to the action proposed, it shall send by post notice thereof in writing to the company, other body corporate or person concerned.

(b)If the company, other body corporate or person concerned does not receive within thirty days of making of application under point (a), the approval of the Tribunal, then and only then, the company, other body corporate or person concerned may proceed to take against the employee, the action proposed.

(c)If the company, other body corporate or person concerned is dissatisfied with the objection raised by the Tribunal, it may, within a period of thirty days of the receipt of the notice of the objection, prefer an appeal to the Appellate Tribunal in such manner and on payment of such fees as may be prescribed.

(d)The decision of the Appellate Tribunal on such appeal shall be final andbinding on the Tribunal and on the company, other body corporate orperson concerned.

(e)For the removal of doubts, it is hereby declared that the provisions of this section shall have effect without prejudice to the provisions of any other law for the time being in force.

Q.2. An inspector was appointed under Sec. 210 of theCompanies Act, 2013 to investigate the affairs of a public company. Mr. WM. the works manager of the company, who is aware of certain misdeeds of the management, desires to know whether he is entitled to any protection against dismissal by the company, if he discloses the misdeeds during the course of examination by the inspector. Advise him explaining the relevant provisions of the Companies Act, 2013. (5 marks; 2008-Nov)

Answer:

Protection of Employees During Investigation [Sec. 218 of Companies Act, 2013]

- An employee of company who has disclosed information during investigation is protected

against dismissal, discharge or removal or change in terms of his employment to his disadvantage, during investigation, without permission of NCLT.

- Company should give intimation ofproposed action to NCLT and if no reply is received within thirty days, proposed action can be taken [Sec. 218(2)].
- If company is not satisfied with order of NCLT, it can file appeal in NCLAT within thirty days [Sec. 218(3)].
- Such removal or change in terms of employment is subject to other laws also [Sec. 218(5)].

Present Case:
Following the provisions of Sec 218, Mr. WM, the Works Manager of the Company is entitled to the protection as laid down under section 218.

Q.3. Pursuant to Section 210 of the Companies Act, 2013 an Inspector was appointed to investigate the affairs of Sterling Trading Limited. Mr. Ahmed the General Manager (Operations) who is aware of certain misdeeds of the management, desires to know whether he is entitled to any protection against dismissal by the company if he discloses the misdeeds during the course of examination by the Inspector. Advise him explaining the relevant provisions of the Companies Act, 2013. (3 marks; 2017-Nov)

Answer:

Protection-of Employees During Investigation [Sec. 218 of Companies Act, 2013]

- An employee of company who has disclosed information during investigation is protected against dismissal, discharge or removal or change in terms of his employment to his disadvantage, during investigation, without permission of NCLT.
- Company should give intimation of proposed action to NCLT and if no reply is received within thirty days, proposed action can be taken [Sec. 218(2)].
- If company is not satisfied with order of NCLT, it can file appeal in NCLT within thirty days [Sec. 218(3)].
- Such removal or change in terms of employment is subject to other laws also [Sec. 218(5)].

Present Case:
Following the provisions of Sec 218, Mr. Ahmed, GM (Operations) of the Company is entitled to the protection as laid down under Section 218.

Q.4. Damage Ltd, the Company wanted to suspend Mr. Z, the CFO of the Company during the pendency of an investigation being conducted under the provisions of the Companies Act, 2013 on the order of Tribunal. The Company approached the Tribunal on 3rd January, 2017 for the proposed action. The Company on 15m February, 2017 passed an order of suspension without waiting for the orders from Tribunal. Comment upon the action taken by the Company with reference to the relevant provisions of the Act.

(4 marks; 2017-May)

Answer:

1. Protection of employees during investigation

Provision: As per Sec. 218 of the Companies Act, 2013, 'notwithstanding anything contained in any other law for the time being in force, if:

(a) during the course of any investigation of the affairs and other matters of or relating to a company, other body corporate or person under Section 210, Section 212, Section 213 or Section 219 or of the membership and other matters of or relating to a company, or the ownership of shares in or debentures of a company or body corporate, or the affairs and other matters of or relating to a company, other body corporate or person, under Section 216; or

(b) During the pendency of any proceeding against any person concerned in the conduct and management of the affairs of a company under Chapter XVI, such company, other body corporate or person proposes:

- To discharge or suspend any employee; or
- To punish him whether by dismissal, removal, reduction in rank or otherwise; or
- to change the terms of employment to his disadvantage the company, other body corporate or person, as the case may be shall obtain approval of the Tribunal of the action proposed against the employee and if the Tribunal has any objection to the action proposed, it shall send by post notice thereof in writing to the company, other body corporate or person concerned.

2. Action against employee: If the company, other body corporate or person concerned does not receive within thirty days of making of application under sub-Section (1), the approval of the Tribunal, then the only then, the company, other body corporate or person concerned may proceed to take against the employee the action proposed.

Present Case:

In the instant case, the action taken by Damage Ltd. to suspend Mr. Z, the CFO of the company is valid as the company approached the Tribunal on 3rd January, 2017 for the proposed action and on 15th February, 2017 passed an order of suspension without waiting the orders from Tribunal (after 30 days of marking *he application)

219. POWER OF INSPECTOR TO CONDUCT INVESTIGATION INTO AFFAIRS OF RELATED COMPANIES, ETC.(1 QUESTION)

Notified Date of Section: 01/04/2013

Q.1. During investigations conducted on the affairs of a company in the public interest, the inspector observed that the Directors of the company had been acting on the instructions of the holding company and he proceeded to investigate the holding company. Is Inspector permitted to do under the provisions of the Companies Act, 2013?

(4 marks; 2017-May)

Answer:

Investigation into affairs of related companies Provision:

Sec. 219 of the Companies Act, 2013 provides for power of inspector to conduct investigation into the affairs of related company.

Accordingly if an investor appointed u/s 210, or 212 or 213 of Companies Act, 2013 to investigate into the affairs of a company considers it necessary for the purpose of the investigation, can also investigate the affairs of:

(a) Any other body corporate which is, or has at only relevant time been the company's subsidiary company or holding company, or a subsidiary company of its holding company;

(b) Any other body corporate which is or has at any relevant time been managed by any person as Managing Director or as manager, who is, or was, at the relevant time, the Managing Director or the manager of the company;

(c) Any other body corporate whose Board of Directors comprises nominees of the company or is accustomed to act in accordance with the directions or instructions of the company or any of its directors; or

(d) Any person who is or has at any relevant time been the company's Managing Director or Manager or Employee.

Thus, According to above Sec. 219. Inspector can proceed to investigate the holding company.

220. SEIZURE OF DOCUMENTS BY INSPECTOR.

Notified Date of Section: 01/04/2014

221. FREEZING OF ASSETS OF COMPANY ON INQUIRY AND INVESTIGATION

Notified Date of Section: 01/06/2016

222. IMPOSITION OF RESTRICTIONS UPON SECURITIES (2 QUESTIONS)

Notified Date of Section: 01/06/2016

Q.1. ABC Limited, over years, enjoys high reputation and its General Reserve is many times more than the paid up capital of the Company. There is apprehension of cornering the shares of the company by some persons likely to result in change in the Board of Directors which may be prejudicial to the Public interest.

Advise, as to how can ABC Limited block the transfer of shares of the company under the provisions of the Companies Act, 2013. (5 marks; 2010-May)

Answer:

Imposition of restrictions upon securities [Sec. 222 of Companies Act, 2013]

Provision:

According to Sec **222(1)** where it appears to the NCLT, in connection with any investigation under Sec. 216 or on a complaint made by any person in this behalf, that there is good reason to find out the relevant facts about any securities issued or to be issued by a company and NCLT is of the opinion mat such facts cannot be found out unless certain restrictions, as it may deem fit, are imposed, NCLT may, by order, direct that the securities shall be subject to such restrictions as it may deem fit for such period not exceeding three years as may be specified in the order.

Further as per Sec. 222(2), where securities in any company are issued or transferred or acted upon in contravention of an order of NCLT under subsection (1), the company shall be punishable with t.ne which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees, or with both.

Present Case:

The facts given in the question squarely fall within the provisions of Sec. 222 of the Companies Act, 2013. The management of ABC Ltd may make a complaint to the NCLT and convince it that the transfer of shares in favour of tiie group of unscrupulous persons would change ihe composition of the Board of Directors of the company which shall be prejudicial to the public interest and if the NCLT is convinced with the plea of the company, it may pass an order as stated above which would block the transfer of shares as stated in the questions.

Q.2. An investigation was ordered by the Central Government under Section 216 of the Companies Act, 2016, against PKR Limited for determining the true membership of the Company. In connection with this investigation, it appears to the Tribunal that there is good reason to find out the relevant facts about 9% Redeemable Cumulative Preference Shares (RCPS) issued by the Company on 15.10.2017 and the Tribunal is of the opinion that unless restriction is imposed on further issue of such shares, the purpose cannot be solved. Accordingly, the Tribunal, by an Order dated15.08.2018, directed the Company that the further issue of RCPS sMf be subject to restrictions for a period of four years. Daspte tb Order of Tribunal as above, PKR Limited proceeded with further issue of RCPS on 20.08.2018 in order to fund the working capital requirements for its expansion project.

Referring to the provisions of the Companies Act, 2013, examine the following:

(I) Can the Tribunal restrict further issue of RCPS? If yes, then to what period?

(II) What are the penal provisions in case of contravention to the above Order?

(5 marks; 2018-Nov)

Answer:

Provision:

(i) **As per Sec. 222 (1) of the Companies Act, 2013,** where it appears to the Tribunal, in connection with any investigation under Section 216 or on a complaint made by any person in

this behalf, that there is good reason to find out the relevant facts about any securities issued or to . be issued by a company and the Tribunal is of the opinion that such facts cannot be found out unless certain restrictions, as it may deem fit, are imposed, the Tribunal may, by order, direct that the securities shall be subject to such restrictions as it may deem fit for such period not exceeding three years as may be specified in that order.

Present Case:

In this case, the Central Government order investigation under Section 216 of the Act, for determine the true membership of the company. The tribunal is of the opinion that unless restriction is imposed on further issue of such shares the purpose cannot be solved. So tribunal as per provision of Section 222 of the Companies Act, 2013, can restrict further issue of shares (RCPS) by order for such period not exceeding three years as may be specified in the order.

(ii) If PKR Ltd. contravene any matter of order as issued under Section 222 (1) then it shall be liable for penal provision as below :

Where securities in any company are issued or transferred or acted upon in contravention of an order of Tribunal under Sub - section (1), the company shall be punishable with fine which shall not be less than one lakh rupees but which may extend to twenty - five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than twenty - five thousand rupees but which may extend to five lakh rupees, or with both.

223. INSPECTOR'S REPORT (2 QUESTIONS)

Notified Date of Section: 01/04/2014

Q.1. What are the duties of the inspector as enumerated in Sec. 223 of the Companies Act, 2013 in relation to his report? (5 marks; 2016 - Dec)

Answer:

Section 223 of the Companies Act, 2013 deals with Inspector's report. The following provisions are applicable in respect of the Inspector's report on investigation:

(i) Submission of interim report and final report [Sub section (1)]	An inspector appointed under this Chapter (Chapter XIV- Inspection, Inquiry and Investigation) may, and if so directed by the Central Government shall, submit interim reports to that Government, and on the conclusion of the investigation, shall submit a final report to the Central Government.
(ii) Report to be in writing or printed [Sub section (2)]	Every report made under sub - section (1) above, shall be in writing or printed as the Central Government may direct.
(iii) Obtaining copy or report [Sub section (3)]	A copy of the above report may be obtained by making an application in this regard to the Central Government.
(iv) Authentication of report [Sub section (4)]	The report of any inspector appointed under this Chapter shall be authenticated either: (a)by the seal of the company whose affairs have been investigated; or (b)By a certificate of a public officer having the custody of the report, as provided under Section 76 of the Indian Evidence Act, 1872, and such report shall be admissible in any legal proceeding as evidence in relation to any matter contained in the report.
(v) Exceptions	Nothing in this section shall apply to the report referred to in Section 212 of the Companies Act, 2013.

Q.2. What are the duties of the inspector as enumerated in Sec. 223 of the Companies Act, 2013 in relation to his report. (6 marks; 2017 - June)

Answer:

Section 223 of the Act lays down the following provisions in respect of the Inspector's report on investigation conducted under the **Chapter XIV:**

(a) Submission of interim report and final report [Sub section (1)]: An Inspector appointed under the Chapter **(Chapter XIV-** Inspection, Inquiry and Investigation) may, and if so directed by the Central Governmentshall, submit interim reports to that Government, and on the conclusion of the investigation, shall submit a final report to the Central Government.

(b)Report to be writing or printed [Sub-section (2)]: Every report made under **sub-section (1)** above shall be in writing or printed as the Central Government may direct.

(c)Obtaining copy of report [Sub-section (3)]: A copy of the above report may be obtained by making an application in this regard to the Central Government.

(d)Authentication of report [Sub-section (4)]: The report of any Inspector appointed under this Chapter shall be authenticated either:

(1)By the seal, if any, of the company whose affairs have been investigated; or

(2)By a certificate of a public officer having the custody of the report, as provided **under Section 76 of the Indian Evidence Act, 1872,** and such report shall be admissible in any legal proceeding as evidence in relation to any matter contained in the report.

(e)Exceptions [Sub section (5)]: Nothing in this section shall apply to the report referred to in **Section 212 of the Companies Act, 2013.**

224. ACTIONS TO BE TAKEN IN PURSUANCE OF INSPECTOR'S REPORT. (1 QUESTION)

Notified Date of Section: 01/04/2014

Q.1. The report submitted by the inspector appointed under Sec. 210 of the Companies Act, 2013 to investigate the affairs of a Company revealed that substantial funds of the company have been misappropriated by the Managing Director of the Company. The Central Government is of the opinion that effective action may not be taken by the company for recovery of the funds misappropriated by the Managing Director. Examine with reference to the provisions of the Companies Act, 2013 the action that can be taken by the Central Government for recovery of damages or funds misappropriated by the Managing Director. (5 marks; 2009-Nov)

Answer:

Recovery of damages:

As per Sec. 224 of the Companies Act, 2013 if, after considering the inspector's report, the CG is satisfied that, in the public interest, proceedings have to be brought against the guilty persons by the company or any body corporate, the CG may itself bring proceedings in the name of such company or body corporate.

The proceedings may relate to :

- The recovery of damages in respect of any fraud, misfeasance or other misconduct in connection with the promotion, formation or management of the affairs of such company or body corporate; or
- The recovery of any property of such company, or body corporate, which has been misapplied or wrongfully retained.

225. EXPENSES OF INVESTIGATION (1 QUESTION)

Notified Date of Section: 01/04/2014

Q.1. M/s Genesis Paper Ltd. has been incurring business losses for past couple of years. The company, therefore, passed a special resolution for voluntary winding up. Meanwhile, complaints were made to the Tribunal and to the Central Government about foul play of the directors of the company, which adversely affected the interests of shareholders of the company as well as the public. In this situation advise whether investigation may be initiated against the company under the provisions of the Companies Act, 2013. (4 marks; 2017-Nov)

Answer:

Voluntary winding up of company, etc., not to stop investigation proceedings:

As per Sec. 226 of the Companies Act, 2013, an investigation may be initiated notwithstanding, and no such investigation shall be stopped or suspended by reason only of, the fact that:

(a) An application has been made under section 241;

(b) The company has passed a special resolution for voluntary winding up; or

(c) Any other proceeding for the winding up of the company is pending before the Tribunal:

Provided that where a winding up order is passed by the Tribunal in a proceeding referred to in clause (c), the inspector shall inform the Tribunal about the pendency of the investigation proceedings before him and the Tribunal shall pass such order as it may deem fit:

Provided further that nothing in the winding up order shall absolve any director or other employee of the company from participating in the proceedings before the inspector or any liability as a result of the finding by the inspector.

Present Case:

Here, M/s. Genesis Paper Ltd. has been incurring losses and goes for voluntary resolution by passing a special resolution. Meanwhile, directors of company are making foul play and which adversely affects the interest of the shareholders of the company.

So, in this case investigation may be validly initiated against the company as per Sec. 226, even though the company has passed, a special resolution for voluntary winding up.

226. VOLUNTARY WINDING UP OF COMPANY, ETC., NOT TO STOP INVESTIGATION PROCEEDINGS

227. LEGAL ADVISERS AND BANKERS NOT TO DISCLOSE CERTAIN INFORMATION.

Notified Date of Section: 09/09/2016

228. INVESTIGATION, ETC., OF FOREIGN COMPANIES

Notified Date of Section: 01/04/2014

229. PENALTY FOR FURNISHING FALSE STATEMENT, MUTILATION, DESTRUCTION OF DOCUMENTS(1 QUESTION)

Notified Date of Section: 01/04/2014

Q.1. Decide the liability of the person for commission of the act during the course of inspection, inquiry or investigation under the Companies Act, 2013:

(I) A person who is required to make statement during the course of investigation pending against its company, is a party to the manipulation of documents related to the transfer of securities and naming of holders in the register of members by the company.

(II) An employee of the company publicized among his social networking of sound financial, position of his organization in order to incite the public to purchase the shares of its company. In actuality, the company was running in loss. (4 marks; 2019 - June)

COMPROMISES, ARRANGEMENTS AND AMALGAMATION

230. POWER TO COMPROMISE OR MAKE ARRANGEMENTS WITH CREDITORS AND MEMBERS (8 QUESTIONS)

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

Q.1. Does the scheme of compromise or arrangement under the Companies Act, 2013 require approval of preference shareholders? (2 marks; 2016- Dec)

Answer:

Preference shareholders: The term 'member' includes preference shareholders also. Further, preference shareholders are a class of members and their rights may be affected differently in the proposed scheme of arrangement. Hence, their approval is also required. If the Tribunal directs separate meeting of preference shareholders and equity shareholders, then the scheme should be approved by requisite majority in both such meetings held as per directions of the Tribunal.

Q.2. Does the scheme of compromise or arrangement require approval of preference shareholder? (3 marks; 2017- Dec)

Answer:

As per **Section 230(3) of the Companies Act, 2013** where a meeting is proposed to be called in pursuance of an order of the [5][Tribunal] under sub-section (1), a notice of such meeting shall be sent to all the creditors or class of creditors and to all the members or class of members and the debenture-holders of the company, individually at the address registered with the company which shall be accompanied by a statement disclosing the details of the compromise or arrangement, a copy of the valuation report, if any, and explaining their effect on creditors, key managerial personnel, promoters and non-promoter members, and the debenture-holders and the effejpt of the compromise or arrangement on any material interests of the directors of the company or the debenture trustees, and such other matters as may be prescribed:

Provided that such notice and other documents shall also be placed on the website of the company, if any, and in case of a listed company, these documents shall be sent to the Securities and Exchange Board and Stock Exchange where the securities of the companies are listed, for placing on their website and shall also be published in newspapers in such manner as may be prescribed.

Hence, the approval of the preference shareholder has to be seeked.

Q.3. A meeting of members of Joka Agricultural Equipments Limited was convened under the orders of the Court for the purpose of considering a scheme of compromise and arrangement. The meeting was attended by 200 members holding 500000 shares. 70 members holding 400000 shares in the aggregate voted for the scheme. 120 members holding 90000 shares in aggregate voted against the scheme. 10 members holding 10000 shares abstained from voting. Examine with reference to the relevant provisions of the Companies Act, 2013 whether the scheme was approved by the requisite majority? (6 marks; 2017-June)

Answer:

Compromise or Arrangement:

According to **Section** 230(6) **of the Companies Act,** 2013, the scheme of compromise and arrangement must be approved by a resolution passed with a majority in number representing three-fourths in value of the creditors, or members, or class of members, as the case may be, present and voting either in person or, by proxy.

The majority is dual, in number and in value. A simple majority of those voting is sufficient. Whereas the 'three-fourths' requirement relates to value. The three-fourths value is to be computed with reference to paid-up capital held by members present and voting at the meeting.

In this case 200 members attended the meeting, but only 190 members voted at the meeting. As 70 members voted in favour of the scheme the requirement relating to majority in number (i.e. 95) is not satisfied.

190 members who participated in the meeting held 4,90,000 shares, three-fourth of which works out to 3,67,500 while 70 members who voted for the scheme held 4,00,000 shares. The majority representing three-fourths in value is satisfied.

Thus, **in the instant case,** the scheme of compromise and arrangement of Joka Agricultural Equipments Limited is not approved as though the value of shares voting in favour is significantly more, the number of members voting in favour do not exceed the number of members voting against.

Q.4. A scheme of reconstruction of Southern Stone Company Limited was approved by its shareholders and creditors in their meeting and resolutions to that effect were passed. Afterwards a few shareholders and creditors of the company raised objections against the said arrangements of reconstruction. The entire paid up capital of the company was wiped out by the accumulated losses. Advise the Directors of the said company about the steps to be taken to give effect to the proposed scheme under the Companies Act, 2013.

(5 marks; 2010-May)

Answer:

Power to compromise or make arrangements with creditors and members (Sec. 230 of Companies Act, 2013.)

1. Where a compromise or arrangement is proposed -

(a) Between a company and its creditors or any class of them; or

(b) Between a company and its members or any class of them,the Tribunal may, on the application of the company or of any creditor or member of the company, or in the case of a company which is being wound up of the liquidator appointed under this Act, or under the Insolvency and Bankruptcy Code, 2016 as the case may be, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal directs.

2. The company or any other person, by whom an application is made under sub-section (1), shall disclose to the Tribunal by affidavit—

(a) all material facts relating to the company, such as the latest financial position of the company, the latest auditor's report on the accounts of the company and the pendency of any investigation or proceedings against the company;

(b) Reduction of share capital of the company, if any, included in the compromise or arrangement;

(c) Any scheme of corporate debt restructuring consented to by^not less than seventy-five per cent of the secured creditors in value, including-

(i) a c; editor's responsibility statement in the Form No. CAA1;

(ii) Safeguards for the protection of other secured and unsecured creditors;

(iii) report by the auditor that the fund requirements of the company after the corporate debt restructuring as approved shall conform to the liquidity test based upon the estimates provided to them by the Board;

(iv) where the company proposes to adopt the corporate debt restructuring guidelines specified by the Reserve Bank of India, a statement to that effect; and

(v) a valuation report in respect of the shares and the property and all assets, tangible and intangible, movable and immovable, of the company by a registered valuer.

3. Where a meeting is proposed to be called in pursuance of an order of the Tribunal under sub-section (1), a notice (in Form No. CAA2) of such meeting shall be sent to all the creditors or class of creditors and to all the members or class of members and the debenture-holders c^f the company, individually at the address registered with the company which shall be accompanied

by a statement disclosing the details of the compromise or arrangement, a copy of the valuation report, if any, and explaining their effect on creditors, key managerial personnel, promoters and non-promoter members and the debenture-holders and the effect of the compromise or arrangement on any material interests of the directors of the company or the debenture trustees and such other matters as may be prescribed.

4. A notice under sub-Section (3) shall provide that the persons to whom the notice is sent may vote in the meeting either themselves or through proxies or by postal ballot to the adoption of the compromise or arrangement within one month from the date of receipt of such notice: **Provided** that any objection to the compromise or arrangement shall be made only by persons holding not less than ten per cent of the shareholding or having outstanding debt amounting to not less than five per cent of the total outstanding debt as per the latest audited financial statement.

5. A notice in Form CAA 3 under sub-section (3) along with all the documents in such form as may be prescribed shall also be sent to the Regional Director, the income-tax authorities, the Reserve Bank of India, the Securities and Exchange Board, the Registrar, the respective stock exchanges, the Official Liquidator, the Competition Commission of India established under sub-Section (1) of Section 7 of the Competition Act, 2002 (12 of 2003).

6. Where, at a meeting held in pursuance of sub-Section (1), majority of persons representing three-fourths in value of the creditors, or class of creditors or members or class of members, as the case may be, voting in person or by proxy or by postal ballot, agree to any compromise or arrangement and if such compromise or arrangement is sanctioned by the Tribunal by an order, the same shall be binding on the company, all the creditors, or class of creditors or members or class of members, as the case may be or in case of a company being wound up, on the liquidator appointed under this Act or under the insolvency and Bankruptcy Code, 2016 as the case may be and the contributories of the company.

7. An order in Form CAA 6 made by the Tribunal under sub-Section (6) shall provide for all or any of the following matters, namely:

(a) where the compromise or arrangement provides for conversion of preference shares into equity shares, such preference shareholders shall be given an option to either obtain arrears of dividend in cash or accept equity shares equal to the value of the dividend payable;

(b) The protection of any class of creditors;

(c) If the compromise or arrangement results in the variation of the shareholders' rights, it shall be given effect to under the provisions of section 48;

(d) if the compromise or arrangement is agreed to by the creditors under sub-section (6), any proceedings pending before the Board for Industrial and Financial Reconstruction established under section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) shall abate;

(e) such other matters including exit offer to dissenting shareholders, if any, as are in the opinion of the Tribunal necessary to effectively implement the terms of the compromise or arrangement:

Provided that no compromise or arrangement shall be sanctioned by the Tribunal unless a certificate by the company's auditor has been filed with the Tribunal to the effect that the accounting treatment, if any, proposed in the scheme of compromise or arrangement is in conformity with the accounting standards prescribed under Sec. 133.

8. The order of the Tribunal shall be filed with the Registrar by the company within a period of thirty days of the receipt of the order.

9. The Tribunal may dispense with calling of a meeting or creditor or class of creditors where such creditors or class of creditors, having at least ninety per cent value, agree and confirm, by way of affidavit, to the scheme of compromise or arrangement.

10. No compromise or arrangement in respect of any buy-back of securities under this section shall be sanctioned by the Tribunal unless such buyback is in accordance with the provisions of section 68.

11. Any compromise or arrangement may include takeover offer made in such manner as may be prescribed:

Provided that in case of listed companies, takeover offer shall be as per the regulations framed by the Securities and Exchange Board.

12. An aggrieved party may make an application to the Tribunal in the event of any grievances with respect to the takeover offer of companies other than listed companies in such manner as may be prescribed and the Tribunal may, on application pass such order as it may deem fit.

Note: Sec. 230 of Companies Act, 2013 is notified w.e.f 15.12.2016 vide notification No. 503677(E) dated 7.12.2016 except sub sections (11) and(12).

Q.5. A meeting of members of Jaora Agricultural Equipments Limited was convened under the orders of the Court/Tribunal for the purpose of considering a scheme of compromise and arrangement. The meeting was attended by 200 members holding 5,00,000 shares. 70 members holding 4,00,000 shares in the aggregate voted for the scheme. 120 members holding 90,000 shares in aggregate voted against the scheme. 10 members holding 10,000 shares abstained from voting. Examine with reference to the relevant provisions of the Companies Act, 2013 whether the scheme was approved by the requisite majority? (5 marks; 2012-Nov)

Answer:

Majority required for approving the scheme of Compromise or arrangement in a meeting of members of a company as called as per direction of Tribunal under Sec. 230(6):

1. The majority of members in person or by proxy or by postal ballot voting.

2. Such majority of members must also be members representing three-fourths in the value of members voting at the meeting.

3. It is to be noted that members not present in the meeting or present in the meeting but remaining neutral are not to be counted.

Present case:

1st Condition: Majority in Number

Total Number of

Members voting = 70 + 120 = 190

Majority is 96 or more members.

Since only 70 members have approved the scheme, this condition is not satisfied.

2nd Condition: 3/4th in value

Members voting in favour = 70

shares held by them = 4,00,000

Members voting against = 120

Shares held by them = 90,000

Total shares = 4,90,000

3/4th of 4,90,000 = 3,67,500

Since shareholders holding 4,00,000 shares voted in favour the 2nd condition is satisfied.

Conclusion: Since both the conditions are not satisfied the scheme is not approved

Q.6. M/s. Eternal Health Ltd. was facing acute financial difficulty as operations were continuously disrupted due to (a) non-availability of raw material (b) successive drought in its marketing areas and loss of demand and (c) frequent breakdown due to non-replacement of old plant and machinery. On the verge of liquidation, the Management proposes one last ARRANGEMENT between creditors and the company, whereby the creditors have to forego 50% of their dues to the company. This has evoked strong protest from some of the creditors who may block the arrangement. You are requested

to examine the arrangement in the light of the Companies Act, 2013 and advise the course of action/procedure to be adopted by the company to implement the same.

(8 marks; 2014-Nov)

Answer:

Sec. 230 of the Companies Act, 2013 relates to Compromise and Arrangements. The scheme of restructuring / arrangement must be approved by a majority in number of creditors/ members in person or by proxy or by postal ballot voting. The creditors/members approving the scheme must represent 3/4th in value of creditors/members who are in person or by proxy or by postal ballot voting. The Tribunal examines the scheme whether it is fair and reasonable or not. Thus, the company should send a notice to its creditors as well as members and put forth a scheme of arrangement which is acceptable by them in the required proportion. After acceptance the arrangement should be disclosed to the Tribunal of jurisdiction which in turn will approve the scheme after being satisfied about its fairness.

Q.7. Answer the following:

The shareholders and creditors of Superfine Limited, in a meeting convened for approval of a scheme of reconstruction of the company, passed resolutions. The scheme of reconstruction provided for the following:

(i) Sale of plant and machineries and appropriation of proceeds for payment of outstanding wages, tax dues and repayment of loan.

(ii) Unsecured creditors to forego 60% of their claims against the company and receive debentures for the balance amount. A few shareholders and creditors raised objections against the said arrangements.

Advise the directors about the steps to be taken to give effect to the proposed scheme under the Companies Act, 2013. **(4 marks; 2017 - May)**

Answer:

Please refer 2010 - May [5] (a) on page no. 184

Q.8. A meeting of members of ABC Limited was convened as per the orders of the Court to consider a scheme of compromise and arrangement. Notice of the meeting was sent to J000 members holding in aggregate 500000 equity shares. The meeting was attended by 800 members holding 350000 shares. 450 members holding 240000 shares voted in favour of the scheme; 200 members holding 60000 shares voted against the scheme. The remaining 150 members abstained from voting. Explain with reference to the provisions of the Companies Act, 2013, whether the scheme is approved by the requisite majority.

(4 marks; 2019-May)

231. POWER OF TRIBUNAL TO ENFORCE COMPROMISE OR ARRANGEMENT (1 QUESTION)

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

Q.1. A scheme of amalgamation of Anu Co. Ltd. with Priya Co. Ltd. was presented to the Tribunal for sanction after the scheme was approved by an overwhelming majority of shareholders, secured and unsecured creditors of both companies at meeting held under Section 231 of the Companies Act, 2013. While the scheme was pending in the High Court, some of the members requisitioned EGM for the purpose of requesting company 'Anu Limited' to negotiate with company 'Priya Ltd.' as according to the requisitionists the exchange ratio was not fair and reasonable. Can the directors refuse to call EGM? Comment. **(3 marks; 2015 - Dec)**

Answer:

In such a case, the tribunal cannot prevent a company from holding a requisitioned meeting for considering a proposed modification of a scheme which is already pending before the tribunal for its sanction.

The Tribunal has wide powers u/s 231 to give directions or make such modification in the compromise or arrangement as it may consider necessary for proper working of the compromise or arrangement arrived at.

Any modification in the scheme could be considered by the Tribunal at the instance of a shareholder.

Further, a mere discussion by the shareholders at a properly requisitioned meeting about the proposal modification to the scheme pending before the Tribunal for sanction would not by itself affect either the Scheme or the Tribunal power to consider the modification and sanction of scheme with or without modification.

Hence, directors can't refuse to call an EGM requisitioned by the member.

232. MERGER AND AMALGAMATION OF COMPANIES(12 QUESTIONS)

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

Q.1. State the powers of the Tribunal about the matters that would be considered while sanctioning the scheme of amalgamation under the provisions of the Companies Act, 2013. **(3 marks; 2014 - June)**

Answer:

While sanctioning the scheme of amalgamation, the Tribunal under Section 232(3) (Merger and amalgamation of companies) of the Companies Act, 2013 may make provision for all or any of the following matters:

(i) The transfer to the transferee company of the whole or any part of the undertaking property or liabilities of the transferor company.

(ii) The allotment by the transferee company of any shares, debenture etc. in that company which under the scheme are to be allotted by that company to any person.

(iii) The continuation of any legal proceedings by or against any transferor and transferee company.

(iv) The dissolution, without winding- up of any transferor company.

(v) The provisions to be made for any persons who within such time and **in** such manner as the court directs, dissent from the scheme of amalgamation.

(vi) Such incidental matters as are necessary to secure that the amalgamation shall be fully and effectively carried out.

Q.2. Explain the "Majority" required for approving the scheme of amalgamation in a meeting of member of a company called as per directions of the Court.
Examine further whether the scheme should be approved by the preference shareholders under Companies Act, 2013. **(2+1=3 marks; 2014 - Dec)**

Answer:

Majority in number representing three-fourth in value of members or class of members, as the case may be, present and voting either in person or by proxy, where proxies are allowed under the rules made under **Section 105 (Proxies) of Companies Act, 2013** must approve the scheme or arrangement providing for amalgamation of companies [Section 232 (Merger and amalgamation of companies) of Companies Act, 2013] Any member who though present at the meeting, does not vote for or against, but remains neutral, is not to be taken under consideration.

As the expression used is member, not only holders of equity shares but also preference shares and equity shares are ordered by the Tribunal to be held separately, the three- fourth majority of each class will have to be ascertained separately.

Q.3. Answer the following with reference to a scheme of amalgamation of companies explaining the relevant provisions of the Companies Act, 2013:
(i) Whether companies being amalgamated must be companies registered in India.
(3 marks; 2016 - June)

Answer:

A scheme of compromise or arrangement may provide for amalgamation of companies under **Section 232 of the Companies Act, 2013.** While the 'transferee company' does not include any company other than a company within the meaning of the **Companies Act, 2013,** the transferor company includes any body corporate whether a company within the meaning of the Companies Act or not. Hence, the scheme of the amalgamation may provide for transfer of the foreign companies to Indian companies.

Q.4. A transferor company got approval for a scheme of amalgamation with the transferee company. An amount of Rs. 5 lakh was deposited by the transferor company on the direction of the Tribunal for settling the dues of employees. An ex-employee of the transferor company objected to the amalgamation citing that he is also entitled for the claim in the amount deposited. Will he succeed Rs. Give reasons? (4 marks; 2013 - Dec)

Answer:

1.	**Facts of the Case**	**Webnenuro Services Ltd, In Re. [(2009 149 Com Cases 61 Del)]** • In this case, the objection of the employee Was overruled by the Tribunal and the scheme was sanctioned. • The reason given was that the transferor company had, in accordance, with the direction of the Tribunal, deposited the amount with the Registrar General of the Tribunal and in case the ex-employee was found entitled to the amount, he could get it with interest. The terms and conditions of service of the employees of the transferor company were not affected and there was no legal impediment in sanctioning the proposed scheme of amalgamation. The scheme was to be sanctioned and the transferor company was to be wound up without formal winding up.
2.	**Tribunal's sanction of scheme only if it bonafide**	Normally, a Tribunal does not sanction a scheme of amalgamation if it is not bona fide or is intended to cover misdeeds of delinquent directors or if the object of the scheme is to prevent investigation or . there is failure in the management of the affairs of the company. .
3.	**Conclusion**	In this case, the employee will not succeed and the scheme of amalgamation will be sanctioned. However, the ex-employee can get the amount claimed with interest.

Q.5. SUP Ltd. is public company incorporated in India. It wants to propose a scheme of arrangement (merger) with another company in the same line of business in India. Help the company in preparing such a scheme of arrangement firstly. Secondly, help the company in taking approval of NCLT. Advise how company should approach NCLT for its approval to the scheme and discuss grounds on the basis of which NCLT will accord its approval. (8 marks; 2017 - Dec)

Answer:

Preparation of Scheme of Amalgamation

The scheme of amalgamation to be prepared by the company should contain inter-alia the following information:

1. Brief details of transferor and transferee companies.
2. Appointed date.
3. Main terms of transfer of assets and liabilities from transferor to transferee.
4. Effective date of the scheme.
5. The terms of carrying on the business activities by transferor between 'appointed date' and 'effective date'.
6. Details of Share Capital of Transferor and Transferee Company.

No Companies or arrangement shall be-sanctioned by the Tribunal unless a certificate by the company's auditor has been filed with the Tribunal to the effect that the accounting treatment, if any, proposed in the scheme of compromise or arrangement is in conformity with the accounting standards prescribed under **Section 133. Approach the Tribunal**

In terms of provisions of **Section 232(1),** an application is required to be made to" the Tribunal for sanctioning a scheme of an arrangement (merger) proposed between a company and another company. On receiving the application, the Tribunal may order a meeting of the creditors or class of creditors or the members or class" of members, as the case may be, to be called, held and conducted in such manner as the Tribunal may direct and the provisions of sub-sections **(3)** to **(6)** of Section **230** shall apply mutatis mutandis.

The company, after receiving such order must circulate the required documents forembers'/creditors' meeting as stated under the provisions of Section 232(2).

Q.6. In a scheme of amalgamation, it was proposed that name of the transferor company shall be deemed to be name of transferee company. The Regional Director (RD), Ministry of Company Affairs, objected to the same on the ground that proposed name is undesirable if it is identical with or too nearly resembling name of an existing company. Decide if the stand taken by the RD is valid under the Companies Act, 2013. Reference may be made of decided case laws. (4 marks; 2018 - June)

Answer:

It has been held in earlier judgement PMP Auto Industries Ltd. that in case of amalgamation **Chapter XV of the Companies Act, 2013** is a complete code in the nature of a "single window clearance" system, the object of which is to eliminate frequent applications being made to the Court in order effectively to implement a scheme of amalgamation which the Court sanctions in exercise of its powers. Further in case, Michelin India Private Limited High Court held that a complete code by itself on the subject of arrangement/compromise and reconstruction comprehensive enough to include a change in the name consequent on the amalgamation or arrangement.

Thus considering the above, in present case the objection of RD is invalid.

Q.7. A scheme of amalgamation was approved by overwhelming majority of members of both the merging companies. The exchange ratio was fixed by a firm of reputed Chartered Accountants. When the scheme of amalgamation was awaiting sanction of the Tribunal, a small group of members of one of the merging companies raised objection on the- ground that the exchange ratio was unfair. Examine with reference to decided case law whether the objection is likely to be sustained. [Modified] (5 marks; 2008-Nov)

Answer:

On an application made to the Tribunal for sanctioning a scheme of amalgamation or reconstruction, the Tribunal may make an order sanctioning it. Once statutory formalities are complied with, the onus lies on those opposing the scheme to satisfy the Tribunal that the scheme is unfair or unreasonable or fraudulent [Re, Hindustan General Electric Corporation Ltd. (1959) 29'Comp Cas 46; Re, Sussex Brick Co. Ltd. (1960) 30 Comp Cas 536],

Where, the valuation is confirmed to be fair by eminent firm of Chartered Accountant and is also approved by majority, the Tribunal will not find fault with the exchange ratio (Re, Tata Oil Mills Co. Ltd. Re, Hindustan Lever Ltd).

Present Case:

The exchange ratio was fixed by a firm of reputed Chartered Accountants. Therefore the dissenting shareholders shall not succeed unless they satisfy the Tribunal that the valuation is grossly unfair [Re, Piramal Spg. & Wvg. Mills Ltd.]

Q.8. Answer the following explaining the relevant provisions of the Companies Act, 2013:

(ii) Whether the Companies seeking sanction of the Tribunal for a scheme of amalgamation must have specific power to amalgamate in the object clause of their Memorandum of Association. (2.5 marks; 2009 - Nov)

Answer:

The Memorandum of Association MOA is the charter of the company. It's object clause explains the scope of the company beyond which it cannot go. Anything done beyond the scope of memorandum is Ultra Vires the company and thus void.

However, to amalgamate with another company is a power of the company, and does not come under the purview of object clause of the company. Therefore, no power to amalgamate is required in the MOA of a company before making an application to the Tribunal for effecting amalgamation. Also, the power to amalgamate has been given by the statute under Sec. 232. Since there is a statutory provision dealing with amalgamation of companies (which does not require that such a provision must be present in the MOA or AOA of the company), no special power in the objects clause of the MOA is necessary for its amalgamation with another company. Sec. 232 is a complete code which gives full jurisdiction to the Tribunal to sanction amalgamation of companies even though there may be no power in the objects clause of MOA. [Re, EITA India Ltd., AIR 1997 Cal 208; United Bank of India v United India Credit & Development Co. Ltd. (1977) 47 Comp Cas 689,730 (Cal)].

Q.9. The members of both Sugam Synthetix Limited and Gaurav Textiles Limited approved the scheme of amalgamation by overwhelming majority. A reputed firm of Chartered Accountants fixed the exchange ratio. The scheme of amalgamation was submitted, as per procedure, for the sanction of the Tribunal. During pendency of the matter a small group of members of one of the merging companies objected to the amalgamation on the ground that the exchange ratio was unfair.

Decide whether the said objection is likely to be sustained. [Modified](8 marks; 2011-May)

Answer:

Please refer 2008 - Nov [4] (a)

Q.10. Hi-tech Engineering Limited engaged in the business of engineering construction and cement manufacturing, decided to concentrate on its core business of engineering construction and hive off (demerge) its cement business in favour of Premier Cement Limited. State the steps to be taken by Hi-tech Engineering Limited to give effect to the proposed demerger under the provisions of the Companies Act, 2013.

(8 marks; 2013-May)

Answer:

HPC Ltd. may demerge its Cement business by complying with the provisions of Sec. 232 of Companies Act, 2013 which are as follows:

1. An application shall be made to the Tribunal under Sec. 230 and it shall be shown to the Tribunal that- under the scheme the whole or any part of the undertaking, property or liabilities of HPC Ltd. (hereinafter referred to as the transferor company) is required to be transferred to BCD Ltd.(hereinafter referred to as the transferee company).

   (a) The Tribunal may on such application, order a meeting of the creditors or class of creditors or the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal may direct and the provisions of subsections (3) to (6) of Section 230 shall apply mutatis mutandis.

2. Where an order has been made by the Tribunal under sub-section (1), the companies in respect of which a division is proposed, shall also be required to circulate the following for the meeting so ordered by the Tribunal, namely:

   (a) The draft of the proposed terms of the scheme drawn up and adopted by the directors of the merging company;

   (b) Confirmation that a copy of the draft scheme has been filed with the Registrar;

   (c) a report adopted by the directors of the merging companies explaining effect of compromise on each class of shareholders, key managerial personnel, promoters and non-promoter shareholders laying out in particular the share exchange ratio, specifying any special valuation difficulties;

   (d) The report of the expert with regard to valuation, if any;

   (e) A supplementary accounting statement if the last annual accounts of any of the merging company relate to a financial year ending more than six months before the first meeting of the company summoned for the purposes of approving the scheme.

3. The Tribunal, after satisfying itself that the procedure specified in subsections (1) and (2) has

been complied with, may, by order, sanction the compromise or arrangement or by a subsequent order, make provision for the following matters, namely:

(a) the transfer to the transferee company of the whole or any part of the undertaking, property or liabilities of the transferor company from a date to be determined by the parties unless the Tribunal, for reasons to be recorded by it in writing, decided otherwise;

(b) the allotment or appropriation by the transferee company of any shares debentures, policies or other like instruments in the company which under the compromise or arrangement, are to be allotted or appropriated by that company to or for any person:

Provided that a transferee company shall not, as a result of the compromise or arrangement, hold any shares in its own name or in the name of any trust whether on its behalf or on behalf of any of its subsidiary or associate companies and any such shares shall be cancelled or extinguished;

(c) The continuation by or against the transferee company of any legal proceedings pending by or against any transferor company on the date of transfer;

(d) Dissolution, without winding-up, of any transferor company;

(e) The provision to be made for any persons who within such time and in such manner as the Tribunal directs, dissent from the compromise or arrangement;

(f) where share capital is held by any non-resident shareholder under the foreign direct investment norms or guidelines specified by the CG or in accordance with any law for the time being in force, the allotment of shares of the transferee company to such shareholder shall be in the manner specified in the order;

(g) The transfer of the employees of the transferor company to the transferee;

(h) Where the transferor company is a listed company and the transferee company is an unlisted company,-

(A) The transferee company shall remain an unlisted company until it becomes a listed company;

(B) if shareholders of the transferor company decide to opt out of the transferee company, provision shall be made for payment of the value of shares held by them and other benefits in accordance with a pre-determined price formula or after a valuation is made, and the arrangements under this provision may be made by the Tribunal:

Provided that the amount of payment or valuation under this clause for any share shall not be less than what has been specified by the SEBI under any regulations framed by it;

(i) where the transferor company is dissolved, the fee, if any, paid by the transferor company on its authorised capital shall be set-off against any fees payable by the transferee company on its authorised capital subsequent to the amalgamation; and

(j) Such incidental, consequential and supplemental matters as are deemed necessary to secure that the merger or amalgamation is fully and effectively carried out.

Provided that no compromise or arrangement shall be sanctioned by the Tribunal unless a certificate by the company's auditor has been filed with the Tribunal to the effect that the accounting treatment, if any, proposed in the scheme of compromise or arrangement is in conformity with the Accounting Standards prescribed under Sec. 133.

4. Where an order under this section provides for the transfer of any property or liabilities,' then, by virtue of the order, that property shall be transferred to the transferee company and the liabilities shall be transferred to and become the liabilities of the transferee company and any property may, if the order so directs, be freed from any charge which shall be virtue of the compromise or arrangement, cease to have effect.

5. Every company in relation to which the order is made shall cause a certified copy of the order to be filed with the Registrar for registration within thirty days of the receipt of certified copy of the order.

6. The scheme under this section shall clearly indicate an appointed date from which it shall be effective and the scheme shall be deemed to be effective from such date and not at a date subsequent to the appointed date.

7. Every company in relation to which the order is made shall, until the completion of the scheme, file a statement in Form No. CAA.8 within two hundred and ten days from the end of

each financial year with the Registrar every year duly certified by a Chartered Accountant or a Cost
Accountant or a Company Secretary in practice indicating whether the scheme is being complied with in accordance with the order of the Tribunal or not.
8. If a transferor company or a transferee company contravenes the provisions of this section, the transferor company or the transferee company, as the case may be, shall be punishable with fine which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees and every officer of such transferor or transferee company who is in default, shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than one lakh rupees but which may extend to three lakh rupees, or with both.

Q.11. A scheme of amalgamation was approved by overwhelming majority of members of both the merging companies at meetings called as per directions of the Court. When the scheme of amalgamation was awaiting sanction of the Tribunal, the exchange ratio was questioned by a small group of members of one of the merging companies. The exchange ratio was fixed by a reputed firm of Chartered Accountants. Examine with reference to the decided case law under the Companies Act, 2013 whether the dissenting shareholders will succeed. [Modified] (4 marks; 2016-May)

Answer:
Please refer 2008 - Nov [4] (a)

Q.12. CPR Ltd. and TJC Ltd. are wholly owned by Government of Tamil Nadu. As a policy matter, the Government issued administrative orders for merging TJC Ltd. with CPR Ltd. in the public interest. State the authority with whom the application for merger is required to be filed under the provisions of the Companies Act, 2013. Also state the provisions governing the preservation of Books and Records of TJC Ltd. after merger under the said Act. (3 marks; 2018-May)

Answer:
Sec. 232 of the Companies Act, 2013 provides provision for merger and amalgamation of Companies. Sec. 230(5) requires that a notice along with all the documents in such form as may be prescribed shall also be sent to prescribed authorities. The provision of Sec. 230(5) shall apply mutatis mutandis to Sec. 232. So that application of merger is required to be filed under Sec. 230(5) of the Companies Act, 2013 with the following authorities:

- Central Government;
- The Income-tax authorities;
- The Reserve Bank of India;

The Securities and Exchange Board;

- The Registrar;
- The respective stock exchanges;
- Official liquidator,
- The Competition Commission of India established under the Competition Act, 2002, if necessary,
- And such other sectoral regulators or authorities which are likely to be affected by the compromise or arrangement.

Preservation of books and papers of TJC Ltd. after merger as per Sec. 239.
The books and papers of a company which has been amalgamated with, or those shares have been acquired by, another company under this chapter shall not be disposed of without the prior permission of the Central Government and before granting such permission, that Government may appoint a person to examine the books and papers or any of them for the purpose of ascertaining whether they contain any evidence of the Commission of an offence in connection with the promotion or formation, or the management of the affairs, of the transferor company or its amalgamation or the acquisition of its shares.

233. MERGER OR AMALGAMATION OF CERTAIN COMPANIES (1 QUESTION)

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

Q.1. Comment on Merger of a 'Subsidiary' Company into 'Holding' Company.
(5 marks; 2017- June)

Answer:

Merger of a 'Subsidiary' Company into 'Holding' Company	(1) As per **Section 233 of the Companies Act, 2013,** a scheme of merger or amalgamation may be entered into between two or more small companies or between a holding company and its wholly-owned subsidiary company or such other class or classes of companies as may be prescribed, subject to the following, namely:	
	(a)	a notice of the proposed scheme inviting objections or suggestions, if any, from the Registrar and Official Liquidators where registered office of the respective companies are situated or persons affected by the scheme within thirty days is issued by the transfer or company or companies and the transferee company
	(b)	The objections and suggestions received are considered by the companies in their respective general meetings and the scheme is approved by the respective members or class of members at a general meeting holding at least ninety per cent. Of the total number of shares
	(c)	each of the companies involved in the merger files a declaration of solvency, in the prescribed form, with the Registrar of the place where the registered office of the company is situated and
	(d)	The scheme is approved by majority representing nine-tenths in value of the creditors or class of creditors of respective companies indicated in a meeting convened by the company by giving a notice of twenty-one days along with the scheme to its creditors for the purpose or otherwise approved in writing.
	(2) The transferee company shall file a copy of the scheme so approved in the manner as may be prescribed, with the Central Government, Registrar and the Official Liquidator where the registered office of the company is situated.	
	(3)On the receipt of the scheme, if the Registrar or the Official Liquidator has no objections or suggestions to the scheme, the Central Government shall register the same and issue a confirmation thereof to the companies.	
	(4)If the Registrar or Official Liquidator has any objections-or suggestions, he may communicate the same in writing to the Central Government within a period of thirty days: Provided that if no such communication is made, its hall be presumed that he has no objection to the scheme.	
	(5)If the Central Government after receiving the objections or suggestions or for any reason is of the opinion that such a scheme is not in public interest or in the interest of the creditors, it may file an application before the Tribunal within a period of sixty days of the receipt of the scheme under **sub-Section (2) stating** its objections and requesting that the Tribunal may consider the scheme **under Section 232.**	
	(6)On receipt of an application from the Central Government or from any person, if the Tribunal, for reasons to be recorded in writing, is of the opinion that the scheme should be considered as per the procedure laid down in **Section 232,** the Tribunal may direct accordingly or it may confirm the scheme by passing such order as it deems fit: Provided that if the Central Government does not have any objection to the scheme or it does not file any application under this section before the Tribunal, it shall be deemed that it has no objection to the scheme.	

234. MERGER OR AMALGAMATION OF COMPANY WITH FOREIGN COMPANY(2 QUESTIONS)

Notified Date of Section:13/04/2017

Q.1. Answer the following explaining the relevant provisions of the Companies Act, 2013:

(i) Whether the companies being amalgamated must be companies registered under the Companies Act, 2013. (2.5 marks; 2009-Nov)

Answer:

Sec. 234 of Companies Act, 2013, lays down the following:

The provisions of this Chapter unless otherwise provided under any other law for the time being in force, shall apply mutatis mutandis to schemes of mergers and amalgamations between companies registered under this Act and companies incorporated in the jurisdictions of such countries as may be notified from time to time by the CG.

Thus companies being amalgamated may be companies registered under Indian Companies Act and a foreign company.

The expression "foreign company" means any company or body corporate incorporated outside India whether having a place of business in India or not.

Q.2. A scheme provides for Amalgamation of PQL International Limited, a foreign company, with DHP Limited, an Indian company registered under the Companies Act, 2013. Referring to the provisions of the above Act, decide whether the scheme providing amalgamation of a foreign company as a transferor company can be sanctioned by the Tribunal. (4 marks; 2015 - May)

Answer:

Merger or Amalgamation of Company with Foreign Company [Sec. 234]

1. The provisions of this Chapter unless otherwise provided under any other few for the time being in force, shall apply mutatis mutandis to schemes of mergers and amalgamations between companies registered under this Act and companies incorporated in the jurisdictions of such countries as may be notified from time to time by the Central Government:

Provided that the CG may make rules, in consultation with the RBI, in connection with mergers and amalgamations provided under this section.

2. Subject to the provisions of any other law for the time being in force, a foreign company, may with the prior approval of the RBf, merge into a company registered under this Act or vice versa and the terms and conditions of the scheme of merger may provide, among other things , for the payment of consideration to the shareholders of the merging company in cash, or in Depository Receipts, or partly in cash and partly in Depository Receipts, as the case may be, as per the scheme to be drawn up for the purpose.

Explanation: For the purposes of sub-section (2), the expression "foreign company" means any company or body corporate incorporated outside India whether having a place of business in India or not.

235. POWER TO ACQUIRE SHARES OF SHAREHOLDERS DISSENTING FROM SCHEME OR CONTRACT APPROVED BY MAJORITY(2 QUESTIONS)

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

Q.1. Premier Technologies Limited proposes to takeover Modern Solutions Limited, an unlisted company, by making an offer to the members of Modern Solutions Limited to purchase all their shares. At present, Premier Technologies Limited are not holding any shares in Modern Solutions Limited. Explain briefly the steps to be taken under the Companies Act, 2013 to give effect to the proposed takeover. (8 marks; 2013-Nov)

Answer:

As per Sec. 235 of the Companies Act, 2013,

1. Where a scheme or contract involving the transfer of shares or any class of shares in a company (the transferor company) to another company (the transferee company) has, within four months after making of an offer in that behalf by the transferee company, been approved by the holders of not less than nine-tenths in value of the shares whose transfer is involved, ether than shares already held at the date of the offer by, or by a nominee of the transferee company or its subsidiary companies, the transferee company may, at any time within two months after the expiry of the said four months, give notice in Form No. CAA 14 to any dissenting shareholder that it desires to acquire his shares at the last intimated address of such shareholder.

[Rule 26 and Form No. CAA.14. Companies (Compromises, Arrangements and Amalgamations) Rules, 2016.]

2. Where a notice under sub-section (1) is given, the transferee company shall, unless on an application to Tribunal to be made with a fee of one thousand rupees. [Schedule of Fees, Companies (Compromises, Arrangements and Amalgamation) Rules, 2016] made by the dissenting shareholder within one month from the date on which the notice was given and the Tribunal thinks fit to order otherwise, be entitled to and bound to acquire those shares on the terms on which, under the scheme or contract, the shares of the approving shareholders are to be transferred to the transferee company.

3. Where a notice has been given by the transferee company under subsection (1) and the Tribunal has not, on an application made by the dissenting shareholder, made an order to the contrary, the transferee company shall, on the expiry of one month from the date on which the notice has been given or, if an application to the Tribunal by the dissenting shareholder is then pending, after that application has been disposed or, send a copy of the notice to the transferor company together with an instrument of transfer, to be executed on behalf of the shareholder by any person appointed by the transferor company and on its own behalf by the transferee company, and pay or transfer to the transferor company the amount or other consideration representing the price payable by the transferee company for the shares which, by virtue of this section, that company is entitled to acquire, and the transferor company shall—

(a) Thereupon register the transferee company as the holder of those shares; and

(b) Within one month of the date of such registration, inform the dissenting shareholders of the fact of such registration and of the receipt of the amount or other consideration representing the price payable to them by the transferee company.

4. Any sum received by the transferor company under this section shall be paid into a separate bank account, and any such sum and any other consideration so received shall be held by that company in trust for the several persons entitled to the shares in respect of which the said sum or other consideration were respectively received and shall be disbursed to the entitled shareholders within sixty days.

5. In relation to an offer made by a transferee company to shareholders of a transferor company before the commencement of this Act, this section shall have effect with the following modifications, namely:-

(a) in sub-section (1), for the words "the shares whose transfer .is involved other than shares already held at the date of the offer by, or by a nominee of, the transferee company or its subsidiaries,", the words "the shares affected" shall be substituted; and

(b) In sub-section (3), the words "together with an instrument of transfer, to be executed on behalf of the shareholder by any person appointed by the transferee company and on its own behalf by the transferor company" shall be omitted.

Q.2. Pioneer Textiles Limited desired to amalgamate its enterprise with Latex Textiles Limited. A scheme of amalgamation for this purpose was approved by an overwhelming majority of shareholders and all creditors of both companies at meetings held under the provisions of Section 232 of the Companies Act, 2013. Thereupon it was presented to the Company Law Tribunal for its sanction. While the scheme was pending in the Tribunal, some of the dissentient shareholders of Pioneer Textiles Limited requisitioned an extraordinary general meeting to negotiate with Latex Textiles Limited as according to the requisitionists the exchange ratio was not fair and reasonable.

Examine whether the directors may refuse to call the extraordinary general meeting. Also discuss the powers of the Tribunal in this respect. **(5 marks; 2018 - May)**

Answer:

- **As per Section 235 of the Companies Act, 2013,**

(i) where a notice has been given by the transferee company on an application made by the dissenting shareholder and the Tribunal has not, made on order to the contrary i.e. order made in favour of the company the transferee company shall on the expiry of the one month from the date on which the notice has been given, or,

(ii) If an application to the Tribunal by the dissenting shareholder is then pending - nothing is required to be done.

(iii) After that application has been disposed of:

shall send a copy of the notice to the transferor company together with an instrument of transfer, to be executed on behalf of the shareholders by any person appointed by the transferor company and on its own behalf by the transferee company and pay or transfer to the transferor company the amount or other consideration representing the price payable by the transferee company for the shares which that company is entitled to acquire.

(iv) **The transferor company shall:**

(a) Thereupon register the transferee company as the holder of those shares; and

(b) Within one month of the date of such registration, inform the dissenting shareholders of the fact of such registration and of the receipt of the amount or other consideration representing the price payable to them by the transferee company.

- In light of above provisions the directors of the company cannot refuse to call the extraordinary general meeting.

  Power of Tribunal:

- Where a notice under Sec. 235(1) is given, the transferee company shall, unless on an application made by the dissenting shareholder to the tribunal, within one month from th date on which the notice was given and the Tribunal thinks fit to order otherwise, be entitled to and bound to acquire those shares on terms on which, under the scheme or contract, the shares of the approving shareholders are to be transferred to the transferee company.

236. PURCHASE OF MINORITY SHAREHOLDING

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

237. POWER OF CENTRAL GOVERNMENT TO PROVIDE FOR AMALGAMATION OF COMPANIES IN PUBLIC INTEREST. (3 QUESTIONS)

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

Q.1. ABC Ltd. and DEF Ltd. are wholly owned by Government of West Bengal. As a policy matter, the Government issued administrative orders for merging DEF Ltd. with ABC Ltd. in the public interest. State the authority with whom the application for merger is required to be filed under the provisions of the Companies Act, 2013.

(4 marks; 2018- Dec)

Answer:

Authority to whom the application for merger is to be made According to Section 237 of the Companies Act, 2013, where the Central Government is satisfied that it is essential in the public interest that two or more companies should amalgamate, the Central Government may, by order notified in the Official Gazette provide for the amalgamation of those companies into a single company.

Hence, in the given situation of merger between two wholly owned Government companies in public interest, there is no specific authority with whom the application for merger is required as the Central Government shall by notification in the Official Gazette, will deliver for the amalgamation of the two said companies into a single company.

Q.2. Examining the provisions of the Companies Act, 2013, explain the powers of the Central Government to order amalgamation of companies in public interest.
(4 marks; 2016- Dec)

Answer:

Section 237(1) states that when the Central Government is satisfied that it is essential in the public interest that two or more companies should amalgamate, the Central Government may, by order notified in the Official Gazette, provide for the amalgamation of those companies into a. single company with such constitution, with such property, powers, rights, interests, authorities and privileges, and with such liabilities, duties and obligations, as may 6e specified in the order.

Q.3. What do you understand by 'public interest'? Explain, giving suitable examples, about its relevance under the Companies Act, 2013. (4 marks; 2015 -Nov)

Answer:

Public Interest with reference to Companies Act, 2013 would mean to be related to or relevance to public interest as interests of members, shareholders, stakeholders in general public and behalf. For example EPS, ratios are not only procedure but also are at for public interest.

The following provisions of the Companies Act, 2013 convey the relevance of the concept of public interest in the context of company law:

1. Sec. 237 empowers the CG to provide for compulsory amalgamation of companies into a single company in the public interest.

2. Under Sections 241 and 242 of Companies Act, 2013 shareholders can file application to Tribunal where affairs of the company are conducted in a manner prejudicial to public interest.

3. Under Sec. 233 (5), if the Regional Director after receiving the objections or suggestions or for any reason is of the opinion that such a scheme is not in public interest or in the interest of the creditors, it may file an application before the Tribunal within a period of sixty days of the receipt of the scheme under sub-section (2) stating its objections and requesting that the Tribunal may consider the scheme under Section 232.

238. REGISTRATION OF OFFER OF SCHEMES INVOLVING TRANSFER OF SHARES (1 QUESTION)

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

Q.1. The Central Government in the public interest ordered for the amalgamation of ABC Limited and DEF Limited into a single company named KPN Limited through a notification in the official gazette. In this connection the prescribed authority ordered that the equity shareholders of ABC Limited were to be provided with a cash compensation of Rs. 2,000 and two equity shares in KPN Limited for every single equity share held in ABC Limited. Mr. Ganesh, an equity shareholder of ABC Limited was dissatisfied not only with the amalgamation but also with the compensation offered by the prescribed authority. Advise him whether he can challenge the above amalgamation order of the Central Government. Also advise him within how many days and before which authority he can prefer an appeal against the order of the prescribed authority. Advise him referring to the provisions of the Companies Act, 2013 in this regard. (6 marks; 2016-Nov)

Answer:

Provision:

Power of Central Government to provide for amalgamation of companies in public interest [Sec 237 of Companies Act, 2013]

1. Where the CG is satisfied that it is essential in the public interest that two or more companies should amalgamate, the CG may, by order notified in the Official Gazette, provide for the amalgamation of those companies into a single company with such constitution, with such property, powers, rights, interests, authorities and privileges, and with such liabilities, duties and obligations, as may be specified in the order.

2. The order under sub-section (1) may also provide for the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company and such consequential, incidental and supplemental provisions as may, in the opinion of the CG, be necessary to give effect to the amalgamation.'

3. Every member Or creditor, including a debenture holder, of each of the transferor companies before the amalgamation shall have, as nearly as may be, the same interest in or rights against the transferee company as he had in the company of which he was originally a member or creditor, and in case the interest or rights of such member or creditor in or against the transferee company are less than his interest in or right against the original company, he shall be entitled to compensation to that extent, which shall be assessed by such authority as may be prescribed and every such assessment shall be published in the Official Gazette, and the compensation so assessed shall be paid to the member or creditor concerned by the transferee company.

4. **Any person aggrieved by any assessment of compensation made by the prescribed authority under sub-section (3) may, within a period of thirty days from the date of publication of such assessment in the Official Gazette, prefer an appeal to the Tribunal and thereupon the assessment of the compensation shall be made by the Tribunal.**

5. No order shall be made under this section unless-

(a) A copy of the proposed order has been sent in draft to each of the companies concerned;

(b) The time for preferring an appeal under sub-section (4) has expired, or where any such appeal has been preferred, the appeal has been finally disposed off; and

(c) the CG has considered, and made such modifications, if any in the draft order as it may deem fit in the light of suggestions and objections which may be received by it from any such company within such period as the CG may fix in that behalf, not being less than two months from the date on which the copy aforesaid is received by that company, or from any class of shareholders therein, or from any creditors or any classof creditors thereof.

6. The copies of every order made under this section shall, as soon as may be after it has been made, be laid before each House of Parliament.

Present Case:

In this case CG in public interest ordered for the amalgamation of ABC Ltd. and DEF Ltd. into single company named KPN Ltd. through a notification in the official gazette. Mr. Ganesh an equity shareholder of ABC Ltd. was dissatisfied not only with the amalgamation but also with the compensation offered by the prescribed authority. So he can challenge above amalgamation by complying with the above provision of Sec. 237 of the Companies Act, 2013.

239. PRESERVATION OF BOOKS AND PAPERS OF AMALGAMATED COMPANIES (1 QUESTION)

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

Q.1. State the provisions of the Companies Act, 2013 relating to preservation of books and papers of amalgamated Companies. (2 marks; 2018 - June)

Answer:

Preservation of Books and Papers of Amalgamated Companies (Section 239):

As per Section 239, the books and papers of a company which has been amalgamated with, or whose share have been acquired by, another company under this Chapter shail not be disposed

of without the prior permission of the Central Government and before granting such permission, that Government may appoint a person to examine the books and papers or any of them for the purpose of ascertaining whether they contain any evidence of the commission of an offence in connection with the promotion or formation, or the management of the affairs of the transferor company or its amalgamation or the acquisition of its shares.

240. LIABILITY OF OFFICERS IN RESPECT OF OFFENCES COMMITTED PRIOR TO MERGER, AMALGAMATION, ETC.

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

PREVENTION OF OPPRESSION AND MISMANAGEMENT

241. APPLICATION TO TRIBUNAL FOR RELIEF IN CASES OF OPPRESSION, ETC(14 QUESTIONS)

Notified Date of Section: 01/06/2016

Q.1. Explain with reference to decided cases, what constitutes and what do not constitute oppression of members. (5 marks; 2013 - Dec)

Answer:

In **Shanti Prasad Jain V. Kalinga Tubes Ltd.** The Supreme Court defined "oppression" as conduct which is burdensome, harsh and wrongful, it involves an element of lack of probity (means correctness, morality, justice) or fair dealing with regard to a member with respect to his rights as a member.

Illustrations of "oppression":

(a)Not holding AGMs.
(b)Deliberately not giving notices of general body meetings to some members.
(c)Not giving financial statement to members.
(d)Carrying on the company's business after base of the company has disappeared.
(e)Using powers which one does not possess and using them against members who have beneficial interests.
(f)Not paying declared dividends.
(g)Refusing illegally, transfer or transmission of shares.
(h)Directors taking more than permissible remuneration.

Illustrations of "no oppression":

(a)Change of management is not necessarily oppression - Shanti prasad Jain's case.
(b)Trying to get majority or trying to retain majority provided unfair means are not used
(c)Not allowing members to inspect books of account.
(d)All directors being members of the same family.
(e)Not declaring dividends according to profits.
(f) Explanatory statement not annexed to notice calling meetings.

Q.2. A group of shareholders of DECEPTIVE TECHNO LTD. filed an application before the Company Law Board/Tribunal alleging various acts of frauds and mismanagement by MR. NAVIN, the Managing Director and his associates. During the course of hearing before the Tribunal, the authorized representatives of the said company contended that the alleged transactions had taken place several years ago and the company has already removed the Managing director, who was responsible for such transactions and hence there is no case before the Tribunal to interfere in the working of the company. Against the submissions on behalf of the company, the applicants submitted that although the fraudulent transactions were done in the past and the Managing Director has been removed, but the company is still controlled by the person, who are in league with the erstwhile Managing Director and are working as his Henchman. State the merits of the applicants arguments and power of the Tribunal. (4 marks; 2011 - Dec)

Answer:

Section 241 of Companies Act, 2013 deals with the relief from oppression and mismanagement if the affairs of the company are being conducted in a manner oppressive to any member of the company or in a manner harmful or prejudicial to the company. The word is '**being conducted**' and that should mean that the oppression and mismanagement should be continuous at the time when the relief is sought. The application is made to Tribunal which can take measure to give relief from oppression and mismanagement to the applicant. From the language it is clear that the Tribunal has no power if the oppression and mismanagement has been done in the past. According to me, the Tribunal can take following steps **in the present case:**

1.It can cancel any transfer of property within **3** months from the date of application.
2.To direct the refund of any funds that has been earned or retained by the directors, officers or managers of the company.

3.Ask the applicant to be more specific and cite examples in support of his or her application.

Q.3. Examine with reference to the provisions of the Companies Act, 2013 whether the following act, of the company is valid: The Board of Directors of a company has made a bonafide decision not to declare any dividend for the year ended 31st March, 2013. A group of shareholders complain to the Tribunal against the above decision of the Board of directors on the ground of mismanagement and wants the company to declare dividend. **(3 Marks; 2014 - June)**

Answer:

The term 'mismanagement' has not been defined under the Act. Normally, mismanagement means gross mismanagement of affairs of company. It may include:

(a)Drawing of funds for personal expenses,

(b)Gross negligence in managing the affairs,

(c)Inaction can also be mismanagement.

Hence, Directors' bona fide decision not to declare dividend and to accumulate available profits into reserves is not mismanagement. Thus **in the present case** the group of shareholders who. complain to Tribunal against the decision of the Board not to declare any dividend and to accumulate available profits into Reserves, would not succeed, as the act of directors does not amount to mismanagement. Furthermore, the shareholder cannot compel the Board to recommend the dividend. The Board's recommendations are placed in the general meeting. The general meeting can reduce the dividend but cannot increase the dividend as recommended by the Board. Therefore, the shareholder cannot compel the company to declare dividend and cannot charge the directors for the mismanagement Section **241** and **242** of the Companies Act, **2013.**

Q.4. A group of shareholders of DEPLOMAT TECHNO LTD., filed an application before the Tribunal alleging various acts of frauds and mismanagement by MR. SUNNY the Managing Director and his associates. During the course of hearing before the Tribunal the authorized representatives of the said company contended that the alleged transactions had taken place several years ago and the company has already removed the Managing Director, who was responsible for such transactions and hence there is no case before the Tribunal to interfere in the working of the company. Against the submissions on behalf of the company, the applicants submitted that although the fraudulent transactions warn done in the past and the Managing Director has been removed, but the company is still controlled by the person, who are in league with the erstwhile Managing Director and are working as his Henchman. State the merits of the applicants' arguments and power of the Tribunal according to the provisions of the Companies Act, 2013.

(4 marks; 2016 - Dec)

Answer:

Section 241 of the Companies Act, 2013 deals with **lho**relief from oppression and mismanagement if the affairs of the **company** are being conducted in a manner oppressive to any member of the company or in a manner harmful or prejudicial to the company. The word Is being conducted' and that should mean that the oppression and mismanagement should be continuous at the time when the relief is sought. The application is made to Tribunal which can take measure to give relief from oppression and mismanagement to the application. From the language it is clear that the Tribunal has no power if the oppression and mismanagement **has been** done in the past. According to the Act, the Tribunal can take following steps **in the present case:**

1.It can cancel any transfer of property within 3 months from the date of application.

2.It can use powers u/s 246 (Application of certain provisions to proceedings u/section 241 or Section 245) of Companies Act, 2013 to direct the refund of any funds that has been earned or retained by the directors, officers or managers of the company.

3.Ask the applicant to be more specific and cite examples in support of his or her application.

Q.5. Due to inadequacy of profits, the Board of directors of Rise Ltd. decided not to recommend any dividend for the financial year ended 31st March, 2015.
Certain shareholders of the company complained to the NCLT regarding mismanagement of the affairs of the company, since the Board of the company did not recommend any dividend. Explaining the provisions of the Companies Act, 2013, examine whether the contention of the shareholdersis tenable? (4 marks; 2015 - June)

Answer:

1.	**Basis of petition under Sec. 241 for relief in case of mismanage-ment Sec. 241 of Companies Act, 2013**	**Section 241 of the Companies Act, 2013**provides for relief in cases of mismanagement. For a petition under this section to succeed, it must be established that the affairs of the company are being conducted in a manner prejudicial to the interest of the company of public interest or that, by reason of any change in the management or control of the company, it is likely that the affairs of the company will be conducted in that manner. If the court NCLT is convinced, it may with a view to bringing to an end of preventing the matter complained or apprehended, make such order as it thinks fit.
2.	**Case Law Analysis**	It was held in the case of **Indowind Energy Ltd. V. ICICI Bank Ltd. [2010] 153 Com Cases 394 (CLB)** that non-declaration of dividend would not amount to oppression and mismanagement.
3.	**Conclusion**	Therefore, applying the above facts and precedent **in the given case,** it can concluded that the non-payment of dividend does not amount to mismanagement and hence the contention of the shareholders shall not be tenable.

Q.6. Distinguish between 'Oppression' and 'mismanagement'. (4 marks; 2014 - Dec)

Answer:

Points	Oppression	Mismanagement
Meaning	The term 'Oppression' is not defined in the Companies Act, 2013. Oppression, according to the dictionary meaning of the word, is any act exercised in a manner burdensome, harshand wrongful. Oppression means violation of condition of fair play. Thecomplaining member must be under a burden which is unjust, harsh or tyrannical. It involves lack of probity or fair dealing to a member in the matter of rights as a shareholder.	The term "Mismanagement" is also, not defined in the Companies Act, 2013. Normally mismanagement means gross misconduct of affairs of the company or misuse of powers given to directors or members under the Companies Act 2013.
Examples	Some of the acts held as oppressive are as follows: • Continuous refusal to register shades to retain control overs affairs of the company. • Illegal removal of director one group and appointing other director without notice to one group of directors. • Calling board meeting with 2 days notice so that NRI directors cannot attend and allotting shares to one group so that it comes into majority. • Issuing shares to wife of directors for wholly illusive consideration. • Attempt to deprive members of	Some of the acts held as mismanagement are as follows: • Not allowing director to function as director • Reckless sanction and disbursement of loans. • Serious violation of legal provisions • Acting beyond authority of memorandum and articles. Directors do not take serious actions in case of corruption, embezzlement etc. • Diversion of funds • Operation of bank accounts by unauthorized persons.

	his ordinary membership rights e.g. denial of voting right or denial to contest election as director.	

Q.7. Attempt the following:
"Oppression need not be continuous." Discuss **(5 marks; 2009 - Dec) [CSEM - II]**

Answer:

Oppression must be a continuous process	• The Supreme Court has observed regarding the meaning of term 'oppression' as follows: It is not enough to show that there is just and equitable cause for winding up though that must be shownas preliminary to the application of **Section 241of Companies Act, 2013.** • It must further be shown that the conduct of the majority shareholders was oppressive to the minority as members and this requires that events have to be considered not in isolation but as part of a consecutive story. • There must be continuous acts on the part of the majority shareholders continuing Upto the date of petition. [Shanti Prashad vs. Kalpana Tubes (1965) 35 Comp. 3511.

Q.8. Comment on The NCLT of law will not interfere with the internal management of companies acting within their powers. **(5 marks; 2012 - June) [CSEM - II]**

Answer:

1	**The Principle of Majority Rule**	• Majority must prevail is the principle of company management like any democratic set up, the majority has its way in a company though due provision must also be made for the protection of minority interest. • This principle that the will of the majority should prevail and bind the minority is known as the principle of majority rule. • The principle of majority rule was˙ first given recognition in the case of Foss. Vs. Harbottle.
2	**Fact of the Case**	• Two members of an incorporated company took legal proceeding against the directors of the company, charging them guilty of fraudulent acts resulting in loss to the company. • The minority shareholders, therefore, decided to take an action for damages against the directors. • The shareholders in general meeting by majority resolved not to take any action against the directors alleging that they were not responsible for the loss which has been incurred. • The NCLT held that the actions were capable^ of confirmation by the majority.
1	**Act illegal or ultra vires**	• The Rule in Foss Vs. Harbottle applies only where the act complained of is within the powers of the company. If act is ultra vires the company, the rule does not apply, no majority can sanctioned or confirm such an act and every shareholder is entitled to bring on action against the company and its officers in respect of it. • Thus every shareholder is entitled to sue for an injunction to restrain the ultra vires acts of the directors or the officers of the company.
2.	**Fraud on the minority**	Where the majority of a company members use their power to defraud or oppress the minority, their conduct is liable to be impeached even by a single shareholders.
3.	**Wrongdoers in control of the**	• When the persons against whom therelief is sought themselves hold and control the majority of shares in the company and will

	company	not permit an action to be brought in the name of the company and shareholders may sue in their own names. • Its reason is that if the majority of shareholders will not be given such right their grievance can never reach the NCLT because the wrongdoers themselves, being in control of company would not allow the company to sue.
4	**Acts requiring a special resolution**	Sometimes the act or the articles of the company require acts to be done only by passing a special[1] resolution at a general meeting of the company and therefore if the majority shareholders purport to do any act without passing a special resolution(i.e. by passing an ordinary resolution), anyone can bring an action to prevent the majority to do so.
5.	**Individual membership rights**	In case of infringement of the individual membership rights, every shareholder is entitled to bring an action in his own name "If such a right is in question a single shareholder can, on principal, defy a majority consisting of all *he other shareholders."

Q.9. Explain the following:
(iv) Mere lack of confidence between the majority shareholders and minority shareholders would not be enoughto order for relief under Section 241 **(4 marks; 2013 - Dec)**

Answer:

- The scope of **Section 241** was very succinctly enunciated by the Supreme Court in **Shanti Prasad Jain v. Kalinga Tubes Ltd.** where it observed that "It is not enough to show that there is just and equitable cause for winding up of the company though that must be shown as a preliminary to the application **under Section 241.**
- It must further be shown that the conduct of majority shareholders were oppressive to the minority as members and this requires that events have to be considered not in isolation but as a part of consecutive story.
- There must be continuous acts on the part of the majority shareholders continuing to the date of petition, showing thatthe affairs of the company were being conducted in a manner oppressive to some members, the conduct must be burdensome, harsh and wrongful.
- Mere lack of confidence between the majority shareholders and the minority shareholders would not be enough unless lack of confidence springs from oppression of minority by the majority in the managementof the company's affairs and such oppression must involve at least an element of lack of probity or fair dealing to a member in the matter of his proprietary rights as a shareholder."

Q.10. A petition signed by 100 members of a company has been moved to NCLT for prevention of mismanagement. Later on, half of the members (signatories) withdrew their consent after filing the petition. Examine whether the remaining applicants (petitioners/signatories) to the petition would be successful in their complaint to NCLT.
(4 marks; 2015 - June)

Answer:

1	**Right to apply, under Section 241 [Section 244]**	The following members of a company shall have the right to apply u/s 241, namely: **(a)In the case of a company having a share capital:** Not less than 100 members of the company or not less than one -tenth of the total number of members, whichever is less or any member or members holding not less than one tenth of the issued share capital of the company, subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares; **(b)In the case of a company not having a share capital:** Not less than one-fifth of the total number of members.
2	**Rajahmundfy Electric Supply**	However, the Tribunal may, on an application, waive all or any of the above requirements so as to enable the members to apply u/s 241. Once

	Co. v. A. Nageshwara Rao, AIR 1956 **SC 213**	the consent has been given by the requisite number of members by signing the application, the application may be made by one or more of them on behalf and for the benefit of all of them, it has been held by the Supreme Court in Rajahmundry Electric Supply Co. v. A. Nageshwara Rao, AIR 1956 SC 213, that if some of the consenting members have, subsequent to the presentation of theapplication, withdrawn their consent, it would not affect the right of the applicant to proceed with the application. Obtaining of consent is a condition precedent to the making of the application and hence a consent obtained subsequent to the application is ineffective. Makhan Lai Jain Vs. The Amrit Banaspati Co. Ltd., 1. L. R. (1954) 1 All. 131.
3	**Chandramurthy V. K. L. Kapsi (2005) 48 SCL 294 CLB**	In L. Chandramurthy V. K. L. Kapsi (2005) 48 SCL 294 CLB, a person who had disposed off his shares was not allowed to apply. **Therefore, in the above case,** the withdrawal of consent by some of the members shall not affect the success of the remaining applicants.

Q.11. In a case pertaining to oppression and mismanagement, the respondents pleaded that the legal heirs of a deceased member whose name is still on the register of members are not entitled to apply before Tribunal, as only member of the company can complain about oppression and mismanagement. Thus, legal heirs have no locus standi. Examine this argument in the light of decided cases. (3 marks; 2018- Dec)

Answer:

'According to Section 241 of Companies Act, 2013 any member of the company may make an application to the Tribunal for relief in cases of oppression or mismanagement under given circumstance. In Worldwide. Agencies (P) Ltd. v. Margaret T. Desor (1990), it was decided that the legal representatives of a deceased member whose name is still on the register of members are entitled to file a petition, for relief against oppression or mismanagement.

In the above case, the above mentioned case is applicable, where the member has died and his name still exists in the register of members, the legal heirs are entitled to maintain the petition.

Q.12. XYZ Ltd. sold a mine, owned by it for Rs. 28.20 crore. A minority shareholder brought an action for damages against their directors and against the company itself stating that the real value of the mine was Rs. 100.00 crore. With reference to provisions of Companies Act, 2013 state whether the action for damages is maintainable Rs. (3 marks; 2019- June)

Q.13. State the conditions which must be satisfied before filing a petition under Sec. 241 of the Companies Act, 2013 for prevention of oppression. (5 marks; 2009-May)

Answer:

Sec. 241 of the Companies Act, 2013 recognizes the right of the minority shareholder to seek remedy against the oppression and thus presents an exception to the time honored rule in Foss v Harbottle.

For the provisions of Sec. 241

Application to Tribunal for relief in cases of oppression, etc. [Sec. 241 of Companies Act, 2013]

(1) Any member of a company who complains that:

(a) the affairs of the company have been or are being conducted in a manner prejudicial to public interest or in a manner prejudicial or oppressive to him or any other member or members or in a manner prejudicial to the interests of the company; or

(b) the material change, not being a change brought about by or in the interests of, any creditors, including debenture holders or any class of shareholders of the company, has taken place in the management or control of the company, whether by an alteration in the BOD or Manager or in the ownership of the company's shares or if it has no share capital,

in its membership or in any other manner whatsoever and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to its interests or its members or any class of members.

May apply to the Tribunal in Form No. NCLT-1 provided such member has a right to apply under Sec. 244, for an order under this Chapter.

(2) The CG, if it is of the opinion that the affairs of the company are being conducted in a manner prejudicial to public interest, it may itself apply to the Tribunal in Form No. NCLT-9 for an order under this Chapter.

Q.14. MNC Private Ltd. is a Company in which there are six shareholders. Mr. Srinath, who is a director and also the legal representative of a deceased shareholder holding less than one tenth of the share capital of the Company made a petition to the Tribunal for relief against oppression and mismanagement. Examine under the provisions of the Companies Act, 2013 whether the petition made by Mr. Srinath is valid and maintainable? **(3 marks' 2018 - Nov)**

Answer:

As per Sec. 241 of the Companies Act, 2013, **any member of the company who complains that:**

(a) the affairs of the company have been or are being conducted in a manner prejudicial to public interest or in a manner prejudicial or oppressive to him or any other member or members or in a manner prejudicial to the interests of the company ; or

(b) the material change, not being a change brought about by, or in the interests of any creditors, including debentures holders or any class of shareholders of the company, has take place in the management or control of the company whether by an alteration in the Board of Directors, or manager or in the ownership of the company's share, or if it has no share capital in its membership or in any other manner whatsoever and that by reason of such change it is likely that the affairs of the company will be conducted in a manner prejudicial to its interests or its members or any class of members may apply to the Tribunal, provided such member has a right to apply under Section 244, for an order.

- The legal representative of a deceased shareholder holding less than one tenth share capital of the company can make a petition to the Tribunal for relief against oppression and mismanagement. So petition made by Mr. Srinath is valid and maintainable.

242. POWERS OF TRIBUNAL

Notified Date of Section: 01/06/2016

243. CONSEQUENCE OF TERMINATION OR MODIFICATION OF CERTAIN AGREEMENTS

Notified Date of Section: 01/06/2016

244. RIGHT TO APPLY UNDER SECTION 241 (19 QUESTIONS)

Notified Date of Section: 01/06/2016

Q.1. In case of application for oppression and mismanagement, how far the following situations hold good under the provisions of Companies Act, 2013.
(i) Application by minority shareholders holding majority beneficial interest.
(ii)Application by a group of shareholders against non-declaration of dividend.
(2 + 1=3 marks; 2014 - Dec)

Answer:

(i) Persons who hold majority of beneficial interest but minority of voting power can complain of oppression which term includes not merely obtaining unfair pecuniary advantage but also an overwhelming desire for power. The remedy is analogous (similar) to winding up but before seeking winding up, a member must exhaust his remedy.

(ii) Non declaration of dividend when it does not lead to devaluation of shares is not an act of mismanagement.

Q.2. ABC Private Limited is a company in which there are eight shareholders. Can a member holding less than one-tenth of the share capital of the company apply to the Tribunal for relief against oppression and mismanagement? Give your answer according to the provisions of the Companies Act, 2013. (4 marks; 2017 - Dec)

Answer:

Under this Section members shall have right to apply under Section 241 of the Act. Accordingly:

(a) The following members of a company shall have the right to apply under Section 241, namely:

(1) in the case of a company having a share capital, not less than one hundred members of the company or not less than one-tenth of the total number of its members, whichever is less, **or** any member or members holding not less than one tenth of the issued share capital of the company, subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares;

(2) In the case of a company not having a share capital, not less than one-fifth of the total number of its members:

Provided that the Tribunal may, on an application made to it in this behalf, waive all or any of the requirements specified in clause (a) or clause (b) so as to enable the members to apply under Section **241.**

Explanation: For the purposes of this Sub-Section, where any share or shares are held by two or more persons jointly, they shall be counted only as one member,

(b) Where any members of a company are entitled to make an application under Sub-Section (1), any one or more of them having obtained the consent in writing of the rest, may make the application on behalf and for the benefit of all of them.

Hence, the petitioner can seek relief by giving an application to Tribunal on this behalf and it may waive any such requirement and case be redressed.

Q.3. XYZ Private Limited is a company in which there are eight shareholders. Can a member holding less than one-tenth of the share capital of the company apply to the Tribunal for relief against oppression and mismanagement under the Companies Act. (3 marks; 2015 - June)

Answer:

Section 244 of the Companies Act, 2013), in the case of a company having share capital, the following members have the right to apply to the Tribunal under section **241** or **242.**

(i) Not less than 100 members of the company or not less than one-tenth of the total number of members, whichever is less; or

(ii) any member or members holding not less than one-tenth of the issued share capital of the company provided the applicant(s) have paid all the calls and other sums due on the shares.

In the given case, since there are eight shareholders. As per (I) above, **10%** of **8** i.e. **1** satisfies the condition.

Therefore, a single member can present a petition to the Tribunal, regardless of the fact that he holds less than one-tenth of the company's share capital.

Q.4. Specialty Chemicals Private Limited is controlled by two groups of members. The group holding majority of shares made an application to Tribunal alleging oppression by the minority group. Give your answer according to the provisions of the Companies Act, 2013. (3 marks; 2015 - Dec)

Answer:

RIGHT **to apply (Section 244):**

(1) Thefollowing members of a company shall have the right to apply under Suction 241, namely:

(a)In the case of a company having a share capital, not less than one hundred members of the company or not less than one-tenth of the total number of its members, whichever is less, or any member or members holding not less, than one-tenth of the

issued share capital of the company, subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares;
(b)In the case of a company not having a share capital, not less than one-fifth of the total number of its members. Provided that the Tribunal may, on an application made to it in this behalf, waive all orany of the requirements specified in clause (a) or clause (b) so as to enable the members to apply under Section 241. (2) Where any members of a company are entitled to make an application under subsection (1), any one or more of them having obtained the consent in writing of the rest, may make the application on behalf and for the benefit of all of them.

Q.5. A group of shareholders consisting of 25 members decide to file a petition before the Tribunal for relief against oppression and mismanagement by the Board of Directors of M/s Fly By Night Operators Ltd. The company has a total of 300 members and the group of 25 members holds, one-tenth of the total paid -up share capital accounting for one - fifteenth of the issued share capital. The main grievance of the group is that due to mismanagement by the board of directors, the company is incurring losses and the company has not declared any dividend even when profits were available in the past years for declaration of dividend. In the light of the provisions of the Companies Act, 2013, advise the group of shareholders regarding the success of (I) getting the petition admitted and (II) obtaining relief from the Tribunal. (3 marks; 2018 - June)

Answer:

Section 244 **of the Companies Act,** 2013 provides the right to apply to the Tribunal for relief against oppression and mis-management. This right is available only when the petitioners hold the prescribed limit of shares as indicated below:

(i) In the case of company having a share capital, not less than 100 members of the Company or not less than one tenth of the total number of its members whichever is less or any member or members holding not less than one tenth of the issued share capital of the company, provided that the applicant(s) have paid all calls and other dues on the shares.

(ii) In the case of company not having share capital, not less than one-fifth of the total number of its members.

Since the group of shareholders do not number 100 or hold 1/10th of the issued share capital or constitute 1/10th of the total number of members, they have no right to approach the Tribunal for relief. However, the Tribunal may, on an application made to it waive all or any of the requirements specified in (i) or (ii) so as to enable the members to apply under Section 241.

As regards obtaining relief from Tribunal, continuous losses cannot, by itself, be regarded as oppression (Ashok Betelnut Co. P. Ltd. vs. M.K. Chandrakanth).

Similarly, failure to declare dividends or payment of low dividends also does not amount to oppression. (Thomas Veddon V.J. (v) Kuttanad Robber Co. Ltd).

Thus, the shareholders may not succeed in getting any relief from Tribunal.

Q.6. A group of members of XYZ Limited has filed a petition before the Tribunal alleging various acts of oppression and mismanagement by the majority shareholders of the company. The Petitioner group holds 12% of the issued share capital of the company. During the pendency of the petition, some of the petitioner group holding about 5% of the issued share capital of the company wish to disassociate themselves from the petition and they along with the other majority shareholders have submitted before the Tribunal that the petition may be dismissed on the ground of non-maintainability.
Examine their contention having regard to the provisions of the Companies Act, 2013.
(4 marks; 2018- Dec)

Answer:

1.The argument of the majority shareholders that the petition may be dismissed on the ground of non-maintainability is not correct.

2.The proceedings shall continue irrespective of withdrawal of consent by some petitioners. It has been held by the Supreme Court in Rajmundhry Electric Corporation vs. V. Nageswar Rao, A.I.R. (1956) S.C. 273 that if some of the consenting members have

subsequent to the presentation of the petition withdraw their consent, it would not affect the right of the applicant to proceed with the petition.
3.Hence, the validity of the petition must be judged on the facts as they were at the time of presentation.
4.Neither the right of the applicants to proceed with the petition nor the jurisdiction of Tribunal to dispose it of on its merits can be affected by events happening subsequent to the presentation of the petition.

Q.7. PBX Pvt. Ltd. is a company in which there are 6 shareholders. Mr. Bala, who is a director and also the legal representative of a deceased shareholder holding less than one tenth of the share capital of the company made a petition to the tribunal for relief against oppression and mismanagement. Examine under the provisions of the Companies Act, 2013 whether the petition made by Mr. Bala is valid and maintainable.
(4 marks; 2019- June)

Q.8. Distinguish between Oppression and mismanagement application and Class action suits. (4 marks; 2018 - June)

Answer:

Oppression and Mismanagement Application:

Section 244 of the Companies Act, 2013 provides that the following members of a company have the right to apply in case of oppression and management referred to under **Section 241** to the tribunal:

(a)in the case of a company having a share capital, not less than one hundred members of the company or not less than one -tenth of the total number of its members, whichever is less, or any member or members holding not less than one-tenth of the issued share capital of the company, subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares;

(b)in the case of a company not having a share capital, not less than one-fifth of the total number of its members:

The Tribunal has the power that on an application made to it in this behalf, waive all or any of the above mentioned requirements so as to enable the members to apply under **Section 241.**

Class Action Suits:

Section 245 of the Companies Act, 2013, deal with Class action suits. It is provided that members, depositors or any class of them, may, if they are of the opinion that the management or conduct of the affairs of the company are being conducted in a manner prejudicial to the interests of the company or its members or depositors, file an application before the Tribunal on behalf of the members or depositors. The requisite number of members is as under:

(a) in the case of a company having a share capital, not less than one hundred members of the company or not less than such percentage of the total number of its members as may be prescribed, whichever is less, or any member or members holding not less than such percentage of the issued share capital of the company as may be prescribed, subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares;

(b) In the case of a company not having a share capital, nor less than one-fifth of the total number of its members. Further, the requisite number of depositors shall not be less than one hundred depositors or not less than such percentage of the total number of depositors as may be prescribed, whichever is less, or any depositor or depositors to whom the company owes such percentage of total depositsof the company as may be prescribed.

Q.9. The issued, subscribed and paid up capital of OPM Limited is five crore rupees consisting of fifty lacs equity shares of ten rupees each. The company has seven hundred members. A petition was made to the appropriate authority duly signed by eighty members holding two lakh fifty thousand equity shares of the company seeking relief against oppression and mismanagement. Subsequently twenty of them withdrew their consent. Examine with reference to the relevant provisions of the Companies Act, 2013 and decided case law whether the petition is maintainable. (5 marks; 2008-Nov)

Answer:

Right to apply under Sec. 241. [Sec. 244 of Companies Act, 2013]

(1) The following members of a company shall have the right to apply under section 241, namely:

(a) in the case of a company having a share capital, not less than one hundred members of the company or not less than one-tenth of the total number of its members; whichever is less, or any member or members holding not less than one-tenth of the issued share capital of the company, subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares;

(b) In the case of a company not having a share capital, not less than one-fifth of the total number of its members along with a fees of twenty five thousand rupees [Schedule of fpes to NCLT, 2016

Provided that the Tribunal may, on an application made to it in this behalf, waive all or any of the requirements specified in clause (a) or clause (b) so as to enable the members to apply under Sec. 241.

Explanation: For the purposes of this sub-section, where any share or shares are held by two or more persons jointly, they shall be counted only as one member.

(2) Where any members of a company are entitled to make an application under sub-section (1), any one or more of them having obtained the consent in writing of the rest, may make the application on behalf and for the benefit of all of them. [Rajahmundri Electric Supply Corporation v Nages Hwara Rao AIR 1956 SC 213].

Present Case:

Total No. of Members = 700

(i)1/10 of 700 =70

Paid up Capital = Rs. 5 cr

(ii) 1/10 of 5 cr = Rs. 50,00,000 or 5,00,000 equity share

(iii) 100 member slowest of 3 =70 members.

Thus the petition is valid as it has been made by 80 members.

Such application shall remain valid despite the fact that some of the applicants have subsequently withdrawn their consents.

Q.10. A group of members of XYZ Limited has filed a petition before the NCLT alleging various acts of oppression and mismanagement by the majority shareholders of the Company. The Petitioner group holds twelve percent of the issued share capital of the company. During the pendency of the petition, some of the petitioner group holding about five percent of the issued share capital of the company wish to disassociate themselves from the petition and they alongwith the other majority shareholders have submitted before the NCLT that the petition may be dismissed on the ground of non-maintainability. Examine their contention having regard to the provisions of the Companies Act, 2013. (5 marks; 2009-Nov)

Answer:

Right to apply under Sec. 241. [Sec. 244 of Companies Act, 2013]

Please refer2008 - Nov [4] (b) on page no. 199

Present Case:

Petitioner group holds twelve percent of issued share capital. Thus they satisfy the eligibility criteria and have the right to approach NCLT.

More over, such application shall remain valid despite the fact that seme of the applicants have subsequently with drawn their consent.

Q.11. Certain Members of MDV Company Limited having share capital feel that the affairs of the company are being mismanaged by Directors. Members therefore, decide to move the NCLT, complaining the mismanagement of company affairs by Directors of the Company. Examine the provisions of the Companies' Act, 2013 and state.

(i) Whether members are entitled to complain the NCLT.

(ii) Whether the following acts of the Board of Directors amount to mismanagement:

(a) Continuation of Directors in their office after expiry of their tenure and infighting continues among them.

(b) Non-declaration of dividend when it does not lead to devaluation of shares.

(8 marks; 2010-Nov)

Answer:

Right to apply under Sec. 241. [Sec. 244 of Companies Act, 2013]

Please refer 2008 - Nov [4] (b) on page no. 199

Present Case:

1. Continuation of directors in their office after the expiry of their term and infighting among them has been held to be the act of mismanagement. **(Shishu Ranjan Dutta Vs. Bhola Nath papers House Ltd.)**

2. Non-declaration of dividend when it does not lead to devaluation of shares is not an act of mismanagement. **(V.J. Thomas Vettom vs. Kuttanand Rubber Co. Ltd.)**

Q.12. M/s. Zebra Private Limited was incorporated in the year 2010 under the Companies Act, 2013 by 3 brothers, namely A, B and C. All the three were Promoter-directors named in the Articles of Association and subscribed foi 100 shares each in the company through Memorandum of Association. Thereafter, from time to time, further shares were allotted in proportion of one-third to each of them and in due course the company started earning substantial profits. Due to greed of money, the two brothers, namely A and B joined hands together and assumed complete control of the company leaving their brother C in lurch. Both the brothers got further shares allotted to themselves, thereby their joint shareholding increased from sixty percent to ninety percent, while the shareholding of C got reduced from the erstwhile thirty three percent to ten percent. No notice of any Board Meeting was sent to C, who was sidelined and was also removed as a Director. Aggrieved by the decisions taken by his two brothers at his back, C seeks your advice for taking out appropriate proceedings before the NCLT or Judicial authority of competent jurisdiction. Also suggest the nature of reliefs he may claim while filing his case.

(8 marks; 2011-Nov)

Answer:

Provision:

Issue of further shares amounts to oppression if it is proved that the idea of issuing further shares was to benefit one group to the detriment of the other **[Piercy v Mill(s) & Co. (1920) 1 Ch. 77].**

Further issue of shares must be made for the benefit of the company. If the directors use their fiduciary power of issuing shares for an extraneous purpose like maintenance or acquisition of control over the affairs of the company, it would amount to oppression. It is not open to the directors to issue and allot shares in a manner by which an existing majority of shareholders is reduced to a minority. If the issue of shares disturbs the existing majority of the shareholders and if it is not bonafide, it will amount to oppression.

Present Case:

In the given case, further shares have been allotted to A and B without simultaneous offer to other members (C) on pro-rata basis. Such single act of issue of further shares shall have a

continuous effect, and so it amounts to oppression, especially if, the Board meeting at which the further shares are allotted is held without complying with the requirements of Sec. 173, and the member who was not offered further shares was also removed from directorship **[Bhagirath Agarwala v Tara properties P. Ltd.].**

Therefore, C should file an application with the NCLT for claiming relief from oppression.

Q.13. 60% shares of Indo-French Ltd. are held by the French group and balance by the Indian group. As per Articles of Association of the company, both groups had equal managerial powers. The relationship between the two groups soured and the operations of the company reached a deadlock. The Indian group approached the NCLT for action against the French group for oppression as stated in Section 241 of the Companies Act, 2013. Based on the above said facts decide the following issues.

(i) Whether the contention of oppression against the French group by the Indian group is tenable?

(ii) What are the powers of NCLT in this regard? **(8 marks; 2012-May)**

Answer:

Provision:

An application seeking relief from the NCLT must make out a prima facie case that the degree of oppression is so severe that there is just and equitable ground for winding up of the company.

(i) As per the Articles of the Company both groups had equal managerial powers.

As such, there may be a deadlock, but not oppression. It is not a case for winding up of the company and so relief under Section 241 is not available **[Ganasambandam (CP) v Tamilnad Transports (Coimbatore) Pvt. Ltd. (1971) 41 Comp Cas 26].** Thus, the contention of the Indian group that the foreign group is acting in a manner oppressive to the Indian group is not tenable.

(ii) The powers of the NCLT under Sec. 241 are discretionary incharacter.

(a) NCLT may order the foreign group to buy out the minority group shareholding at the fair price with necessary permission as was held in YashovardhanSaboo v Groz Backed Saboo Ltd. (1993) 1 Comp LJ 20

(b) However, where there was deadlock in the management of private limited company and both the parties failed to buy the other group, the company was wound up under just and equitable clause **[Kishan Lai Ahuja v Suresh Kumar Ahuja].**

(c) Thus, in the given case, if both the groups fail to exercise the option to buy the other group NCLT may order the company to be wound up.

Q.14. The issued, subscribed and paid-up capital of Supreme Chemicals Limited is two crore rupees consisting of twenty lacs equity shares of ten rupees each. The said company has eight hundred members. For the purpose of relief against oppression and mismanagement, a petition was submitted before the appropriate authority duly signed by ninety members holding one lakh equity shares of the said company. Subsequently, thirty members, who signed the petition, withdrew their consent. Decide, under the provisions of the Companies Act, 2013 whether the said petition is maintainable?

(5 marks; 2013-May)

Answer:

Right to apply under Sec. 241. [Sec. 244 of Companies Act, 2013]

Please refer 2008 - Nov [4] (b) on page no. 199

Present Case:

In case of **Supreme Chemical Ltd.** the shareholder pattern are as follows:

two crore rupees equity share capital held by eight hundred members.

The petition alleging oppression and mismanagement has been made by the members as follows:

(i) Number of members making the petition: ninety

(ii) Amount of share capital held by members making the petition: ten lakhs

Thus, the petition to be valid should have been made by:

(i) Hundred members, or

(ii) Not less than eighty members (being one tenof eight hundred members),

(iii) Any one member holding twenty lakh share capital.

Thus, the petition made by ninety members meet the eligibility criteria specified under the Companies Act, 2013, therefore, the petition is maintainable.

Again, the consent to be given by shareholder is reckoned at the beginning of the proceedings. The withdrawal of consent by shareholder during the course of proceedings does not affect the maintainability **[Rajahmundri Electric Supply Corporation Vs Nageshwara Rao]**

Therefore, such petition shall remain valid despite the fact that 30 members, who signed the petition, have withdrawn their consent subsequently.

Q.15. Examine the merits of the following petitions made under Sec. 241 and 242 of the Companies Act, 2013 in the light of Judicial pronouncements made in this regard:

(i) A group of shareholders holding twelve percent, of the issued share Capital of Unique Products Limited have filed a petition before the NCLT alleging various acts of illegal, invalid and irregular transactions entered into in the-name of the Company.

(ii) Specialty Chemicals Private Limited is controlled by two groups of members. The group holding majority of shares made an application to NCLT alleging oppression by the minority group. **(8 marks; 2013-Nov)**

Answer:

Right to apply under Sec. **241.** [Sec. **244** of Companies Act, **2013]**

Please refer 2008 - Nov [4] (b) on page no. 199

Present Case:

(i) A group of shareholders holding twelve percent of the issued share capital of Unique Products Limited have filed a petition before the NCLT alleging various acts of illegal, invalid and irregular transactions entered into in the name of the Company.

Since the group holds more than ten percent of issued share capital therefore their application is valid. However, the petition filed by the group of shareholders will fail unless they can prove to the satisfaction of the NCLT that the acts complained of in the petition are oppressive and prejudicial to the interest of the company and the public interest.

(ii) Application by Majority:

Majority of shareholders can apply to NCLT for relief against the oppression by the minority members. This is because, Sec 244 specifies the minimum number of members who are eligible to make an application. It nowhere prohibits a majority of members from making the application.

Where the application is made by a majority of members, relief may be granted if the NCLT is satisfied that the majority is oppressed and has been rendered completely ineffective by the wrongful acts of a minority group.

Q.16. Zebra Private Limited was incorporated in the year 2010 under the Companies Act, 1956 by 3 brothers, namely A, B and C. All the three were promoter-directors named in the Articles of Association and subscribed for 100shares each in the company through Memorandum of Association. Thereafter from time to time, further shares were allotted in proportion to one-third to each of them and in due course the company started earning substantial profits. Due to greed of money, the two brothers, namely A and B joined hands together and assumed complete control of the company leaving their brother C in lurch. Both the brothers got further shares allotted to themselves, thereby their joint holding increased from 66% to 90%, while the shareholding of C got reduced from 33% to 10% No notice**of any Board Meeting was sent to C, who was sidelined and was**

also removed as a director. Aggrieved by the decision taken by his two brothers at his back, C seeks your advice tor taking out appropriate proceedings before the NCLT or Judicial authority of competent jurisdiction. Also suggest the nature of reliefs he may claim while filing the case. (8 marks; 2014- Nov)

Answer:

Please refer 2011 - Nov [5] (a) on page no. 202

Q.17. The issued and paid up capital of MNC Limited is five crore rupees consisting of five lakh equity shares of hundred rupees each. The said company has five hundred members. A petition was submitted before the NCLT signed by eighty members holding ten thousand equity shares of the company for the purpose of relief against oppression and mismanagement by the majority shareholders. Examining the provisions of the Companies Act, 2013, decide whether the said petition is maintainable. Also explain the impact on the maintainability of the above petition, if subsequently forty members, who had signed the petition, withdrew their consent. (8 marks; 2015-May)

Answer:

Right to apply under Sec. 241. [Sec. 244 of Companies Act, 2013]

Please refer 2008 - Nov [4] (b) on page no. 199

Present Case:

The share holding pattern of the MNC Limited is given as follows: five crore equity share capital held by five hundred members.

The petition alleging Oppression and Mismanagement has been made by the members as follows:

- No. of members making the petition - eighty
- Amount of share capital held by members making the petition - ten lakh. The petition shall be valid if it has been made by of the following:
  - Hundred Members; or
  - Fifty Members (being one tenth of five hundred) whichever is less; or
  - One Member holding fifty lakhs share capital (being one ten"^{1} of five crore rupees)

As it is evident, the petition made by eighty members meets the eligibility criteria specified under Sec. 244; therefore, the petition is maintainable. The consent to be given by shareholder is reckoned at the beginning of the proceedings.

The withdrawal of consent by shareholder during the course of proceedings does not affect the maintainability of the petition.

Thus, such petition shall remain valid despite the fact that forty members, who signed the petition, have withdrawn their consent subsequently.

Q.18. Answer the following:

(c) A group of shareholders holding 20% of the issued share capital of DEF Limited have filed a petition before the Tribunal alleging the following:

(i) Various acts of illegal, invalid and irregular transactions entered into the name of the company.

(ii) Losses incurred due to mismanagement by the board of directors.

(iii) Non-declaration of dividend despite having sufficient profits in the past years.

Examine the merits of the above petitions made under Section 241 of the Companies Act, 2013 in the light of the judicial pronouncements made in this regard. (4 marks; 2017 - May)

Answer:

Sec. 244 of Companies Act, 2013, provides right to apply to the Tribunal for relief against oppression and mis-management. This right is only available if:

(i) In case of company having a share capital, not less than 100 members of the

company of not less than one tenth of the total number of its member whichever is less or any member or members holding not less than one tenth of the issued share capital of the company, provided that the applicants have paid all calls and other dues on the shares.

(ii) In case of company not having share capital not less than one fifth of total number of its members.

(iii)Since the group of shareholders do not number hundred or hold one tenth of the share capital they have no right to approach the Tribunal. However, the Tribunal may, on an application made it to waive all or any of the requirements specified in (i) or (ii) so as to enable the members to apply under Sec. 241 by proving to the satisfaction of the Tribunal that the acts complained of in tiie petition are oppressive and prejudicial to the interest of the company and the public interest.

Q.19. A group of shareholders consisting of 30 members decide to file a petition before the Tribunal for relief against oppression and mismanagement by the Board of Directors of M/s. Aravalli Manufacturing Company Limited having a paid up Share Capital of Rs. 1 crore. The company has a total of 500 members and the group of 30 members holds one-tenth of the total paid-up share capital accounting for one-fifteenth of the issued share capital. The grievance of the group is that due to the mismanagement by the Board of Directors, the company is incurring losses and has not declared any dividend for the past five years. In the light of the provisions of the Companies Act, 2013, please advise the group of shareholders regarding the admission of the petition and the relief thereof.

(4 marks; 2019-May)

245. CLASS ACTION (2 QUESTIONS)

Notified Date of Section: 01/06/2016

Q.1. What do you mean by Class Action Suit? Discuss with reference to eligibility criteria for class action, nature of relief and effect of Tribunal's order. (4 marks; 2017 - Dec)

Answer:

Section 245 of the Companies Act, 2013 makes provision for class action by investors. The term 'investors' include shareholders, deposit holders and any class of security holders of the company.

Section **245** permits a representative of any class of investors to file a suit before the National Company Law Tribunal for relief.

In terms of **Section 245 (1),** Such number of member or members, depositor or depositors or any class of them, as the case may be, as are indicated in sub-section **(2)** of the section may, if they are of the opinion that the management or conduct of the affairs of the company are being conducted in a manner prejudicial to the interests of the company or its members or depositors, file an application before the Tribunal on behalf of the members or depositors for seeking all or any of the relief specified.

Eligibility criteria for class action

Sub-section (3) (i) of Section 245 of the Companies Act, 2013

Provides the requisite number of members provided in Sub-Section (1) shall be as under:

(a)in the case of a company having a share capital, not less than one hundred members of the company or not less than such percentage of the total number of its members as may be prescribed, whichever is less, or any member or members holding not less than such percentage of the issued share capital of the company as may be prescribed, subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares;

(b)In the case of a company not having a share capital, not less thanone-fifth of the total number of its members.

The requisite number of depositors provided in sub-section (1) shall not be less than one hundred depositors or not less than such percentage of the total number of depositors as may be

prescribed, whichever is less, or any depositor or depositors to whom the company owes such percentage of total deposits of the company as may be prescribed.

Nature of Relief

The order by Tribunal may relate:

(a)To restrain the company from committing an act which is ultra vires the articles or memorandum of the company;

(b)To restrain the company from committing breach of any provision of the company's memorandum or articles;

(c)to declare a resolution altering the memorandum or articles of the company as void if the resolution was passed by suppression of material facts or obtained by mis-statement to the members or depositors;

(d)To restrain the company and its directors from acting on such resolution;

(e)To restrain the company from doing an act which is contrary to the provisions of this Act or any other law for the time being in force;

(f)To restrain the company from taking action contrary to any resolution passed by the members;

(g)To claim damages or compensation or demand any other suitable action from or against:

(i)The company or its directors for any fraudulent, unlawful or wrongful act or omission or conduct or any likely act or omission or conduct on its or their part;

(ii)the auditor including audit firm of the company for any improper or misleading statement of particulars made in his audit report or for any fraudulent, unlawful or wrongful act or conduct; or

(iii)Any expert or advisor or consultant or any other person for any incorrect or misleading statement made to the company or for any fraudulent, unlawful or wrongful act or conduct or any likely act or conduct on his part;

(h) To seek any other remedy as the Tribunal may deem fit.

Effect

Any order passed by NCLT shall be binding on the company and all its members, depositors, auditors, consultants and advisors or any other person associated with the company. Non-compliance of the order by the company shall be punishable with fine which shall not be less than Rs. 5 Lakhs but which may extend to Rs. 25 Lakhs and every officer of the company who is in default shall be punishable with imprisonment for* a term upto 3 years and with fine ranging from Rs. 25,000 to Rs. 1 lakh.

Q.2. What do you understand by 'class action suit' as introduced by the Companies Act, 2013? Explain the objective behind introducing this provision in the Companies Act and the persons who can initiate such class action suit. (4 marks; 2017 - Dec)

Answer:

A class action suit is a lawsuit where a group of people representing a common interest may approach the Tribunal to sue or be sued. It is a procedural instrument that enables one or more plaintiffs to file and prosecute litigation on behalf of a larger group or class having common rights and grievances.

The major objective behind the provision of class action suits is to safeguard the interests of the minority shareholders. So, class action suits are expected to play an important role to address numerous prejudicial and abusive acts committed by the Board of Directors and other managerial personnel.

Person to initiate Class Action Suit:

(A)Members:

The requisite number of members provided in sub-section (1) shall be as under:—

(a)in the case of a company having a share capital, not less than one hundred members of the company or not less than such percentage of the total number of its members as may be prescribed, whichever is less, or any member or members holding not less than such percentage of the issued share capital of the company as may be prescribed,

subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares;

(b)In the case of a company not having a share capital, not less than one-fifth of the total number of its members.

(B) Depositors:

According to **Section 245(3)(ii)** the requisite number of depositors provided in **Section 245(1)** shall not be less than one hundred depositors or not less than such percentage of the total number of depositors as may be prescribed, whichever is less, or any depositor or depositors to whom the 'company owes such percentage of total deposits of the company as may be prescribed.

246. APPLICATION OF CERTAIN PROVISIONS TO PROCEEDINGS UNDER SECTION 241 OR SECTION 245.

Notified date of Section: 09/09/2016

WINDING UP

270. MODES OF WINDING UP

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

(Q) Define "contributory" in a winding up. Explain the liabilities of contributories as present and past member. Give your answer according to the Companies Act, 2013.

(5 marks; 2017 - June)

Answer:
Contributory:
According to **Section 2(26) of the Companies Act, 2013** in a winding up, the term "contributory" means a past or present member liable to contribute to the assets of the company in the event of its being wound up and includes holders of shares which are fully paid up. If a member is once placed in the list of contributories, he is liable to the extent of original shares that remain unpaid, unless he proves that he should not have been placed in the list.
When a company goes into liquidation, every member, whether past or present, has to contribute to the assets of the company. However, a past member will not be required to contribute in the following circumstances:

(a)if he had ceased to be a member for a period of one year or upwards before the commencement of winding up.
(b)If the debt or liability of the company was contracted or incurred after he ceased to be a member.

(c)If the present members are able to satisfy the contributions required to be made by them under the Act.

(Q) Distinguish between'Insolvency of an individual/firm' and 'winding-up of a company'.

(4 marks; 2010 - June) [CSEM - II]

Answer:

S. No.	Basis	'Insolvency of an individual/firm'	'Winding-up of a company*
1.	**Vesting of Property**	The whole of the insolvents property is taken out of his hands and rest in the Tribunal or the official assignee.	The property remains vested in the company, subject to being administered for the purposes of winding up as the company retains its complete existence.
2.	**Discharge of the liabilities**	An insolvent individual can obtain his discharge and continueliving and working free from burden of his debts.	A company in liquidation cannot obtain its discharge and continuefree from the burden of its debts.
3.	**Administration**	The administration of the property by the official Assignee or the official receiver occurs if he is declared an insolvent by the Tribunal.	The directors powers by the liquidator occurs even if the company is fully solvent. Winding up even of a solvent company can be proceeded with the aid of Tribunal, as in voluntary winding up.

(Q) Distinguish between 'Winding-up' and 'dissolution'. (4 marks; 2014 - Dec)

Answer:
The term winding up and dissolution are sometimes erroneously used to mean the same thing. But there is a subtle difference between the two terms.

	Winding - Up	Dissolution
(i)	Winding up is a process	Dissolution is its end result.
(ii)	Winding up proceeds dissolution. This means that winding up is the prior stage .	Dissolution, the subsequent one.

(iii)	On the commencement of winding up, the Corporate Status and Power of the Company continue.	It is on dissolution that the name of the company is struck off the register of companies and it ceases to exist.
(iv)	Creditors can prove their debts in the winding up.	But not on the dissolution of the company.
(v)	The liquidator appointed by the company or the Tribunal carries out the winding up proceedings.	But the order for dissolution can be passed by the Tribunal only.

(Q) Briefly explain the various modes of winding-up of a company.

(8 marks; 2009 - June) [CSEM - II]

Answer:

Modes of Winding Up [Section 270 (1)] of Companies Act, 2013:

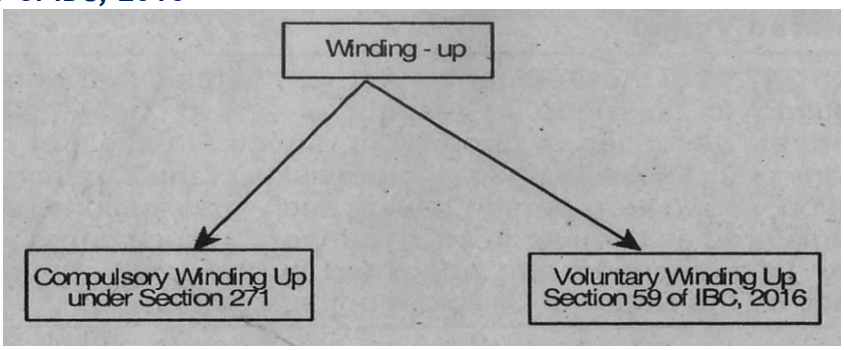
A company may be wound up in any one of the following three ways, namely -

(i) by the Tribunal (compulsory winding up);

(ii) by passing of an appropriate resolution for voluntary winding up at a general meeting of members (voluntary winding up).

Winding-up:

Compulsory Winding Up under **Section 271 of the Companies Act, 2013** Voluntary Winding Up under **Section 59 of IBC, 2016**



1	**Compulsory Winding up by the Tribunal (Section 271) of the Companies Act, 2013**	Winding-up by the Tribunal, also calledcompulsory winding up, may be ordered in casesmentioned in **Section 271.** **Circumstances under which the company maybe wound up by Tribunal are as follows:**	
		(a)	If the company is unable to pay its debts;
		(b)	If the company has, by special resolution,resolved that the. company be wound up bythe Tribunal;
		(c)	If the company has acted against theinterests of sovereignty and integrity of India,the security of the State, the friendly relationswith foreign States, Public order, decency ormorality;
		(d)	If the Tribunal has ordered the winding up ofthe company under Chapter XIX;
		(e)	If on an application made by the Register or any other person authorised by the Central Government, the Tribunal is of the opinion that the affairs of the company have beenconducted in a fraudulent manner or thecompany was formed for fraudulent andunlawful purpose orthe persons concerned inthe formation or management of its affairshave been guilty of fraud, misfeasance ormisconduct in connection therewith and thatit is proper that the company be wound-up;
		(f)	If the company has made a default in filingwith the Registrar its financial statements orannual return for immediately preceding five consecutive financial years; or
		(g)	If the Tribunal is of opinion that it is just andequitable that the company should be woundup.

2	**Voluntary Winding up** -	Chapter V of the Insolvency and Bankruptcy Codeof India 2016 deals with the Voluntary Liquidationof Corporate Persons. **Section** 59
		(1) A corporate person who intends to liquidateitself voluntarily and has not committed anydefault may initiate voluntary liquidationproceedings under the provisions of thisChapter.
		(2) The voluntary liquidation of a corporateperson under sub-section (1) shall meet suchconditions (3) and procedural requirementsas may be specified by the Board.
		(3) Without prejudice to sub-section (2), voluntary liquidation proceedings of a corporate personregistered as a company shall meet thefollowing conditions, namely: (a) a declaration from majority of thedirectors of the company verified by anaffidavit stating that- (i) they have made a full inquiry into theaffairs of the company and they haveformed an opinion that either thecompany has no debt or that it will beable to pay its debts in full from theproceeds of assets to be sold in thevoluntary liquidation; and (ii) the company is not being liquidatedto defraud any person; (b) the declaration under sub-clause (a) shallbe accompanied with the followingdocuments, namely: (i) audited financial statements and record of business operations of Thecompany for the previous two yearsor for the period since its incorporation, whichever is later; (ii) a report of the valuation of the assetsof the company, if any prepared by aregistered valuer; (c) within four weeks of a declaration under sub-clause (a), there shall be- (i) a special resolution of the membersof the company in a general meetingrequiring the company to beliquidated voluntarily and appointingan insolvency professional to act asthe liquidator; or (ii) a resolution of the members of thecompany in a general meeting requiring the company to beliquidated voluntarily as a result of expiry of the period of its duration, ifany, fixed by its articles or on theoccurrence of any event in respect ofwhich the articles provide that thecompany shall be dissolved, as thecase may be and appointing aninsolvency professional to act as theliquidator: Provided that the companyowes any debt to any person,creditors representing two thirds invalue of the debt of the companyshall approve the resolution passedunder sub-clause (c) within sevendays of such resolution.
		(4) The company shall notify the Registrar ofCompanies and the Board about theresolution under sub- Section (3) to liquidatethe company within seven days of suchresolution or the subsequent approval by thecreditors, as the case may be.
		(5) Subject to approval of the creditors undersub-Section (3), the voluntary liquidationproceedings in respect of a company shall bedeemed to have commenced from the date ofpassing of the resolution under sub-clause (c)of sub-section (3).
		(6) The provisions of Sections 35 to 53 ofChapter III and Chapter VII shall apply tovoluntary liquidation proceedings forcorporate persons with such modifications asmay be necessary.
		(7) Where the affairs of the corporate personhave been completely wound up, and itsassets completely liquidated, the liquidatorshall make an application to the AdjudicatingAuthority for the dissolution of such corporateperson.
		(8) The Adjudicating Authority shall on anapplication filed by the liquidator undersub-Section (7), pass an order that thecorporate debtor

		shall be dissolved from the date of that order and the corporate debtorshall be dissolved accordingly.
		(9) A copy of an order under sub-Section (8)shall within fourteen days from the date ofsuch order, be forwarded to the authority withwhich the corporate person is registered.

(Q) Comment on the following:
In case of a company, the terms 'winding-up' and 'dissolution' convey the same meaning.
(5 marks; 2010 - June) [CSEM - II]

Answer:
Please refer 2014 - Dec

(Q) Comment on The terms 'winding-up' and 'dissolution' are not one and the samething.
(5 marks; 2010- Dec) [CSEM - II]

Answer:
Please refer 2014 - Dec

(Q) Comment on "Winding-up is only a process while dissolution puts an end to the existence of a company".(5 marks; 2012 - Dec) [CSEM - II]

Answer:
In the process of winding up the assets of the company are disposed of and the debts of the company are paid off out of the realised assets by a liquidator. If any balance remains in the hands of liquidator, it is distributed among the members of the company in accordance with their rights under the articles.
According to Professor Gower, "winding up of a company is the process whereby its life is ended and its property administered for the benefit of its creditors and members."

- An administrator, is called liquidator, is appointed and he takes control of the company, collects its assets, pay its debts and finally distributes any surplus among the members in accordance with their rights.
- At the end of the winding up there will not be type remained any of assets and liabilities in the company, and it **will** therefore **be** simply a formal step for it to be dissolved that is for its legal personality as a corporation to be brought to an end.
- In between winding up and dissolution the legal entity of the company remains and its may be sued in a Tribunal.
- A company which has been dissolved no longer exist as a separate entity capable of holding property or of being sued in Tribunal of law, but a company in liquidation though the administration of its affairs has passed the liquidator retains its complete existence.
- If the liquidation should be annulled, the company will resume its powers.
- On dissolution the company's name is struck off the register 'of companies and its legal personality as a corporation comes to an end.

271. CIRCUMSTANCES IN WHICH COMPANY MAY BE WOUND UP BY TRIBUNAL

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

(Q) Asha Ltd., has made default in filing financial statements and annual returns for a continuous period of 4 financial years ending on 31st March, 2017. The Registrar of Companies having jurisdiction approached the Central Government to accord sanction to present a petition to Tribunal (NCLT) for the winding up of the company on the above ground under section 272 of the Companies Act, 2013. Examine the validity of the RoC move, explaining the relevant provisions of the Companies Act, 2013. (3 marks; 2018 - Dec)

Answer:
Validity of RoC's action
According to Section 271 (d) of the Companies Act, 2013, a Company may, on a petition under Section 272, be wound up by the Tribunal, if the Company has made a default in filing with the

Registrar its financial statements or annual returns for immediately preceding five consecutive financial years.

In the given case, the move by RoC to present a petition to Tribunal for the winding up of Asha Ltd. is not valid as the Company has made default in filing financial statements and annual returns for a continuous period of 4 financial years ending on 31st March, 2017.

(Q) Referring to the provisions of the Companies Act, 2013, state the grounds on which the Registrar of Companies can file a petition for winding-up of a company.

(4 marks; 2015 - Dec)

Answer:

The Registrar shall be entitled to present a petition for winding up under Section 271, except on the grounds specified in clause (a) or clause (e) of that sub-section:

Provided that the Registrar shall obtain the previous sanction of the Central Government to the presentation of a petition:

Provided further that the Central Government shall not accord its sanction unless the company has been given a reasonable opportunity of making representations.

(Q) LED Bulb Ltd., has made default in filing financial statements and annual returns for a continuous period of 4 financial years ending on 31st March, 2017, The Registrar of Companies having jurisdiction approached the Central Government to accord sanction to present a petition to Tribunal (NCLAT) for the winding up of the company on the above ground under Section 272 of the Companies Act, 2013. Examine the validity of the RoC move, explaining the relevant provisions of the Companies Act, 2013. State the time limit for passing an order by the Tribunal under Section 273 of the Companies Act, 2013?

(6 marks; 2018 - May)

Answer:

Provision:

As per Sec. 271 of the Companies Act, 2013, **a company may on apetition under Sec. 272, be wound up by the Tribunal:**

(a) If the company has by special resolution, resolved that the company be wound up by the Tribunal;

(b) If the company has acted against the interests of the sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, decency or morality;

(c) If on an application made by the Registrar or any other person authorised by the Central Government by notification under this Act, the Tribunal is of the opinion that the affairs of the company have been conducted in a fraudulent manner or the company was formed for fraudulent and unlawful purpose or the persons concerned in the information or management of its affairs have been guilty of fraud misfeasance or misconduct in connection therewith and that it is proper that the company be wound up;

(d) If the company has made a default in filing with the Registrar its financial statements or annual returns for immediately preceding five consecutive financial years; or

(e) If the Tribunal is of the opinion that it is just and equitable that the company should be wound up.

Present Case:

- In this question, LED bulb Ltd. has made default in filing financial statements and annual returns for a continuous period of four financial years ending on 31st March 2017. The Roc approached the Central Government to present a petition to NCLT for winding up of the company. So in light of provisions of Section 272, Roc's move is not valid in law.
- As per Sec. 273 of the Companies Act, 2013, an order passed under Section 272 shall be made within ninety days from the date of presentation of the petition.

272. PETITION FOR WINDING UP

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

(Q) On 3rd December, 2018 the Registrar of Companies applied to the Regional Director for seeking sanction to file a winding up application against a company. On next day i.e. on 4th December, 2018 the Regional Director granted its sanction. Examine the validity of Regional Director's action. (3 marks; 2018 - Dec)

Answer:

Under **Section 272(1) of Companies Act, 2013,** provides that a petition to the Tribunal for the winding up of a company can be presented by Registrar of Companies. But, Registrar shall obtain the previous sanction of the Central Government to the presentation of a petition. The section also provides that the Central Government shall not accord its sanction unless the company has been given a' reasonable opportunity of making representations. The Power of Central Government in this context has been assigned to Regional Directors.

In the above case, Regional Director granted its sanction on the very next day of filing of the petition without giving reasonable opportunity to the company of being heard. Here the action of Regional Director is invalid.

273. POWERS OF TRIBUNAL

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

(Q) The Mumbai Bench of National Company Law Tribunal has received a petition for winding up of Presentable Commodities Ltd. Pramod, Manager (Human Resource) of the company wants to know from you, Secretary of the company, what orders can be passed by the Tribunal in this regard. Advise Pramod, under the relevant provisions of the Companies Act, 2013. (4 marks; 2018 - June)

Answer:

According to **Section 273(1) of the Companies Act, 2013** the Tribunal may, on receipt of a petition for winding up may pass any of the following orders:

(a)Dismiss it, with or without costs;
(b)Make any interim order as it thinks fit;
(c)Appoint a provisional liquidator of the company till the making of a winding up order;
(d)Make an order for the winding up of the company with or without costs;
(e)Any other order as it thinks fit.

274. DIRECTIONS FOR FILING STATEMENT OF AFFAIRS

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

(Q) Explain the provisions of the Companies Act, 2013 relating to preparation and filing of Statement of Affairs (SA) in case of winding of a company by the Tribunal, with regard to the following aspects:

(i) Who is required to prepare and file SA and whether cost and expenses incurred in preparing SA are recoverable?

(ii) Contents of SA and the period within which the same is required to be submitted and to whom? Also state about delay in filing SA andupto what period the same is allowed.

(4 marks; 2016 - May)

Answer:

Directions for filing Statement of Affairs [Sec. 274 of Companies Act, 2013]

1. Where a petition for winding up is filed before the Tribunal by any person other than the company, the Tribunal shall, if satisfied that a prima facie case for winding up of the company is made out, by an order direct the company to file its objections along with a SA within thirty

days of the order in such form and in such manner as may be prescribed:

Provided that the Tribunal may allow a further period of thirty days in a situation of contingency or special circumstances:

Provided further that the Tribunal may direct the petitioner to deposit such security for costs as it may consider reasonable as a precondition to issue directions to the company.

2. A company, which fails to file the SA as referred to in sub-section (1), shall forfeit the right to oppose the petition and such directors and officers of the company as found responsible for such non-compliance, shall be liable for punishment under sub-section (4).

3. The directors and other officers of the company, in respect of which an order for winding up is passed by the Tribunal under clause (d) of subsection (1) of section 273, shall, within a period of thirty days of such order, submit, at the cost of the company, the books of account of the company completed and audited upto the date of the order, to such liquidator and in the manner specified by the Tribunal.

4. If any director or officer of the company contravenes the provisions of this section, the director or the officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees, or with both.

5. The complaint may be filed in this behalf before the Special Court by Registrar, provisional liquidator, Company Liquidator or any person authorised by the Tribunal.

275. COMPANY LIQUIDATORS AND THEIR APPOINTMENTS

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

276. REMOVAL AND REPLACEMENT OF LIQUIDATOR

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

277. INTIMATION TO COMPANY LIQUIDATOR, PROVISIONAL LIQUIDATOR AND REGISTRAR

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

278. EFFECT OF WINDING UP ORDER

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

279. STAY OF SUITS, ETC., ON WINDING UP ORDER

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

280. JURISDICTION OF TRIBUNAL

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

281. SUBMISSION OF REPORT BY COMPANY LIQUIDATOR

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

(Q) A listed Public Company was ordered to be wound up by the order of the Chennai High Court. While ordering the winding up, the Court ordered the Official Liquidator to submit a preliminary report to the Court as per the provisions contained in the Companies Act. Referring to the provisions of the Companies Act, 2013, state briefly the details to be given in the preliminary report of the official liquidator. **(5 marks; 2016 - June)**

Answer:

As soon as the winding up order is received by the official liquidator, a preliminary report is required to be submitted to the Tribunal. This report should be submitted as soon as the Liquidator receives the Statement of Affairs from the persons who were directors of the company at the time of winding up.

There is a time limit of six months within which the official Liquidator is required to submit his preliminary report to the Tribunal.

The preliminary report should contain the following details:

1. The amount of capital issued, subscribed and paid up.
2. The estimated amount of assets and liabilities giving separately
   - (a) Cash and negotiable 'securities,
   - (b) Debts due from contributories,
   - (c) Debts due to the company and securities, if any, available in respect thereof,
   - (d) Movable and immovable properties belonging to the company,
   - (e) Unpaid calls.
3. If the company has failed, the causes of the failure.
4. The opinion of the liquidator as to whether any further enquiry is desirable as to any matter relating to promotion, formation or failure of the company or the conduct of the business thereof.

The Official Liquidator has also the power to make a further report if in his opinion the company was formed with a view to commit a fraud or a fraud has been committed in respect of any matter which in his opinion is desirable to bring to the notice of the Tribunal.

282. DIRECTIONS OF TRIBUNAL ON REPORT OF COMPANY LIQUIDATOR

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

283. CUSTODY OF COMPANY'S PROPERTIES

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

284. PROMOTERS, DIRECTORS, ETC., TO COOPERATE WITH COMPANY LIQUIDATOR

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

285. SETTLEMENT OF LIST OF CONTRIBUTORIES AND APPLICATION OF ASSETS

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

286. OBLIGATIONS OF DIRECTORS AND MANAGERS

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

287. ADVISORY COMMITTEE

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

288. SUBMISSION OF PERIODICAL REPORTS TO TRIBUNAL

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

289. POWER OF TRIBUNAL ON APPLICATION FOR STAY OF WINDING UP

290. POWERS AND DUTIES OF COMPANY LIQUIDATOR

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

291. PROVISION FOR PROFESSIONAL ASSISTANCE TO COMPANY LIQUIDATOR

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

292. EXERCISE AND CONTROL OF COMPANY LIQUIDATOR'S POWERS

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

293. BOOKS TO BE KEPT BY COMPANY LIQUIDATOR

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

294. AUDIT OF COMPANY LIQUIDATOR'S ACCOUNTS

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

295. PAYMENT OF DEBTS BY CONTRIBUTORY AND EXTENT OF SET-OFF

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

(Q) Define "contributory" in a winding up. Explain the liabilities of contributories as per Companies Act, 2013. [Modified] (8 marks; 2011-May)

Answer:

Definition of Contributory As per Sec. 2 (26),

"Contributory" means a person liable to contribute towards the assets of the company in the event of its being wound up.

Explanation: For the purposes of this clause, it is hereby clarified that a person holding fully paid-up shares in a company shall be considered as a contributory but shall have no liabilities of a contributory under the Act whilst retaining rights of such a contributory:

Settling List of Contributory

- In settling the list of contributories, the Tribunal shall distinguish between those who are contributories in their own right and those who are contributories as being representatives of, or liable for the debts of others **[Sec. 285(2)].**
- While settling the list of contributories, the Tribunal shall include every person, who is or has been a member, who shall be liable to contribute to the assets of the company an amount sufficient for payment of the debts and liabilities and the costs, charges and expenses of winding up, and for the adjustment of the rights of the contributories among themselves, subject to the following conditions, namely:—

  (a) A person who has been a member shall not be liable to contribute if he has ceased to be a member for the preceding one year or more before the commencement of the winding up;

  (b) A person who has been a member shall not be liable to contribute in respect of any debt or liability of the company contracted after he ceased to be a member;

  (c) No person who has been a member shall be liable to contribute unless it appears to the Tribunal that the present members are unable to satisfy the contributions required to be made by them in pursuance of this Act;

  (d) In the case of a company limited by shares, no contribution shall be required from any person, who is or has been a member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as such member;

  (e) in the case of a company limited by guarantee, no contribution shall be required from any person, who is or has been a member exceeding the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up but

if the company has a share capital, such member shall be liable to contribute to the extent of any sum unpaid on any shares held by him as if the company were a company limited by shares. **[Sec. 285(3)].**

Liability of Contributory

Payment of debts by Contributory and extent of set-off [Sec. 295]

1. The Tribunal may, at any time after passing of a winding up order, pass an order requiring any contributory for the time being on the list contributories to pay, in the manner directed by the order, any money due to the company, from him or from the estate of the person whom he represents exclusive of any money payable by him or the estate by virtue of any call pursuance of this Act.

2. The Tribunal, in making an order, under sub-section (1), may,—

(a) in the case of an unlimited company, allow to the contributory, by way of set-off, any money due to him or to the estate which he represents from the company, on any independent dealing or contract with the company, but not any money due to him as a member of the company in respect of any dividend or profit; and

(b) in the case of a limited company, allow to any director or manager whose liability is unlimited, or to his estate, such set-off.

3. In the case of any company, whether limited or unlimited, when all the creditors have been paid in full, any money due on any account whatever to a contributory from the company may be allowed to him by way of set-off against any subsequent call.

(Q) Info-tech Overtrading Ltd. was ordered to be compulsory wound up by an order dated 10"' March, 2019 by the Tribunal. The official liquidator who has taken control of the assets and other records of the company has noticed that:

(i) One of the contributory whose calls are pending to be paid is about to leave India for evading payment of calls and;

(ii) A person having books of accounts of the company in his possession may abscond to avoid examination of books of accounts in respect of the affairs of the company.

Apprehending such possibilities, Tribunal detained such contributory for next 6 month disallowing him to leave India as well as arrest & seized books of accounts from the person which may possibly abscond to avoid examination of the affairs of the company.

Referring to the provisions of Companies Act, 2013, answer the following in current scenario:

(i) What is the validity of Tribunal's order for detention of contributory disallowing him to leave India?

(ii) Is it correct from Tribunal's part to arrest and seize books of accounts from the person planning to abscond to avoid examination of books of accounts in respect of the affairs of the company? **(8 marks; 2019-May)**

296. POWER OF TRIBUNAL TO MAKE CALLS

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

297. ADJUSTMENT OF RIGHTS OF CONTRIBUTORIES

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

298. POWER TO ORDER COSTS

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

299. POWER TO SUMMON PERSONS SUSPECTED OF HAVING PROPERTY OF COMPANY, ETC.

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

300. POWER TO ORDER EXAMINATION OF PROMOTERS, DIRECTORS, ETC.

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

301. ARREST OF PERSON TRYING TO LEAVE INDIA OR ABSCOND

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

302. DISSOLUTION OF COMPANY BY TRIBUNAL

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

303. APPEALS FROM ORDERS MADE BEFORE COMMENCEMENT OF ACT

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

304. CIRCUMSTANCES IN WHICH COMPANY MAY BE WOUND UP VOLUNTARILY

305. DECLARATION OF SOLVENCY IN CASE OF PROPOSAL TO WIND UP VOLUNTARILY

(Q) The Directors of Welldone Company Limited are required to file declaration of solvency as they desire to proceed for voluntary winding up of the company. Advise them about the requirements to be followed for the said purpose. **(6 Marks; 2014 - June)**

Answer:

Declaration of Solvency in case **of proposal to wind-up voluntarily (Section 305)**

The declaration to be made by the director or directors or in case the company has more than two directors, by the majority of directors of a company under Sub-Section (1) of Section 305 read with rule 24 of Companies (Winding up) Rules, 2013 shall be in Form No. 51 and such a declaration has to be made at a meeting of the Board, make a declaration verified by an affidavit to the effect that they have made a full inquiry into the affairs of the company and they have formed an opinion that the company has no debt or whether it will be able to pay its debts in full from the proceeds of assets sold in voluntary winding up.

A declaration made under Section 305 (1) shall have no effect for the purposes of this Act, unless:

(a)It is made within five weeks immediately preceding the date of the "passing of the resolution for winding up the company and it is delivered to the Registrar for registration before that date.

(b)It contains a declaration that the company is not being wound up to defraud any person or persons.

(c)it is accompanied by a copy of the report of the auditors of the company prepared in accordance with the provisions of this Act, on the profit and loss account of the company for the period commencing from the date up to which the last such account was prepared and ending with the latest practicable date immediately before the making of the declaration and the balance sheet of the company made out as on that date which would also contain a statement of the assets and liabilities of the company on that date, andwhere there are any assets of the company, it is accompanied by a report of the valuation of the assets of the company prepared by a registered valuer Section 305 (4) states that when the company iswound up in pursuance of a resolution passed within a period of five weeks after the making of the declaration, but its debts are not paid or provided for in full, it shall be presumed, until the contrary is shown, that the director or directors did not have reasonable grounds for his or their opinion under Sub-Section **(1). Section 305 (5)** states that any director of a company making a declaration under this Section without having reasonable grounds for the opinion that the company will be able to pay its debts in full from the proceeds of assets sold in voluntary winding up shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to

five years or with fine which shall not be less than fifty thousand rupees but which may extend to three lakhs rupees, or with both.

306. MEETING OF CREDITORS

308. PUBLICATION OF RESOLUTION TO WIND UP VOLUNTARILY

309. COMMENCEMENT OF VOLUNTARY WINDING UP

309. EFFECT OF VOLUNTARY WINDING UP

310. APPOINTMENT OF COMPANY LIQUIDATOR

311. POWER TO REMOVE AND FILL VACANCY OF COMPANY LIQUIDATOR

312. NOTICE OF APPOINTMENT OF COMPANY LIQUIDATOR TO BE GIVEN TO REGISTRAR

313. CESSER OF BOARD'S POWERS ON APPOINTMENT OF COMPANY LIQUIDATOR

314. POWERS AND DUTIES OF COMPANY LIQUIDATOR IN VOLUNTARY WINDING UP

315. APPOINTMENT OF COMMITTEES

316. COMPANY LIQUIDATOR TO SUBMIT REPORT ON PROGRESS OF WINDING UP

317. REPORT OF COMPANY LIQUIDATOR TO TRIBUNAL FOR EXAMINATION OF PERSONS

318. FINAL MEETING AND DISSOLUTION OF COMPANY

319. POWER OF COMPANY LIQUIDATOR TO ACCEPT SHARES, ETC., AS CONSIDERATION FOR SALE OF PROPERTY OF COMPANY.

320. DISTRIBUTION OF PROPERTY OF COMPANY

(Q) A Housing Society started banking business which was ultra vires the regulations governing the said society. On its winding-up, the assets were composed partly of the shareholders' money and partly of the ultra vires depositor's money.
Discuss the rights of the shareholders and depositors. (2 marks; 2014 - Dec)

Answer:

- When the lender's money and that of the company have become mixed up and the two can't be separated from each other, the lender may claim pari passu distribution of the assets with shareholders in the event of the winding up of the company.
- Hence, the entire remaining amount should be apportioned between the shareholders and ultra vires depositors in proportion to the amount paid up by them respectively.

321. ARRANGEMENT WHEN BINDING ON COMPANY AND CREDITORS

322. ARRANGEMENT WHEN BINDING ON COMPANY AND CREDITORS

323. COSTS OF VOLUNTARY WINDING UP

324. DEBTS OF ALL DESCRIPTIONS TO BE ADMITTED TO PROOF

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

325. APPLICATION OF INSOLVENCY RULES IN WINDING UP OF INSOLVENT COMPANIES

326. OVERRIDING PREFERENTIAL PAYMENTS

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

(Q) Explain briefly over-riding preferential payments in accordance with the provision of the Companies Act, 2013. (4 marks; 2017- Dec)

Answer:

As per Section 320, subject to the provisions of this Act as to overriding preferential payments under Section 326, the assets of a company shall, on its winding up, be applied in satisfaction of its liabilities pari passu and, subject to such application, shall, unless the articles otherwise provide, be distributed among the members according to their rights and interests in the company.

(Q) The official Liquidator of VASUDHA LTD. receives a notice for a trade creditor of the Company that the Tribunal has passed a decree in its favour, relating to the dues for services rendered to VASUDHA LTD. and that the amount specified in the Tribunal decree should be paid first, prior to the clearing of dues of workmen. The same is opposed by the workmen. Advise the official Liquidator suitably; with reference to provisions of the Companies Act, 2013. (7 marks; 2010 - June)

Answer:

According to **Section 326 (Overriding preferential payments) of theCompanies Act 2013,** the dues of the workmen and the dues of the securedcreditors are to be treated at same footing. Both these dues are to bedischarged on priority over all other dues of the company.

Section 326 is overriding (means above) all other provisions and statesclearly that workmen's dues and debts due to secured creditors shall be paidin priority to all other debts. Hon'ble Supreme Court has also confirmed thisin UCO Bank 1994 that provisions of **Section 326 of the CompaniesAct, 2013** will override all other claims of the creditors.

(Q) At the time of winding up of SIMON HOTEL LTD. (SHL),a supplier of company named MKG LTD., presents to the official liquidator, a Tribunal decree in their favour ordering payment of certain sum. The claim of MKG LTD. is that they should be paid in preference over the claims of the workmen for their dues. The same is not accepted by the workmen. Examine the validity of the rival claims in the light of the provisions of the Companies Act, 2013.

(6 marks; 2013-June)

Answer:

Preferential dues during winding up proceedings:

The situation given in the question is covered by the provisions of **Section 326 (Overriding preferential payments) of Companies Act, 2013.** Theeffect of combined reading of these sections is that the workmen of the company become secured creditors by operation of law to the extent to the workmen's dues and are entitled to proportional payment along with other secured creditors.

If there is no secured creditor, in such an event, to the extent of workmen's dues, the workmen of the company become unsecured preferential creditors under **Section 326** the object of **Section 326** is to ensure that the:

(a)Workmen should not be deprived of their legitimate claims in the event of the liquidation of the company.

(b)The assets of the company would remain charged for the payment of workmen's dues, and

(c)Such charge will be pari passu (means in proportion, proportionally) with the charge of other secured creditors.

There is no other statutory provision overriding the claim of the secured creditors except the said **Section 326.**

Thus, the law is very much clear in this respect and the Hon'ble Supreme Court of India held in the case of UCO Bank [(1994) 81 Comp. Case 780] that the provisions of **Section 326 of the Companies Act, 2013** will override all other claims of the creditors even where a decree has been passed by a Tribunal.

In view of the above stated legal position, the contention of the-workmen of. SUMON HOTEL LTD. is valid and the Official Liquidator will have to pay their dues as provided in **Section 326 of the Companies Act, 2013.**

(Q) Explain the term 'Overriding Preferential Payments' under the provision of the Companies Act, 2013. ABC Limited is being wound-up by the Tribunal. The official liquidator has realized Rs. 100 lakh by selling the land and buildings mortgaged by the company in favour of its bankers. The company owes Rs. 200 lakh to the bank. The bank has claimed that the amount realised by sale of land and buildings must be paid in full to it in preference to the workmen's dues to the extent of Rs. 50 lakh. Examine the banks claim with reference to the provisions of the Companies Act. **(3 + 2 = 5 marks; 2015 - June)**

Answer:

Overriding preferential payment: As per Section 362 of the Companies Act, 2013 notwithstanding anything contained in any other provisions of this Act or any other law for the time being in force in the winding-up of a company - (i) workmen's dues and (ii) debts due to secured creditors to the extent such debts rank, under clause (c) of the proviso to Sub-section (1) of Section 325, pari passu with such dues, shall be paid in priority to all other debts.

- These debts payable under (i) and (ii) above shall be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions.
- As per the above provision, the dues of the workmen and debt due to the secured creditors are to be treated pari passu and have to be treated as prior to all other dues.
- In view of the stated legal position in the problem, the contention of the Bank to pay the amount in full is not valid as the debts payable to the workmen and the secured creditors shall be paid in full, unless the realized assets are insufficient to meet the due debts, in which case they shall abate in equal proportions.
- Here, **in the given problem,** the realized assets of ABC Limited is Rs. 100 lakh and debts due to the secured creditor (Bank) is Rs. 200 lakh and the workmen's dues is Rs. 50 lakh.

In the light of the provisions of **Sections 325 and 326,** amount to be paid towards

Workmen's dues $= \frac{\text{Amt.realized x Workmen's dues}}{\text{Workmen's dues + Secured loan}}$

$= \text{Rs. 100 lacs x } \frac{Rs.50\ lacs}{Rs.50\ lacs + Rs.200\ lacs}$

$= \text{Rs. 100 lacs x } \frac{Rs.50}{Rs.250}$

= Rs. 100 lacs x $\frac{1}{5}$ = Rs. 20 lacs

- In view of the provisions of **Sections 325 and 326,** the contention of the bank that whole of Rs. 100 lacs realized from the sale of land, etc, shall be paid to the bank towards repayment to loan is not tenable, only a sum of Rs. 80 lacs shall be paid.
- Thus, Official Liquidator will have to pay Rs. 20 Lacs to Workmen and Rs. 80 Lacs to the Bank.

(Q) M/s. Raman Ltd. was wound up by the Tribunal. The official liquidator invited claims from its creditors which stood as under:

Income tax dues	Rs. 11 lakhs
Sales tax dues	Rs. 5 lakhs
Dues of Workers	Rs. 25 lakhs
Unsecured loans payable to directors	Rs. 25 lakhs
Trade creditors who supplied raw material	Rs. 15 lakhs
Secured creditor being the bankers of the company	Rs. 75 lakhs
	Rs.156 lakhs

Official Liquidator could realise only Rs. 80 lakhs by sale of assets and realisations made from the company's debtors, which is not sufficient to pay to all the creditors. Please decide the order of priority for payment to creditors explaining the relevant provisions of the Companies Act, 2013. **(5 marks; 2009-Nov)**

Answer:

Provision:

Overriding preferential payments [Sec. 326] [Substituted by Insolvency and Bankruptcy Code, 2016 w.e.f. 15.11.16]

1. In the winding up of a company under this Act, the following debts shall be paid in priority to all other debts:

(a) Workmen's dues; and

(b) where a secured creditor has realised a secured asset, so much of the debts due to such secured creditor as could not be realised by him or the amount of the workmen's portion in his security (if payable under the law), whichever is less, pari passu with the workmen's dues:

Provided that in case of the winding up of a company, the sums referred to in sub-clauses (i) and (ii) of clause (b) of the Explanation, which are payable for a period of two years preceding the winding up order or such other period as may be prescribed, shall be paid in priority to all other debts (including debts due to secured creditors), within a period of thirty days of sale of assets and shall be subject to such charge over the security of secured creditors as may be prescribed.

2. The debts payable under the proviso to sub-section (1) shall be paid in full before any payment is made to secured creditors and thereafter debts payable under that subsection shall be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions.

Present case, eighty lakhs rupees have been realised by the sale of all the assets of the company. The amount due to secured creditors is seventy five lakhs rupees and the workmen's dues are twenty five lakhs rupees. Overriding preferential payments (workmen's dues and secured creditors) amount to one hundred lakhs rupees.

Therefore, the workmen's dues and secured creditors shall abate in equal proportions, i.e., payments to workmen and secured creditors shall be made in the proportion of amount owed by the company to them (i.e., in the ration of 75:25). Accordingly the workers shall be paid twenty lakhs rupees and the secured creditors shall be paid sixty lakhs rupees. No payment shall be made to the Government authorities for income tax dues, sales tax dues, unsecured loans payable to directors or to trade creditors who supplied raw material.

327. PREFERENTIAL PAYMENTS

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

(Q) In relation to winding up of a company incorporated under the Companies' Act 2013 explain clearly the meaning of the term 'overriding preferential payments'. Examine the provisions of the Companies Act 2013 and decide whether the following debts of a company under the winding up shall be 'Preferential payments' and shall be paid in priority to the claim of unsecured creditors:

(a) Wages amounting to Rs. 30,000/- (Rupees Thirty thousand) only of an employee for services rendered for a period of 8 months within the preceding 12 months next before the relevant date.

(b) Rs. 1 lac due to an employee from Provident Fund and Rs. 50,000/- towards gratuity.

(8 marks; 2010-Nov)

Answer:

Provision:

Legal Provision under Sec. 326 and Sec. 327

Overriding preferential payments [Sec. 326] **[Substituted by Insolvency and Bankruptcy Code, 2016 w.e.f. 15.11.16]**

1. In the winding up of a company under this Act, the following debts shall be paid in priority to all other debts:

(a) Workmen's dues; and

(b) where a secured creditor has realised a secured asset, so much of the debts due to such secured creditor as could not be realised by him or the amount of the workmen's portion in his security (if payable under the law), whichever is less, pari passu with the workmen's dues:

Provided that in case of the winding up of a company, the sums referred to in sub-clauses (i) and (ii) of clause (b) of the Explanation, which are payable for a period of two years preceding the winding up order or such other period as may be prescribed, shall be paid in probity to all other debts (including debts due to secured creditors), within a period of thirty days of sale of assets and shall be subject to such charge over the security of secured creditors as may be prescribed.

2. The debts payable under the proviso to sub-section (1) shall be paid in full before any payment is made to secured creditors and thereafter debts payable under that subsection shall be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions.

Preferential payments [Sec. 327]

1. In a winding up, subject to the provisions of section 326, there shall be paid in priority to all other debts,—

(a) all revenues, taxes, cesses and rates due from the company to the CG or a SG or to a local authority at the relevant date and having become due and payable within the twelve months immediately before that date; .

(b) all wages or salary including wages payable for time or piece work and salary earned wholly or in part by way of commission of any employee in respect of services rendered to the company and due for a period not exceeding four months within the twelve months immediately before the relevant date, subject to the condition that the amount payable under this clause to any workman shall not exceed such amount as may be notified;

(c) all accrued holiday remuneration becoming payable to any employee, or in the case of his death, to any other person claiming under him, on the termination of his employment before, or by the winding up order, or, as the case may be, the dissolution of the company;

(d) unless the company is being wound up voluntarily merely for the purposes of reconstruction or amalgamation with another company, all amount due in respect of contributions payable during the period of twelve months immediately before the relevant date by the company as the employer of persons under the Employees State Insurance Act, 1948 (34 of 1948) or any other law for the time being in force;

(e) unless the company has, at the commencement of winding up, under such a contract with any insurer as is mentioned in section 14 of the Workmen's Compensation Act,(now known as The Employee's Compensation Act) 1923 (8 of 1923), rights capable of being transferred to and vested in the workmen, all amount due in respect of any compensation or liability for compensation under the said Act in respect of the death or disablement of any employee of the company:

Provided that where any compensation under the said Act is a weekly payment, the amount payable under this clause shall be taken to be the amount of the lump sum for which such weekly payment could, if redeemable, be redeemed, if the employer has made an application under that Act;

(f) All sums due to any employee from the provident fund, the pension fund the gratuity fund or any other fund for the welfare of the employees maintained by the company; and

(g) The expenses of any investigation held in pursuance of sections 213 and 216, in so far as they are payable by the company.

Present Case:

(a) Wages amounting to thirty thousand rupees, of an employee for services rendered for a period of eight months within the preceding twelve months next before the relevant date.

All wages and salaries of an employee for service rendered for a period not exceeding four months within the preceding twelve months next before the relevant date, but not Exceeding twenty thousand rupees in any one case are the preferential payments. In the given case, it is not a preferential payment. Only a part of it shall be the preferential payment.

(b) One lac rupees due to an employee from provident fund and fifty thousand rupees towards gratuity.

All sums due to any employee from any fund including a provident, pension or a Gratuity for the welfare of the employees, maintained by the company are the preferential payments. Therefore in the given case both the sums i.e. one l ac rupees and fifty thousand rupees are the preferential payments.

(Q) Explain the term "Overriding Preferential Payments" under the provisions of the Companies Act, 2013. ABC Limited is being wound-up by the Court/Tribunal. The official liquidator has realised Rs. 100 lakh by selling the land and buildings mortgaged by the company in favour of its bankers.

The company owes Rs. 200 lakh to the bank. The bank has claimed that the amount realised by sale of land and buildings must be paid in full to it in preference to the workmen's dues to the extent of Rs. 50 lakh. Examine the Bank's claim with reference to the provisions of the Companies Act, 1956. **(8 marks; 2012-Nov)**

Answer:

Overriding Preferential Payments

Please refer 2010 - Nov [4] (b) on page no. 226

Present Case:

The realised assets of ABC Ltd. is of one hundred lakhs rupees and debt due to the secured creditor i.e. Bank is Rs. 200 lakhs and workmen's dues is fifty lakh rupees.

Therefore the workmen's dues and dues payable to Bank shall abate in equal proportions.
Accordingly the workmen shall be paid twenty lakh rupees and the Bank shall be paid eighty lakhs rupees. Thus the Bank's claim is not tenable.

(Q) Best Plastics Limited is being wound up by Tribunal. The Official Liquidator after realization of the assets has an amount of Rs. 28 lakhs in his hand towards payment of creditors of the company. Details of creditors are as follows:

(i)	Secured Creditors	Rs. 20 lakhs
(ii)	Workers wages	Rs. 15 lakhs
(iii)	Income Tax payable	Rs. 2 lakhs
(iv)	Unsecured Creditors	Rs. 40 lakhs
	Total Creditors	Rs. 77 lakhs

Since the available amount in the hands of Liquidator is only Rs. 28 lakhs, which is insufficient to meet the claims of all the above creditors, explain the procedure you would follow for payment of the above in accordance with the provisions of the Companies Act, 2013, assuming that the company has created a charge on all the assets of the company in favour of secured creditors. **(4 marks; 2015-Nov)**

Answer:

Overriding Preferential Payments:

Please refer 2010 - Nov [4] (b) on page no. 226

Present Case:

In the present case, only twenty eight lakhs rupees are available whereas the overriding preferential payments (workers due and secured creditors) amounts to thirty five lakhs rupees. Therefore, the workers due and dues payable to secured creditors shall be distributed in equal proportions i.e., the payments to workers and secured creditors shall be made in the proportion of amount owned by the company to them (i.e. the ratio of 20 : 15). Accordingly the workers shall be paid twelve lakhs rupees and the secured creditors shall be paid sixteen lakhs rupees. No payment shall be made to the Government Authorities for tax dues or to unsecured creditors.

(Q) Some applicants consented to become shareholders of a company on the condition that their suggestions should be included in the memorandum and articles of association. Their suggestions, however, were not carried out by the promoters but the applicants signed usual applications for shares allotted to them and thereby become shareholders of the company. The company went into liquidation.

(i) What shall be the fate of the applicants who had consented to become shareholders on certain conditions?

(ii) What shall be the amount to be borne by the secured creditors out of the expenses incurred by the liquidator if:

(a) The value of the security of secured creditors of a company is Rs. 1.00 lac.

(b) Total amount of workmen's due is Rs. 1.00 lac and

(c) Debts due from the company to its secured creditors is Rs. 3.00 lacs.

(d) The liquidators incurred Rs. 10,000 for the preservations of the security before it is realized by the secured creditors. **(4 marks; 2017 - May)**

Answer:

(i) In this case, some applicants consented to become shareholders of a company on the condition that their suggestion, should be included in the memorandum and articles of association. Their suggestions however, were not carried out by the promoters but the applicant signed the usual applications for shares which were allotted to them and thereby become shareholders of the company. It was held that it was not open to them to object subsequently to their being shareholders of the company on the ground that the condition had not been fulfilled. (East Bengal Sugar Mills Ltd. In Re. (1941) 11 comp. cas169).

(ii) The workmen portion of the security is therefore 1 /4th of the value of the security, i.e. 25,000.

If the liquidator incurs 10,000 for the preservation it is equal to the following equation.

= 10,000 - $(\frac{10,000 \text{ x } 25,000}{1,00,000})$

= 10,000-2,500

= 7,500 amount borne by creditors.

328. FRAUDULENT PREFERENCE

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

(Q) INSTABLE FERTILIZERS LTD. has been continuously incurring losses the company mortgaged its machinery to MR. BULLY one of its creditors on 1st September 2009 relating to outstanding of Rs. 15 lakhsdue to him .The other creditors of the company filed a petition for winding up the Company on 19th December 2009. The company was ordered to be wound up on 30th April 2010. Discuss whether the Official Liquidator can declare the transaction of mortgage with Mr. Bully as invalid. **(6 marks; 2010 - Dec)**

Answer:

This relates to **Section 328 of the Companies Act, 2013 (Fraudulent preference) of the Companies 2013.** According to **Section 531**, a transaction will be treated as invalid if all the following conditions are satisfied:

1.Transaction relates the property of the company.
2.It occurred within 6 months before the start of winding-up of company.
3.There was no pressure relating to transaction.
4.The main motive was to give preference to one creditor over other creditors.

When the Tribunal orders winding-up of company, the effective date of commencement of winding up is not the date of order of the Tribunal but the date when the petition for winding up was presented to the Tribunal. Thus in the current case, the winding up will be deemed to have commenced on 19th December 2009 on which other creditors filed the petition. Let us examine the above conditions in the current case:

1.Transaction relates the property of the company. This is true as machinery was mortgaged which is property of the company.
2.It occurred within 6 months before the start of winding up of company. This is true because the date of transaction is September 1 st 2009 which is within 6 months from the date of winding up of company i.e. December 19th, 2009.
3.There was no pressure relating to transaction. This is true as the transaction was a voluntary act of the company and there was no pressure on the company.,
4.The main motive was to give preference to one creditor over other creditors. This is true as the company gave preference to Mr. Bully over other creditors.

Conclusion: The official liquidator can declare the mortgage of machinery to Mr. Bully as invalid and void.

(Q) A company was in financial distress. They pledged certain immovable properties with a nationalised bank in the belief that their loan limits would be increased. However within 3 months, some creditors filed a petition for winding up. The management was accused of fraudulent preference.

(i) In the above context discuss fraudulent preference.

(ii) Would your answer be different if the charge was createdin favour ofan NBFC?

(4 marks; 2016- May)

Answer:

Fraudulent Preference:

As per Sec. 328 of Companies Act, 2013

1. Where a company has given preference to a person who is one of the creditors of the company or a surety or guarantor for any of the debts or other liabilities of the company, and the company does anything or suffers anything done which has the effect of putting that person into a position which, in the event of the company going into liquidation, will be better than the position he would have been in if that thing had not been done prior to six months of making

winding up application, the Tribunal, if satisfied that, such transaction is a fraudulent preference may order as it may think fit for restoring the position to what it would have been if the company had not given that preference.

2. If the Tribunal is satisfied that there is a preference transfer of property, movable or immovable, or any delivery of goods payment, execution made, taken or done by or against a company within six months before making winding up application, the Tribunal may order as it may think fit and may declare such transaction invalid and restore the position.

Present case:

The company pledged certain immovable properties with a nationalised bank in the belief that their loan limits would be increased. However within three months, some creditors filed a petition for winding up. The management was accused of fraudulent preference.

Thus, pledging certain immovable properties with a nationalised bank is not a fraudulent preference because it has been done in the good faith so that their loan limits would be increased. It is a transaction in good faith. The answer would be same even it charge was created in favour of an NBFC.

(Q) Modern Textiles Limited incurred huge losses during the last three financial years and its financial position was bad. The Company created a legal mortgage on some of its immovable properties in favour of a bank on 1st September, 2012 in the hope that by keeping good faith with the bank it could get further advances from the bank and the same could be utilized to revive the Company. Some creditors filed winding up petition in the Tribunal on 15th January, 2013. The Tribunal passed an order of winding up on 1st August, 2013. Answer the following with reference to the provisions of the Companies Act, 2013:

(i) What is meant by 'Fraudulent Preference'? State the effect of 'Fraudulent Preference'.

(ii) Whether the creation of legal mortgage by the Company in favour of the bank would amount to fraudulent preference? (8 marks; 2013-Nov)

Answer:

Fraudulent Preference (Sec. 328)

Where a company has given preference to a person who is one of the creditors of the company or a surety or guarantor for any of the debts or other liabilities of the company, and the company does anything or suffers anything done which has the effect of putting that person into a position which, in the event of the company going into liquidation, will be better than the position he would have been in if that thing had not been done prior to six months of making winding up application, the Tribunal, if satisfied that, such transaction is a fraudulent preference may order as it may think fit for restoring the position to what it would have been if the company had not given that preference. **[Sec. 328(1)]**

Effect

If the Tribunal is satisfied that there is a preference transfer of property, movable or immovable, or any delivery of goods, payment, execution made, taken or done by or against a company within six months before making winding up application, the Tribunal may order as it may think fit and may declare such transaction invalid and restore the position. **[Sec 328(2)].**

Creation of legal mortgage by the company in favour of the bank: In the present case, the Modern Textiles Limited created a legal mortgagee on some of its immovable properties in favour of a bank on 1sl September, 2012 in the hope that by keeping good faith with the bank it could get further advances from the bank and the same could be utilized to revive the company. Thus, the creation of legal mortgage on some of its immovable properties with the bank is not a fraudulent preference because it has been done in the good faith so that the company could get further advances from the bank. It is a transaction in good faith.

329. TRANSFERS NOT IN GOOD FAITH TO BE VOID

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

330. CERTAIN TRANSFERS TO BE VOID

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

331. LIABILITIES AND RIGHTS OF CERTAIN PERSONS FRAUDULENTLY PREFERRED

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

332. EFFECT OF FLOATING CHARGE

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

(Q) State briefly the effect of floating charge on the undertaking or property of the company when a company is being wound-up. (3 marks; 2019 - June)

333. DISCLAIMER OF ONEROUS PROPERTY

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

334. TRANSFERS, ETC., AFTER COMMENCEMENT OF WINDING UP TO BE VOID.

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

335. CERTAIN ATTACHMENTS, EXECUTIONS, ETC., IN WINDING UP BY TRIBUNAL TO BE VOID

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

336. OFFENCES BY OFFICERS OF COMPANIES IN LIQUIDATION

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

337. PENALTY FOR FRAUDS BY OFFICERS

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

338. LIABILITY WHERE PROPER ACCOUNTS NOT KEPT.

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

339. LIABILITY FOR FRAUDULENT CONDUCT OF BUSINESS.

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

340. POWER OF TRIBUNAL TO ASSESS DAMAGES AGAINST DELINQUENT DIRECTORS, ETC.

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

(Q) What is meant by "misfeasance"? Who can initiate misfeasance proceedings and is there any time limit for initiating such proceedings? Examine the extent to which the legal representatives of a deceased Director, against whom misfeasance proceedings were initiated, can be held liable under the provisions of the Companies Act, 2013.

(8 marks; 2013 - May)

Answer:

The word 'Misfeasance' is not defined anywhere in-the Companies Act.

It can be defined in general sense as an act or omission in the nature of breach of trust in relation to the company which causes losses or injury to the company.

Power of Tribunal to assess damages against Delinquent Directors, etc. [Sec. 340 of Companies Act, 2013]

1. If in the course of winding up of a company, it appears that any person who has taken part in the promotion or formation of the company or any person, who is or has been a director, manager, Company Liquidator or officer of the company:

(a) Has misapplied or retained or become liable or accountable for, any money or property of the company; or

(b) Has been guilty of any misfeasance or breach of trust in relation to the company;

The Tribunal may, on the application of the Official Liquidator or the Company Liquidator or of any creditor or contributory, made within the period specified in that behalf in sub-section(2), inquire into the conduct of the person, director, manager, Company Liquidator or officer aforesaid and order him to repay or restore the money or property or any part thereof respectively, with interest at such rate as the Tribunal considers just and proper or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust, as the Tribunal considers just and proper.

2. An application under sub-Section (1) shall be made within five years from the date of the winding up order or of the first appointment of the Company Liquidator in the winding up or of the misapplication, retainer, misfeasance or breach of trust, as the case may be, whichever is longer.

3. This section shall apply, notwithstanding that the matter is one for which the person concerned may be criminally liable.

Liability of Legal Representative of a deceased Director, against whom misfeasance proceedings were initiated.

In the case of death of directors, the Supreme Court held that the proceeding commenced against the delinquent director of a company which is under liquidation as per Sec. 340 can be continued even after his death against his legal representatives and the amount declared to be due in such misfeasance proceedings can be realised from the estates of the deceased on the hands of his legal representatives.

Tribunal further held that the legal representatives would not, however, be liable for any sum beyond the value of the estate of the deceased in their hands [Official liquidator Supreme Bank Ltd Vs P.A. Tendalkar, Official liquidator \/s. Parthasarthy Sinha]. Hence the misfeasance proceeding can be continued against the legal representatives of A.

341. LIABILITY UNDER SECTIONS 339 AND 340 TO EXTEND TO PARTNERS OR DIRECTORS IN FIRMS OR COMPANIES

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

342. PROSECUTION OF DELINQUENT OFFICERS AND MEMBERS OF COMPANY

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

343. COMPANY LIQUIDATOR TO EXERCISE CERTAIN POWERS SUBJECT TO SANCTION.

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

344. STATEMENT THAT COMPANY IS IN LIQUIDATION.

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

345. BOOKS AND PAPERS OF COMPANY TO BE EVIDENCE

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

346. INSPECTION OF BOOKS AND PAPERS BY CREDITORS AND CONTRIBUTORIES

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

347. DISPOSAL OF BOOKS AND PAPERS OF COMPANY

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

348. INFORMATION AS TO PENDING LIQUIDATIONS

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

(Q) Winding up proceedings has been commenced by the Tribunal against Paramount Limited, a government company (Central Government is a member). Even after completion of one year from the date of commencement of winding up proceedings, it has not been possible to conclude the same. The liquidator is of the opinion that the statement shall be filed with tribunal and registrar only.
(i) Decide validity to the opinion made by the liquidator and penalty that can be imposed on the liquidator for contravention of the provision as per the Companies Act, 2013.
(ii)Discuss, if the Paramount Limited is a non-government company. (7 marks; 2018- June)

Answer:

Section 348 of the Companies Act, 2013 states that, if the winding up of a company is not concluded within one year after its commencement then the Company Liquidator shall file a statement in such form containing such particulars as may be prescribed. Such statement shall be filled within two months of the expiry of such year and it shall be filled continuously thereafter until the winding up is concluded, at intervals of not more than one year or at such shorter intervals as may be prescribed. The statement shall be duly audited, by a person qualified to act as auditor of the company and position of with respect to the proceedings in the liquidation. The statement shall be filled with the tribunal in the case of a winding up by the Tribunal. A copy shall simultaneously be filed with the Registrar and shall be kept by him along with the other records of the company. Where a statement relates to a Government company in liquidation, the Company Liquidator shall forward a copy thereof,

- To the Central Government, if that Government is a member of the Government Company;
- To any State Government, if that Government is a member of the Government Company; or
- To the Central Government, and any State Government, if both the Governments are members of the Government Company.

If Paramount Limited is a Government Company:

In the current scenario, we can understand that the Paramount Limited is a government company in which Central Government is a member and hence statement is also required to file to the Central Government along with the Tribunal and Registrar. So, the opinion by the Company Liquidator is not tenable in the eyes of the law and he is liable for penal action under the Act. The company liquidator shall be punishable with fine which may extend to five thousand rupees for every day during which the failure continues.

If Paramount Limited is a Non-Government Company

In the current scenario, the Paramount Limited is a non-government company hence statement is only required to file with the Tribunal and Registrar only. So, the opinion by the Company Liquidator is tenable in the eyes of the law and he is not liable for any penal action under the Act.

(Q) JKL Company Limited has gone into winding up. The winding up proceedings have already commenced but the winding up could not be completed within a period of two years.
Referring to the provisions of the Companies Act, 2013, answer the following:
(i) As the Company Liquidator of the company what duties you are required to perform in relation to filing of petition?
(ii) What shall be your answer in case the company in question is a Government company?
(iii) What consequences follow in case the Company Liquidator does not comply with the legal requirements in relation to the above? **[Modified] (8 marks;2014-Nov)**

Answer:

Information as to pending liquidations [Sec. 348]

(i) **As per Sec. 348(1) of the Companies Act, 2013,** if the winding up of a company is not concluded within one year after its commencement the Company Liquidator shall, unless he is exempted from so doing, either wholly or in part by the CG (Power delegated to Regional Director vide Notification No. SO 4090CE dt. 19.12.16) within two months of the expiry of such year and thereafter until the winding up is concluded, at intervals of not more than one year or at such shorter intervals, if any, as may be prescribed, file a statement in such form containing such particulars as may be prescribed, duly audited, by a person qualified to act as auditor of the company, with respect to the proceedings in, and position of, the liquidation with the Tribunal. **Provided that** no such audit as is referred to in this sub-section shall be necessary where the provisions of section 294 apply.

[Substituted by Insolvency Bankruptcy Code, 2016]

Further as per Sec. 348(2),

When the statement is filed with the Tribunal under clause (a) of subsection (1), a copy shall simultaneously be filed with the Registrar and shall be kept by him along with the other records of the company.

(ii) In case of Government Company **where a statement referred to in sub-section (1) relates to a Government company in liquidation, the Company Liquidator shall forward a copy thereof—**

(a) To the CG, if that Government is a member of the Government company;

(b) To any SG if that Government is a member of the Government company; or

(c) To the CG and any SG, if both the Governments are members of the Government company. [Sec. 348 (3)].

(iii) If a Company Liquidator contravenes the provisions of this section, the Company Liquidator shall be punishable with fine which may extend to five thousand rupees for every day during which the failure continues. [Sec. 348(6)]
If a Company Liquidator makes wilful default in causing the statement referred to in sub-section (1) audited by a person who is not qualified to act as an auditor of the company, the Company Liquidator shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to one lakh rupees, or with both. [Sec. 348(7)]

(Q) Winding-up proceeding has been commenced by the court against Lucky Limited, a non-government company. Even after completion of one year from the date of commencement of winding up proceedings, it has not been possible to conclude the same. Discuss the duties of the liquidator with respect to auditing and filing of the required statements with the appropriate authority as per the provisions of the Companies Act, 2013. Also discuss the penalty which can be imposed on the liquidator for contravention of the above provisions. .

(4 marks; 2016-Nov)

Answer:

Information as to pending Liquidations [Sec. 348]

Please refer 2014 - Nov [5] (a) on page no. 216

Present Case:

It is clear that company shall require to complete winding up procedure before such 12 months and so that Lucky Limited shall require to complete such procedure within 12 months.
If Lucky Limited do not complete the process of winding up then penal provision applies as given under Sec. 348(6) & 348(7).

349. OFFICIAL LIQUIDATOR TO MAKE PAYMENTS INTO PUBLIC ACCOUNT OF INDIA

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

350. COMPANY LIQUIDATOR TO DEPOSIT MONIES INTO SCHEDULED BANK

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

351. LIQUIDATOR NOT TO DEPOSIT MONIES INTO PRIVATE BANKING ACCOUNT

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

352. COMPANY LIQUIDATION DIVIDEND AND UNDISTRIBUTED ASSETS ACCOUNT

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

353. LIQUIDATOR TO MAKE RETURNS, ETC.

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

354. MEETINGS TO ASCERTAIN WISHES OF CREDITORS OR CONTRIBUTORIES

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

355. COURT, TRIBUNAL OR PERSON, ETC., BEFORE WHOM AFFIDAVIT MAY BE SWORN

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

356. POWERS OF TRIBUNAL TO DECLARE DISSOLUTION OF COMPANY VOID

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

357. COMMENCEMENT OF WINDING UP BY TRIBUNAL

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

358. EXCLUSION OF CERTAIN TIME IN COMPUTING PERIOD OF LIMITATION

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

359. APPOINTMENT OF OFFICIAL LIQUIDATOR

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

360. POWERS AND FUNCTIONS OF OFFICIAL LIQUIDATOR

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

361. SUMMARY PROCEDURE FOR LIQUIDATION

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

362. SALE OF ASSETS AND RECOVERY OF DEBTS DUE TO COMPANY

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

363. SETTLEMENT OF CLAIMS OF CREDITORS BY OFFICIAL LIQUIDATOR

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

364. APPEAL BY CREDITOR

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

365. ORDER OF DISSOLUTION OF COMPANY

Notified Date of Section: 7/12/2016
Effective Date: 15/12/2016

COMPANIES INCORPORATED OUTSIDE INDIA

379. APPLICATION OF ACT TO FOREIGN COMPANIES (9 QUESTIONS)

Notified Date of Section: 12/09/2013

Q.1. Explain with reference to the provisions of The Companies Act, 2013, whether the following companies are covered under the definition of "foreign companies".
(i)Indian citizens incorporated a company in Dubai for the purpose of carrying on business there.
(ii)A company incorporated in New York, U.S.A., which has a share transfer office at Chennai? **(4 marks; 2013 - Dec)**

Answer:
Foreign company has been defined in Section 2(42) of the Companies Act 2013 as follows:
"Foreign Company" means any company or body corporate incorporated outside India which:

(a)Has a place of business in India whether by itself or through an agent, physically or through electronic mode; and

(b)Conducts any business activity in India in any other manner.

According to Section 386, a share transfer office or share registration office shall constitute a place of business.

Status of foreign company:

(a)A foreign company is not a company as defined under Section 2(20) of the Companies Act 2013.

(b)A foreign company is a body corporate as defined under **Section** 2(11) **of the Companies Act** 2013.

As per **Section** 379 **(Application of Act to foreign companies) of the Companies Act,** 2013, foreign company means a company incorporated outside India but having a place of business in India. Accordingly, to qualify as foreign company; A company must have both the following features:

(i) It should be a company incorporated outside India and
(ii) It should have a place of business in India:

As to what amounts to having a place of business in India; Provides that the expression 'place of business' includes a share transfer or share registration office.

The company incorporated in Dubai for the purpose of carrying on business there is not a foreign company because it has no place of business in India: Its incorporation by Indian citizen is immaterial. In order to be a foreign company it has to have a place of business in India. A company incorporated in Newyork which has a share transfer office at Chennai is a foreign company.

Amendment made by Companies (Amendment) Act, 2017:
Revised Section 379-
(1)Sections 380 to 386 (both inclusive) and Sections 392 and 393 shall apply to all foreign companies:
Provided that the Central Government may, by Order published in the Official Gazette, exempt any class of foreign companies, specified in the Order, from any of the provisions of Sections 380 to 386 and Sections 392 and 393 and a copy of every such order shall, as soon as may be after it is made, be laid before both Houses of Parliament.
(2)Where not less than fifty per cent of the paid-up share capital, whether equity or preference or partly equity and partly preference, of a foreigncompany is held by one or more citizens of India or by one or morecompanies or bodies corporate incorporated in India, or by one or more citizens of India and one or more companies or bodies corporate incorporated in India, whether singly or in the aggregate, such company shall comply with, the provisions of this Chapter and such other provisions of this Act as may be prescribed with regard to the business carried on by it in India as if it were a company incorporated in India."

Q.2. Indian citizens incorporated a company in London for the purpose of carrying on business there. Examine with reference to the relevant provisions of the Companies Act, 2013 whether it is a "Foreign Company". What would be your answer in case the London Company was incorporated by a company registered in India. (4 marks; 2014 - June)

Answer:

As per **Section** 379 a company shall be foreign company if -

(i) It is incorporated outside India; and

(ii) It has established a place of business in India

Thus, for deciding as to whether a company is a foreign company or not, the criterion is to see as to whether the company has established a place of business in India or not, and not the persons who have incorporated the company.

- In this case, Indian citizens have formed a company outside India, Since, the company has not established any place of business in India, the company cannot be said to be a foreign company.
- The fact that Indian citizens have formed a company in a foreign country is immaterial in deciding whether the company is a foreign company or not.
- The answer would have remained same even if the London company had been incorporated by a company registered in India for the same reason as stated above.

Amendment made by Companies (Amendment) Act, 2017:

Revised Section 379-

(1)Sections 380 to 386 (both inclusive) and Sections 392 and 393 shall apply to all foreign companies:

Provided that the Central Government may, by Order published in the Official Gazette, exempt any class of foreign companies, specified in the Order, from any of the provisions of Sections 380 to 386 and Sections 392 and 393 and a copy of every such order shall, as soon as may be after it is made, be laid before both Houses of Parliament.

(2)Where not less than fifty per cent, of the paid-up share capital, whether equity or preference or partly equity and partly preference, of a foreign company is held by one or more citizens of India or by one or more companies or bodies corporate incorporated in India, or by one or more citizens of India and one or more companies or bodies corporate incorporated in India, whether singly or in the aggregate, such company shall comply with the provisions of this Chapter and such other provisions of this Act as may be prescribed with regard to the business carried on by it in India as if it were a company incorporated in India."

Q.3. Robertson Ltd. is a company registered in Thailand. Although, it has no place of business established in India, yet it is doing online business through telemarketing in India. Whether it will be treated as a Foreign Company under the Companies Act, 2013? Explain. (7 marks; 2017 - Dec)

Answer:

(a)According to **Section 2(42) of the Companies Act, 2013,** 'foreign company' means any company or body corporate incorporated*outside India which:

(1)Has a place of business in India whether by itself or through an agent, physically or through electronic mode, and

(2)Conducts any business activity in India in any other manner.

(b)According to the Companies (Registration of Foreign Companies) Rules, 2014, 'electronic mode' means carrying out electronically based, whether main server is installed in India or not, including, but not limited to:

(1)Business to business and business to consumer transactions, data interchange and other digital supply transactions.

(2)Offering to accept deposits or inviting deposits or accepting deposits or subscriptions in securities, in India or from citizens of India.

(3)Financial settlements, web based marketing, advisory and transactional services, database services and products, supply chain management.

(4)Online services such as telemarketing, telecommunicating, telemedicine, education and information research, and

(5)All related data communication services, whether conducted by e-mail, mobile devices, social media, cloud computing, document management, voice or data transmission or otherwise.

Hence, it will be treated as a Foreign company under the Companies Act, 2013.

Q.4. A Company incorporated outside India having shareholders who are all Indian citizens. Examine and state whether the above company can be considered as 'Foreign Company' under the Companies Act, 2013. (2 marks; 2018 - Dec)

Answer:

A company incorporated outside India, will not be deemed to be a foreign company even though all the shareholders are Indian citizens, but it has a place of business in India.

Q.5. Examine whether the following companies can be considered as 'Foreign Companies' under the Companies Act, 2013:

(i) A company which is incorporated outside India employs agents in India but has no place of Business in India.

(ii) A company incorporated outside India having shareholders who are all Indian citizens.

(iii) A company incorporated in India but all the shares are held by foreigners.

(5 marks; 2009-Nov)

Answer:

(i) **Foreign Company:** Please refer 2008 - Nov [6] (b) on page no. 255

(ii) A company incorporated outside India, will not be deemed to be a Foreign Company even though all the shareholders are Indian citizens, unless it has a place of business in India. [Sec. 2 (42) of the Companies Act, 2013]

(iii) A Company Registered in India is not a 'Foreign Company' even if some or all its shares are held by foreign company or foreign institutions or foreign body corporate.

Q.6. Examine in the light of the provisions of the Companies Act, 2013 whether the following companies can be considered as "Foreign Companies":

(i) A company incorporated outside India having a share registration office at New Delhi;

(ii) A company incorporated outside India having shareholders who are all Indian citizens;

(iii) A company incorporated in India but all the shares are held by foreigners.

Also examine whether the above companies can issue Indian Depository Receipts under the provisions of the Companies Act, 2013? (8 marks; 2013-May)

Answer:

Foreign Company:

Please refer 2008 - Nov [6] (b) on page no. 255 ***Thus, according to the above provision:***

(i) (a) A company incorporated outside India having a share registration office at New-Delhi is a foreign company.

(b) A company incorporated outside India having a share registration office at New Delhi can issue Indian Depository Receipts.

(ii) A company incorporated outside India having shareholders who are all India citizens

(i) Having place of business in India:

A company incorporated outside India does not become foreign company within the meaning of Sec. 2 (42) of the Companies Act, 2013 unless it has established a place of business in India. Here in the given case all the shares are held by Indian citizens. The status of the company continues to be a foreign company but such a company shall comply with certain conditions/provisions of the Companies Act, 2013, as may be prescribed with reference to the business carried on by it in India as if it was a company incorporated in India.

(ii) Not having place of business in India:

Since in the given case, the company is incorporated outside India and not having an established

place of business in India, the company is not a foreign company. Its incorporation by Indian citizens is immaterial. In order to be a foreign company it has to have a place of business in India.

(iii) A company incorporated in India but all the shares are held by foreigners cannot issue Indian Depository Receipts.

Q.7. In the light of the provisions of the Companies Act, 2013 explain whether the following Companies can be considered as a 'Foreign Company':

(i) A Company which has no place of business established in India, yet, is doing online business through telemarketing in India.

(ii) A Company which is incorporated outside India employs agents in India but has no place of business in India.

(iii) A Company incorporated outside India having shareholders who are all Indian citizens.

(8 marks; 2018 - Nov)

Answer:

As per Sec. 2(42) of the Companies Act, 2013, a foreign company means any company or body corporate incorporated outside India which:

(a) Has a place of business in India whether by itself or through an agent, physically or through electronic mode; and

(b) Conducts any business activity in India in any other manner.

According to the Companies (Registration of Foreign Companies) Rules 2014, "Electronic mode" means carrying out electronically based, whether main server is installed in India or not, including but not limited to:

(a) Business to business and business to consumer transactions, data interchange and other digital supply transactions;

(b) Offering to accept deposits or inviting deposits or accepting deposits or subscriptions in securities, in India or from citizen of India;

(c) Financial settlements, web based marketing, advisory and transactional services, database services and products, supply chain management;

(d) Online services such as telemarketing, telecom muting, telemedicine, education and information research; and

(e) all related data communication services, whether conducted by e - mail, mobile devices, social media, cloud computing, document management, voice or data transmission or otherwise.

In light of above provisions following answer shall be given whether they are considered as 'Foreign Company'

(i) A company which has no place of business established in India, yet, is doing online business through telemarketing in India. It is considered as a Foreign Company.

(ii) A company which is incorporated outside India employs agents in India but has no place of business in India is not a Foreign Company.

(iii) A company incorporated outside India having shareholders who are all Indian citizens is a foreign company.

Q.8. Robertson Ltd. is a company registered in Thailand. Although, it has no place of business established in India, yet it is doing online business through telemarketing in India. Whether it will be treated as a Foreign Company under the Companies Act, 2013? Explain.

(4 marks; 2015-Nov)

Answer:

According to Sec. 2(42) of the Companies Act, 2013, "foreign company" means any company or body corporate incorporated outside India which:

(a) Has a place of business in India whether by itself or through an agent, physically or

through **electronic mode;** and

(b) Conducts any business activity in India in any other manner.

According to the Companies (Registration of Foreign Companies) Rules, 2014, "electronic mode" means carrying out electronically based, whether main server is installed in India or not, including, but not limited to:

(a) Business to business and business to consumer transactions, data interchange and other digital supply transactions;

(b) Offering to accept deposits or inviting deposits or accepting deposits or subscriptions in securities in India or from citizens of India;

(c) Financial settlements, web based marketing, advisory and transactional services, data base services and products, supply chain management;

(d) **Online services such as telemarketing, telecommuting, telemedicine,education and information research; and**

(e) All related data communication services whether conducted by e-mail, mobile devices, social media, cloud computing, document management, voice or data transmission or otherwise.

Present Case:

Looking to the above description, it can be said that being involved in business activity through telemarketing, Robertson Ltd., will be treated as foreign company.

Q.9. Mr. Ziyan an Indian citizen holds 25% of the paid up capital of Laurel Steven Limited, a company which was incorporated in Singapore with a paid up capital of 10 million Singapore Dollars. Swaraj Limited a company registered in India holds 30% of the paid up capital of Laurel Steven Limited. Laurel Steven Limited has recently established a share transfer office at New Delhi. The Company seeks your advise as to what formalities it should observe as a foreign company under Companies Act, 2013. (4 marks; 2017-Nov)

Answer:

In terms of the definition of a foreign company under Section 2(42) of the Companies Act, 2013 a "Foreign Company" means any company or body corporate incorporated outside India which:

(a) Has a place of business in India whether by itself or through an agent, physically or through electronic mode; and

(b) Conducts any business activity in India in any other manner.

According to Sec. 386 of the Companies Act, 2017, for the purposes of Chapter XXII of the Companies Act, 2013 (companies incorporated outside India), "Place of Business" includes a share transfer or registration office.

Further, Sec. 379 of the Companies Amendment Act, 2017 states that where not less than fifty percent of the paid up share capital, whether equity or preference or partly equity and partly preference, of a foreign company is held by one or more citizens of India or by one of more companies or bodies corporate incorporated in India, or by one or more citizens of India and one or more companies or bodies corporate incorporated in India, whether singly or in aggregate, such company shall comply with the provisions of this chapter and such other provisions of this act as may be prescribed with regard to the business carried on by it in India as if it were a company incorporated in India.

Present Case:

In this case given in the question, the following facts are given:

(a) Laurel Steven Limited was incorporated in Singapore and has a place of business (share transfer office) in India, hence, it is a foreign company.

(b) Its shareholding comprises of twenty five percent held by Mr. Ziyan who is a citizen of India and thirty percent by Swaraj Limited which is a company registered in India. Together the two Indian shareholders hold fifty five percent of the share capital of Laurel Steven Limited.

- Therefore, although Laurel Steven Limited is a foreign company, due to the holding

of more than fifty percent of its share capital by two Indian entities, it will be covered under Sec. 379 and will be treated as a Company incorporated in India or an Indian company.

- However, it may be noted that under Sec. 379, the application of the Companies Act, 2013 on Laurel Steven Ltd. will be only in respect of business carried by it in India and not in relation to its business any where outside India.
- The Companies Act, 2013 under chapter XXII does not require a foreign company to file any documents in relation to its global business.

Formalities to be observed by Foreign Company

Under Section 380 of the Act, a foreign company is required to file for registration within thirty days of the establishment of a place of business in India the following documents with the registrar:

(a) A certified copy of the charter, statutes or memorandum and articles, of the company another instruments constituting or defining the constitution of the company. If the instruments not in English Languages, a certified translation thereof in the English Languages;

(b) The full address of the registered or principal office of the company;

(c) A list of the directors and secretary of the company containing such particulars as may be prescribed;

In relation to the nature of particulars to be provided as above, the companies (Registration of Foreign Companies) Rules, 2014, provide that the list of directors and secretary or equivalent (by whatever name called) of the foreign company shall contain the following particulars, for each of the persons included in such list, namely:

(1) Personal name and surname in full;

(2) Any former name or names and surname or surnames in full;

(3) Father's name or mother's name and spouse's name;

(4) date of birth;

(5) Residential address;

(6) Nationality;

(7) If the present nationality is not the nationality of origin, his nationality of origin;

(8) Passport number, date of issue and country of issue; (if a person holds more than one passport then details of all passports to be given);

(9) income-tax permanent account number (PAN), if applicable;

(10) Occupation, if any;

(11) Whether directorship in any other Indian company, (Director identification Number (DIN), Name and Corporate Identity Number (CIN) of the company in case of holding directorship;

(12) Other directorship or directorships held by him;

(13) Membership number (for secretary only); and

(14) E-mail ID.

(d) the name and address or the names and addresses of one or more persons resident in India authorised to accept on behalf of the company service of process and may notices or other documents required to be served on the company;

(e) The full address of the office of the company in India which is deemed to be its principal place of business in India;

(f) Particulars of opening and closing of a place of business in India on earlier occasion or occasions;

(g) Declaration that none of the directors of the company or the authorised representative in India has ever convicted or debarred from formation of companies and management in India or abroad; and

(h) Any other information as may be prescribed.

380. DOCUMENTS, ETC., TO BE DELIVERED TO REGISTRAR BY FOREIGN COMPANIES (8 QUESTIONS)

Notified Date of Section: 01/04/2014

Q.1. A company incorporated in Malaysia, has established its place of business at Mumbai, what documents are required to be furnished on such establishment of business in India under the Companies Act. (3 marks; 2015 - June)

Answer:.

Foreign Companies shall, within 30 days of establishment of the place of business, deliver to the ROC for registration (Section 380 of the Companies Act, 2013):

(a) Certified Copy of - (i) Charter, (ii) Statutes, (iii) Memorandum and Articles, or (iv) other instrument constituting or defining the constitution of the Company, and, a certified English Translation thereof, if the instrument is not in the English Language,

(b) Full Address of the Registered or Principal Office of the Company,

(c)List of Directors and Secretary of the Company, containing prescribed particulars,

(d)Name(s) and Address(es) of person(s) resident in India, authorised to accept on behalf of the Company service of process and any notices or other documents required to **be** served on **the** Company, and

(e)Full Address of Office of the Company in India which is to be deemed its Principal Place of Business in India.

(f)Particulars of Opening and Closing of a place of business in India on earlier occasion or occasions,

(g)Declaration that none of the Directors or Authorized Representative in India has ever been convicted or debarred from formation of Companies and management in India or abroad, and

(h)Form FC-1, along with - (i) attested copy of approval from RBI/Other Regulators under various law / Regulations, or (ii) a declaration from the Authorized Representative that no such approval is required.

Q.2. What are the documents etc. to be delivered to the Registrar of Companies (MCA) by foreign companies for registration? (8 marks; 2017 - June)

Answer:

Following documents are to be submitted with ROC for registration of a foreign company:

(a) Every foreign company shall, within 30 days of the establishment of its place of business in India, deliver to the Registrar for registration:

1.A certified copy of the Charter, Statutes or Memorandum and Articles, of the company or other instruments constituting or defining the constitution of the company. If the instrument is not in the English language, a certified translation thereof in the English language.

2.The full address of the Registered or Principal Office of the company.

3.a list of the director's and secretary of the company containing such particulars as may be prescribed.

In relation to the nature of particulars to be provided as above, the **Companies (Registration of Foreign Companies) Rules, 2014,** provide that the list of directors and secretary or equivalent (by whatever name called) of the foreign company shall contain the following particulars for each of the persons included in such list, namely:

(a)Personal name and surname in full.

(b)Any former name or names and surname or surnames in full.

(c)father's name or mother's name and spouse's name.

(d)Date of birth.

(e)Residential address.

(f)Nationality.

(g)If the present nationality is not the nationality of origin, his nationality of origin.

(h)Passport number, date of issue and country of issue, (if a person holds more than one passport then details of all passports to be given)
(i)income-tax permanent account number (PAN), if applicable,
(j) Occupation, if any.
(k) Whether directorship in any other Indian company, (Director Identification Number (DIN), Name and Corporate Identity Number (CIN) of the company in case of holding directorship).
(l) other directorship or directorships held by him.
(m) Membership number (for Secretary only), and
(n) E-mail ID.

4.The name and address or the names and addresses of one or more persons resident in India authorized to accept, on behalf of the company, service of process and any notices or other documents required to be served on the company.

5.The full address of the office of the company in India which is deemed to be its principal place of business in India.

6.Particulars of opening and closing of a place of business in India on earlier occasion or occasions.

7.declaration that none of the directors of the company or the authorized representative in India has ever been convicted or debarred from formation of companies and management in India or abroad, and

8. Any other information as may be prescribed.

Q.3. Indian citizens incorporated a company in U.K. for the purpose of carrying on business there. Examine with reference to the relevant provisions of the Companies Act, 2013 whether it is a 'Foreign Company'. What would be your answer in case the U.K. company was incorporated by a company registered in India'. (5 marks; 2008 - Nov)

Answer:

Foreign Company

Companies which are incorporated in foreign countries but establish place of business in India are described as foreign company.

As per Sec. 2(42) of Companies Act, 2013

Foreign Company means a Company incorporated outside India

(a) Which has a place of business in India whether by itself or through an agent, physically or through electronic mode.

(b) Conduct any business activity in India in any other manner.

Here, the expression "Place of Business" includes a share transfer or registration office. [Sec. 386(c) of the Companies Act, 2013]

Further:

According to Sec. 379(2) of the Companies (Amendment) Act, 2017, where not less than fifty percent of the paid-up share capital, whether equity or preference or partly equity and partly preference, of a foreign company is held by one or more citizens of India or by one or more companies or bodies corporate incorporated in India, whether singly or in the aggregate, such company shall comply with the provisions of this Chapter and such other provisions of this Act as may be prescribed with regard to the business carried on by it in India as if it were a company incorporated in India.

Formalities to be observed by Foreign Company [Sec 380]

1. Foreign companies which, after April 1, 1956 establish a place of business in India must, within 30 days, from the date, file with the Registrar:

(a) a certified copy of the charter, statutes or memorandum and articles of the company or other instruments constituting or defining the constitution of the company and if the instrument is not in English language certified translation thereof;

(b) The full address of the registered or principal office of the company;

(c) a list of the directors and secretary of the company, containing the particulars

mentioned in Sec. 380 of Act, 2013 relating to giving name in full, usual residential address, nationality of origin, his business and particulars of other directorship held by him.

(d) the name and address or the names and addresses of some one or more persons resident in Indian authorised to accept on behalf of the company service of process and any notices or other documents required to be served on the company, and

(e) The full address of the office of the company in India, which is to be deemed its principal place of business in India.

(f) Particulars of opening and closing of a place of business in India on earlier occasion or occasions.

(g) declaration that none of the directors of the company or the authorised representative in India has ever been convicted or debarred from formation of companies and management in India or abroad; and

(h) Any other information as is prescribed under Rule 3 in Form FC-1 of Companies (Registration of Foreign Companies) Rules, 2014

2. Every foreign Company existing at the commencement of this Act shall, if it has not delivered to the Registrar before such commencement, the documents and particulars specified in Section 380 of the Companies Act, 2013, continue to be subject to the obligation to deliver those documents and particulars in accordance with that Act.

3. Where any alteration is made or occurs in the documents delivered to the Registrar under this section, the foreign company shall, within thirty days of such alteration, deliver to the Registrar for registration, a return containing the particulars of the alteration in the Form FC 2 of Companies (Registration of Foreign Companies) Rules, 2014.

Authority to whom such documents are to be furnished:

The documents mentioned above are required to be filed at two places. First with the Registrar of the State where the Principal office of business is situated and second copy with the Registrar of New Delhi.

Requirement related to filing of accounts with ROC by Foreign Company:

1. Every foreign company shall, in every calendar year, —

(a) Make out a balance sheet and profit and loss account in such form, containing such particulars and including or having annexed or attached thereto such documents as is prescribed under Rule 5 and Rule 6 of Companies (Registration of Foreign Companies) Rules, 2014 which is as follows.

Rule 5

Audit of accounts of foreign company.

1. Every foreign company shall get its accounts, pertaining to the Indian business operations prepared in accordance with the requirements of clause (a) of sub-section (1) of section 381 and rule 4, audited by a practicing Chartered Accountant in India or a firm or limited liability partnership of practicing Chartered Accountants.

Explanation: For the purposes of this sub-rule, the expressions “Chartered Accountant”, “Firm” and limited liability partnership shall have the meanings respectively assigned to them under the Act and Limited Liability Partnership Act, 2008 (6 of 2009) respectively.

2. The provisions of Chapter X i.e. Audit and Auditors and rules made thereunder, as far as applicable, shall apply, mutatis mutandis, to the foreign company.

Rule 6

List of places of business of foreign company

Every foreign company shall file with the Registrar, along with the financial statement, in Form FC.3 with such fee as provided under Companies (Registration Offices and Fees) Rules, 2014 a list of all the places of business established by the foreign company in India as on the date of balance sheet.

(b) Deliver a copy of those documents to the Registrar:

Provided that the Central Government may, by notification, direct that, in the case of any foreign company or class of foreign companies, the requirements of clause (a) shall not apply, or shall apply subject to such exceptions and modifications as may be specified in that notification.

2. If any such document as is mentioned in sub-section (1) is not in the English language, there shall be annexed to it a certified translation thereof in the English language.

3. Every foreign company shall send to the Registrar along with the documents required to be delivered to him under sub-section (1), a copy of a list in the Form FC 3 of all places of business established by the company in India as at the date with reference to which the balance sheet referred to in sub-section (1) is made out.

Present Case:

Considering the above explained provisions of Sec. 379 of Companies Act, 2013, the company incorporated in U.K. for the purpose of carrying on business in U.K. is not a foreign company. Its incorporation by Indian citizens is immaterial. In order to be a Foreign company the U.K. Company must have a place of business in India. There will be no difference in answer, even if the U.K. Company was incorporated by a company registered in India.

Q.4. A company incorporated in Singapore has established its place of business at Chennai. State the documents which are required to be furnished on such establishment of business in India under the Companies Act, 2013 and the authorities to whom such documents are to be furnished. (5 marks; 2009 - May)

Answer:

Please refer 2008 - Nov [6] (b) on page no. 255

Q.5. DEJYAS Company Limited incorporated in Singapore,desires to establish a place of business at Mumbai. You being a practicing Chartered Accountant has been appointed by the company as a liaison officer, for compliance of legal formalities on behalf of the company. Examining the provisions of the Companies Act, 2013 state the documents you are required to furnish on behalf of the company, on the establishment of a place of business at Mumbai. (8 marks; 2012 - May)

Answer:

Please refer 2008 - Nov [6] (b) on page no. 255

Q.6. State the documents that are required to be delivered by a foreign company at the time of establishment of a place of business in India. State to whom the said documents are to be delivered. (4 marks; 2014-May)

Answer:

Please refer 2008 - Nov [6] (b) on page no. 255

Q.7. Qinghai Huading Industrial Company Ltd., incorporated in China established a place of business at Mumbai. The Charter/Documents constituting the Company is in Mandarian Chinese (Chinese local language). It is required inter alia to file a certified translation of above documents with the Registrar of Companies in India. Who can authenticate the translated charter/documents as per the provisions of the Companies Act, 2013 and Rules made there under governing foreign companies in case such translation is made at Mumbai? (2 marks; 2018 - May)

Answer:

According to Rule 10 of the Companies (Registration of Foreign Companies) Rules, 2014,

(i) All the documents required to be filed with the Registrar by the foreign companies shall be in English language and where any such document is not in English language, there shall be attached a translation thereof in English language duly certified to be correct in the manner given in these rules.

(ii) Where such translation is made within India, it shall be authenticated by:

(a) An advocate, attorney or pleader entitled to appear before any High Court; or

(b) An affidavit, of a competent person having, in the opinion of the Registrar, an adequate knowledge of the language of the original and of English.

In the instant case, Qinghai Huading Industrial Company Ltd. can translate the related documents within India and they shall be authenticated by the persons mentioned under the above Rules.

Q.8. Galilio Ltd. is a foreign company in Germany and it established a place of business in Mumbai. Explain the relevant provisions of the Companies Act, 2013 and rules made thereunder relating to preparation and filing of financial statements, as also the documents to be attached along with the financial statements by the foreign company.

(4 marks; 2016-May)

Answer:

Provisions relating to preparation and of filing the Financial Statement

Please refer 2008 - Nov [6] (b) on page no. 255

Documents to be attached along with the Financial Statement as per

Companies (Registration of Foreign Companies Rules, 2014:

(a) Documents required to be annexed to Financial Statement as per Chapter IX Accounts of Companies (e.g. Board's Report, Auditors' Report, etc.) [Rule 4(1)(i)]

(b) Copies of latest Consolidated Financial Statements of the Parent Foreign Company, as submitted to the prescribed authority in the country of its incorporation under the prevailing law in that country. [Rule 4(1)(ii)j -

(c) Statement of Related Party Transactions showing specified particulars. [Rule 4(2)(a)]

(d) Statement of Repatriation of Profits showing specified particulars. [Rule 4(2)(b))]

(e) Statement of Transfer of Funds showing specified particulars. [Rule 4(2)(c)]

(f) Form FC-3, showing a list of all Places of Business established by the Foreign Company in India as on the date of Balance Sheet.

Time limit

Time Limit for filing is six months from the close of the financial year. Onapplication by the company, the time limit is extendable by ROC for maximum another 3 months, for any special reason.

381. ACCOUNTS OF FOREIGN COMPANY (1 QUESTION)

Notified Date of Section: 01/04/2014

Q.1. State briefly the requirements relating to filing of accounts with the Registrar of Companies by the Foreign Company in respect of Global Business as well as Indian Business.

(2 marks; 2019 - June)

382. DISPLAY OF NAME, ETC., OF FOREIGN COMPANY. (1 QUESTION)

Notified Date of Section: 12/09/2013

Q.1. The liability of members of Style Limited, a company incorporated in Singapore, is limited. The company plans to start a place of business in Mumbai from 1st Dec., 2016. It has taken an office space in Andheri (West), Mumbai for that purpose. The person who is to take charge of Mumbai Office seeks your advice regarding the provisions of the Companies Act, 2013, in respect of displaying of the company's name etc. at its Mumbai office as well as in its business letters and other documents. Advise him with reference to the provisions of the Companies Act, 2013 governing foreign companies.

(4 marks; 2016-Nov)

Answer:

Provision

Sec. 382 of the Companies Act, 2013 provides that every foreign company shall:

(a) conspicuously exhibit on the outside of every office or place where it carries on business in India, the name of the company and the country in which it is incorporated, in letters easily legible in English characters, and also in the characters of the language or one of the languages in general use in the locality in which the office or place is situate;

(b) cause the name of the company and of the country in which the company is incorporated, to be stated in legible English characters in all business letters, bill-heads and letter paper, and in all notices, and other official publications of the company; and

(c) if the liability of the members of the company is limited, cause notice of that fact:

(i) to be stated in every such prospectus issued and in all business letters bill-heads, letter paper, notices, advertisements and other official publications of the company, in legible English characters; and

(ii) to be conspicuously exhibited on the outside of every office or place where it carries on business in India, in legible English characters and also in legible characters of the language or one of the languages in general use in the locality in which the office or place is situate.

Present Case: Hence, the person who is to take charge of Mumbai Office of Style Limited may follow the above provisions in respect of displaying of the company's name etc. at its Mumbai office as well as in its business letters and other documents.

383. SERVICE ON FOREIGN COMPANY (1 QUESTION)

Notified Date of Section: 12/09/2013

Q.1. X Inc is a company registered in UK and carrying on Trading Activity, with Principal Place of Business in Chennai. Since the company did not obtain registration or make arrangement to file Return, the State GST Officer having jurisdiction, intends to serve show cause notice on the Foreign Company. As Standing Counsel for the Department, advise the GST Officer on valid service of Notice. **(4 marks; 2014 - Nov)**

Answer:

X Inc. a company registered in UK and carrying on trading activity, with Principal Place of Business in Chennai has not obtained GST registration. The state GST officer having jurisdiction intends to serve show cause notice on the company. As standing counsel for department I would advice the GST officer to continue to issue notice to the company by quoting the relevant laws requiring registration of the said foreign company & to file returns. The GST officer is right in his contention that since the principal place of business of Foreign Company is in Chennai, it is required to register itself and file returns to the GST authority.

Manner of serving Notice [Sec 383]

Notice can be served or addressed to any person whose name and address have been delivered to ROC under Sec. 380 and left at or sent by post to, the address which has been so delivered to ROC, or by electronic mode.

384. DEBENTURES, ANNUAL RETURN, REGISTRATION OF CHARGES, BOOKS OF ACCOUNT AND THEIR INSPECTION

Notified Date of Section: 01/04/2014

385. FEE FOR REGISTRATION OF DOCUMENTS

Notified Date of Section: 01/04/2014

386. INTERPRETATION.

Notified Date of Section: 12/09/2013

387. DATING OF PROSPECTUS AND PARTICULARS TO BE CONTAINED THEREIN (1 QUESTION)

Notified Date of Section: 01/04/2014

Q.1. Under Section 387 of the Companies Act, 2013, what are the particulars required to be included in a prospectus to be issued by an existing Foreign Company?
(3 marks; 2014 - Dec)

Answer:

Sub section 1 **of Section** 387 reads as follows:

No person shall issue, circulate or distribute in India any prospectus offering to subscribe for securities of a company incorporated or to be incorporated outside India, whether the company has or has not established, or when formed will or will not establish, a place of business in India, unless the prospectus is dated and signed, and

(a) Contains particulars with respect to the following matters, namely:

(i)The instrument constituting or defining the constitution of the company;

(ii)The enactments or provisions by or under which the incorporation of the company was effected;

(iii)Address in India where the said instrument, enactments or provisions, or copies thereof, and if the same are not in the English language, a certified translation thereof in the English language can be inspected;

(iv)The date on which and the country in which the company would be or was incorporated; and

(v)Whether the company has established a place of business in India and, if so, the address of its principal office in India; and

(b)States the matters specified under Section 26.

Provided that sub-clauses (i), (ii) and (iii) of clause (a) of this sub-section shall not apply in the case of a prospectus issued more than two years after the date at which the company is entitled to commence business.

388. PROVISIONS AS TO EXPERT'S CONSENT AND ALLOTMENT

Notified Date of Section: 01/04/2014

389. REGISTRATION OF PROSPECTUS

Notified Date of Section: 01/04/2014

390. OFFER OF INDIAN DEPOSITORY RECEIPTS

Notified Date of Section: 01/04/2014

391. APPLICATION OF SECTIONS 34 TO 36 AND CHAPTER XX

Notified Date of Section: 01/04/2014

392. PUNISHMENT FOR CONTRAVENTION(2 QUESTIONS)

Notified Date of Section: 01/04/2014

Q.1. ABC Limited, a foreign company failed to deliver some desired documents to the Registrar of Companies as required under Section 380 of the Companies Act, 2013. State the provisions of penalty prescribed under the said Act, which can be levied on ABC Limited for its failure. **(4 marks; 2015 - May)**

Answer:

Punishment for contravention [Sec 392]

Without prejudice to the provisions of section 392, if a foreign company contravenes the provisions of this Chapter, the foreign company shall be punishable with

(i) Fine which shall not be less than one lakh rupees but which may extend to three lakh rupees and

(ii) In the case of a continuing offence, with an additional fine which may extend to fifty thousand rupees for every day after the first during which the contravention continues and
(iii) Every officer of the foreign company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than twenty five thousand rupees but which may extend to five lakh rupees, or with both.

Q.2. Ronnie Coleman Ltd., a foreign Company failed to deliver some documents to the Registrar of Companies as required under Section 380 of the Companies Act, 2013. State the provisions of Penalty prescribed under the Act, which can be levied on Ronnie Coleman Ltd. for its failure to deliver the documents. (2 marks; 2018-Nov)

Answer:

The Companies Act, 2013 lays down the governing provisions for foreign companies in Chapter XXII which is comprised of Sections 379 to 393. The penalties for non-filing or for contravention of any provision for this chapter including for non filing of documents with the Registrar as required by Sec. 380 and other Sections in this chapter are laid down in Sec. 392 of the Act, which provides that if a foreign company contravenes the provisions of this chapter, the foreign company shall be punishable with a fine which shall not be less than Rs. 1,00,000 but which may extend to Rs. 3,00,000 and in the case of continuing offence, with an additional fine which may extend to Rs. 50,000 for every day after the first during which the contravention continues and every officer of the foreign company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less. than Rs. 25,000 but which may extend to Rs. 5,00,000 or, with both.

393. COMPANY'S FAILURE TO COMPLY WITH PROVISIONS OF THIS CHAPTER NOT TO AFFECT VALIDITY OF CONTRACTS, ETC.

Notified Date of Section: 01/04/2014

Offences & Penalties

435. ESTABLISHMENT OF SPECIAL COURTS (1 QUESTION)

Notified Date of Section: 18/05/2016

Q.1. State the law with respect to the Establishment of Special Court. Mr. A is Judicial Magistrate in a Lower Court. He was appointed to hold the office of the Special Court for the speedy disposal of the pending cases under the Act. Decide as per the applicable provisions of the Companies Act, 2013, whether the appointment of Mr. A is tenable.

(4 marks; 2018 - June)

Answer:

The Central Government may for the purpose of providing speedy trial of offences punishable under this Act with imprisonment with two year or more, by notification establish or designate Special Courts, [sub - section (1) of Section 435, as amended]. All other offences shall be tried, as the case may be, by a Metropolitan Magistrate or a Judicial Magistrate of the First Class having jurisdiction to try any offence under this Act or under any previous company law. [Proviso to sub - section (1) of Section 435, as inserted]. A Special Court shall consist of a single judge appointed **by** 3 Central Government. The Judge shall be appointed with the concurrent, the Chief Justice of the High Court within whose jurisdiction the judge to be appointed is working.

Appointment of judge: A Special Court shall consist of a single judge who shall be appointed by the Central Government with the concurrence of the Chief Justice of the High Court within whose jurisdiction the judge to be appointed is working. A person shall not be qualified for appointment as a judge of a Special Court unless he is, immediately before such appointment, holding office of a Sessions Judge or an Additional Sessions Judge. Since **in the given case,** Mr. A who is a Judicial Magistrate in a lower court, was appointed to hold the office of the special court for the speedy disposal of the pending cases under the Act. As per the above provision, person shall be qualified for appointment as a judge of a Special Court if he is, immediately before such appointment, holding office of a Sessions Judge or an Additional Sessions Judge. Here, Mr. A. was not complying with the eligibility criteria, so his appointment as a judge of special court is not tenable.

436. OFFENCES TRIABLE BY SPECIAL COURTS

Notified Date of Section: 18/05/2016

437. APPEAL AND REVISION

Notified Date of Section: 18/05/2016

438. APPLICATION OF CODE TO PROCEEDINGS BEFORE SPECIAL COURT

Notified Date of Section: 18/05/2016

439. OFFENCES TO BE NON-COGNIZABLE (4 QUESTIONS)

Notified Date of Section: 12/09/2013

Q.1. Which offences are deemed to be Non-cognizable under the Companies Act, 2013? Enumerate the relevant provisions. (5 marks; 2015 - Dec)

Answer:

Offences to be Non-Cognizable

1. Notwithstanding anything in the Code of Criminal Procedure, 1973, every offence under this Act except the offences referred to in sub-section (6) of Section 212 shall be deemed to be non-cognizable within the meaning of the said Code.

2. 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 of the company, or of a person authorised by the Central Government in that behalf.

3. Notwithstanding anything contained in the Code of Criminal Procedure, 1973, where the complainant under sub-section (2) 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.
4. The provisions of sub-section (2) 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.

Q.2. In the annual general meeting of XYZ Ltd., while discussing on the matter of retirement and reappointment of director Mr. X, allegations of fraud and financial irregularities were levelled against him by some members. This resulted into chaos in the meeting. The situation was normal only after the Chairman declared about initiating an inquiry against the director, Mr. X, however, could not be re-appointed in the meeting. The matter was published in the newspapers next day. On the basis of such news, whether the court can take cognizance of the matter and take action against the director on its own?

Justify your answer with reference to the provisions of the Companies Act, 2013.

(4 marks; 2017 - Dec)

Answer:

Section 439 of the Companies Act, 2013 provides that offences under the Act shall be non-cognizable. As per this section:
1. Notwithstanding anything in the Code of Criminal Procedure, 1973, every offence under this Act except the offences referred to in sub section (6) of section 212 shall be deemed to be non-cognizable within the meaning of the said Code.
2. 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 of the company, or of a person authorized by the Central Government in that behalf.
Thus, in the given situation, the court shall not initiate any suo moto action against the director Mr. X without receiving any complaint in writing of the Registrar of Companies, a shareholder of the company or of a person authorized by the Central Government in this behalf.

Q.3. In the annual general meeting of XYZ Ltd, while discussing on the matter of retirement and reappointment of director Mr. X, allegations of fraud and financial irregularities were levelled against him by some members. This resulted into chaos in the meeting. The situation was normal only after the chairman declared about initiating an inquiry against the director. Mr. X, however, could not be re-appointed in the meeting. The matter was published in the newspapers next day. On the basis of such news, whether the court can take cognizance of the matter and take action against the director on its own?

Justify your answer with reference to the provisions of the Companies Act, 2013.

(4 marks; 2015- Nov)

Answer:

Provision:

Sec. 439 of the Companies Act, 2013 provides that offences under the Act shall be non-cognizable. As per this section:

1. Notwithstanding anything in the Code of Criminal Procedure, 1973, every offence under this Act except the offences referred to in Sec. 212(6) shall be deemed to be non-cognizable within the meaning of the said Code.

2. 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 (Inserted by Companies (Amendment) Act, 2017) of the company, or of a person authorized by the Central Government in that behalf.

Present Case:

Thus, in the given case, the court shall not initiate any suo moto action against the director Mr. X without receiving any complaint in writing of the Registrar of Companies, a shareholder of the company or a member (Inserted by Companies (Amendment) Act, 2017) of a person authorized by the Central Government in this behalf.

Q.4. Mrs. Preeti, a lady aged about 32 years and Managing Director of M/s Grow more Plantations Ltd., has been arrested for an offence covered under section 447 of the Companies Act, 2013 on a complaint made by the Director, Serious Fraud Investigation Officer. Mrs. Preeti seeks your legal advise as to the conditions under which she can be released on bail and the role of Special Court in this regard. (4 marks; 2017- Nov)

Answer:

- Overriding the effect and provisions given under the Code of Criminal Procedure, 1973, every offence under this act except offences under Sec. 212(6) of the Companies Act, 2013, which deals with the investigation into affairs of company by serious fraud investigation office, shall be deemed to be non-cognizable within the meaning of said code.
- A Court shall taken cognizance of any offence under this Act which is alleged to have been committed by any company or any officer thereof only on the written complaint of:

  (a) The registrar

  (b) A shareholder of the company, or

  (c) Of a person authorized by the Central Government in that behalf.
- So, in this case, Mrs. Preeti can make application to a court which it in its jurisdiction for a bail.

440. TRANSITIONAL PROVISIONS

Notified Date of Section: 18/05/2016

441. COMPOUNDING OF CERTAIN OFFENCES (6 QUESTIONS)

Notified Date of Section: 01/06/2016

Q.1. State the different types of Penalties prescribed under the Companies Act, 2013. (3 marks; 2018 - June)

Answer:

Types of Penalties:

There are five types of penalties that have been contemplated under the Companies Act, 2013. They are:

(1) Fine only
(2) Imprisonment or fine
(3) Imprisonment or fine or with both
(4) Imprisonment and fine and
(5) Imprisonment only

Of the above, the offences referred to in (1) to (3) are compoundable and others are not compoundable.

Q.2. All offences under the Companies Act, 2013 are non-cognizable. Comment. (2 marks; 2018 - Dec)

Answer:

As per Section 439(1) of The Companies Act, 2013, every offence under the Companies Act, 2013 except the offences referred to in Section 212(6) shall be deemed to be non-cognizable under the code of criminal procedure. As per Section 212(6), offence covered under Section 447 of the Act shall be cognizable. Therefore, the given statement in the question is not valid.

Q.3. Explain what is meant by (i) Compoundable Offences and (ii) Non- Compoundable Offences. State the authorities who can compound the said offences. Indicate whether the following offences are compoundable or non- compoundable:

(i) Failure to hold the annual general meeting of the company.

(ii) Failure to file copies of annual accounts with the Registrar of Companies.

(iii) Acceptance of deposits in excess of the prescribed limits and

(iv) Non-distribution of dividend to the members within the prescribed time.

(8 marks; 2011-May)

Answer:

Compounding of Offences

Fine and imprisonment can be imposed only by competent Tribunal. Flow ever, instead of going to Tribunal, the offender (company or its officer) may agree to pay composition amount. Order for paying composition money can be made by quasi-judicial authorities. This is called 'compounding of offences'.

'Compounding' is essentially a compromise arrangement between administrator of the enactment and person committing an offence. Compounding crime consists of receipt of some consideration (termed as compounding fees) in return for an agreement not to prosecute one who has committed an offence **Compounding of certain offences:**

As per Sec. 441 (1) of Companies (Amendment) Act, 2017,

notwithstanding anything contained in the Code of Criminal Procedure, 1973, any offence punishable under this Act (whether committed by a company or any officer thereof) not being an offence punishable with imprisonment only, or punishable with imprisonment and also with fine, may, either before or after the institution of any prosecution, be compounded by -

(a) The Tribunal; or

(b) Where the maximum amount of fine which may be imposed for such offence does not exceed five lakh rupees, by the Regional Director or any officer authorised by the Central Government.

On payment or credit, by the company or, as the case may be the officer, to the Central Government of such sum as that Tribunal or the Regional Director or any officer authorized by the Central Government, as the case may be, may specify:

Provided that the sum so specified shall not, in any case, exceed the maximum amount of the fine which may be imposed for the offence so compounded:

Provided further that in specifying the sum required to be paid or credited for the compounding of an offence under this sub-section, the sum, if any, paid by way of additional fee under sub-section(2) of section 403 shall be taken into account:

Provided also that any offence covered under this sub-section by any company or its officer shall not be compounded if the investigation against such company has been initiated or is pending under this Act.

Note: Reference to Tribunal by ROC will be made in Form No. NCLT-9 [Rule 88 of NCLT Rules, 2016]

As per sec. 441(2) of the Companies Act, 2013, nothing in sub-section **(1)** shall apply to an offence committed by a company or its officer within a period of three years from the date on which a similar offence committed by it or him was compounded under this section.

Explanation. — For the purposes of this section,—

(a) Any second or subsequent offence committed after the expiry of a period of three years from the date on which the offence was previously compounded, shall be deemed to be a first offence;

(b) "Regional Director" means a person appointed by the CG as a Regional Director for the purposes of this Act.

Non Compoundable offences

These are those offences which are punishable with imprisonment and fine both.

Solution to given problem

(i) Failure to hold the AGM of the company is compoundable u/s 99 of the Companies Act, 2013 because there is only a monetary penalty upto one lakh rupees and further fine upto five thousand rupees per day.

(ii) Failure to file copies of annual accounts with the ROC is also compoundable under Sec. 137 (3) of Companies Act, 2013 because there is monetary penalty only which is one thousand rupees per day upto ten lakh rupees

(iii) Acceptance of deposits in excess of the prescribed limits is a non- compoundable offence under Sec. 76 because it is punishable with imprisonment and fine.

As per Sec. 76A Companies (Amendment) Act, 2017 where company contravenes conditions prescribed under Sec. 73 or Sec. 76, the company shall in addition to the payment of amount and interest, be punishable with a fine which shall not be less than one crore rupees or twice the amount of deposit accepted by the company, whichever is lower, but which may extend to ten crore rupees. Further more, every officer of the company who is in default shall be punishable with imprisonment which may extend to seven years or with a fine which shall not be less than twenty- five lakh rupees but which may extend to two crores rupees.

(iv) According to Sec. 127, where a dividend has been declared by a company but has not been paid or the warrant in respect thereof has not been posted within thirty days from the date of declaration to any shareholder entitled to the payment of the dividend, every director of the company shall, if he is knowingly a party to the default, be punishable with imprisonment which may extend to two years and with fine which shall not be less than one thousand rupees for every day during which such default continues and the company shall be liable to pay simple interest at the rate of eighteen percent per annum during the period for which such default continues since the offence is punishable by fine and imprisonment both hence the offence is non compoundable.

Q.4. The Directors of a public company received a show cause notice from the Registrar of Companies for violation of Sec. 185 of the Companies Act, 2013. State whether the said offence is compoundable under the said Act. Is it possible for a person to apply for compounding of offence even after prosecution has been launched? Whether penalty paid in respect of compounding of an offence will be treated as a dis-qualification under Part I of Schedule V to the Companies Act, 2013 requiring approval of the Central Government for the appointment of such person as a Managing Director of a public company? (8 marks; 2012-Nov)

Answer:

Compounding of offence:

Please refer 2011 - May [5] (a) (ii) on page no. 288

Present Case:

1. As per Sec. 185(4) of the Companies (Amendment) Act, 2017 if any loan is advanced or a guarantee or security is given or provided or utilised in contravention of the provisions of this section,—

(i) The company shall be punishable with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees:

(ii) every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees; and

(iii) the director or the other person to whom any loan is advanced or guarantee or security is given or provided in connection with any loan taken by him or the other person, shall be punishable with imprisonment which may extend to six months or with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees, or with both.

Since the offence is punishable by fine and imprisonment both hence the offence is not compoundable

2. Compounding u/s 441 of Companies Act 2013, Act can be done before or after institution of prosecution. Prior permission of Tribunal is not necessary for compounding of offence.

3. If a person has been convicted by a Tribunal of any offence and sentenced to imprisonment for a period of 7 years or more, he shall not be eligible to be a director of a company [Proviso to Sec. 164(1)]

Since imprisonment u/s 185 of Companies Act, 2013 is for six months therefore it is not a disqualification.

Q.5. Mr. X a Director of XYZ Limited received a show cause notice from the Registrar of Companies for an offence under Sec. 188 of the Companies Act, 2013 in respect of certain contracts entered into with the company without the approval of the Central Government. The offence is punishable with fine only under Sec. 450 of the Act. He seeks your advice whether he can take steps for getting the offence compounded either before or after the prosecution is launched. Advise him explaining the effect of compounding of offence either before or after institution of prosecution.

(5 marks; 2008-Nov)

Answer:

Compounding of offence:

Please refer 2011 - May [5] (a) (ii) on page no. 288

Present Case:

Since the offence is punishable with fine only u/s 450 of the Act, 2013 therefore the offence is compoundable.

Q.6. Mr. Joseph, a member of Armaments Ltd., is aggrieved due to failure of the company to make payment of dividend declared in the AGM held in August, 2015. He makes a complaint, in writing, before the court of competent jurisdiction within the prescribed period of limitation, but the court refused to take cognizance of the alleged offence. Explain the legal position in this regard under the Companies Act, 2013.

Also state the offences under the Companies Act, 2013 which are cognizable and which are non-cognizable. **(4 marks; 2016-May)**

Answer:

Provision:

As per Sec. 123(4) of the Companies Act, 2013, the amount of dividend including interim dividend shall be deposited in a scheduled bank in a separate bank account within five days from the date of declaration of dividend.

According to Sec. 127, where a dividend has been declared by a company but has not been paid or the warrant in respect thereof has not been posted within thirty days from the date of declaration to any shareholder entitled to the payment of the dividend, every director of the company shall, if he is knowingly a party to the default, be punishable with imprisonment which may extend to two years and with fine which shall not be less than one thousand rupees for every day during which such default continues and the company shall be liable to pay simple interest at the rate of eighteen percent per annum during the period for which such default continues since the offence is punishable by fine and imprisonment both hence the offence is non compoundable.

Cognizable offence:

Cognizable offence means such a severe offence in which aggrieved person arrested immediately without any warrant.

Non Cognizable offence:

Non cognizable offence means it is not such severe offence and person aggrieved is not be arrested without warrant.

Present Case:

In the present case, Mr. Joseph, a member of Armaments Ltd. is aggrieved due to failure of the company to make payment of dividend declared in the AGM held in August 2015. He makes a complaint, in writing, before the court of competent jurisdiction within the prescribed period of limitation, but the court refused to take cognizance of the alleged offence.
Here, the Court shall take cognizance of the offence relating to non payment of dividend as the shareholders have made a complaint in writing before the competent jurisdiction.

442. MEDIATION AND CONCILIATION PANEL (4 QUESTIONS)

Notified Date of Section: 01/04/2014

Q.1. Difference between Mediation and Conciliation.

Answer:

The meaning of these words as understood in India appears to be similar. 'Mediation' is a way of settling disputes by a third party who helps both sides to comeio an agreement, which each considers acceptable. Mediation can be 'evaluative' or 'facilitative'. 'Conciliation', is a procedure like mediation but the third party, the conciliator, takes a more interventionist role in bringing the two parties together and in suggesting possible solutions to help achieve a settlement. The difference lies in the fact that the 'conciliator' can make proposals for settlement, 'formulate' or 'reformulate' the terms of a possible settlement while a 'mediator' would not do so but would merely facilitate a settlement between the parties.
From the very wording it appears that the 'Mediation and Conciliation Panel' as contemplated under Section 442 (as the name suggests) will adopt dual approach of 'Mediation' as well as 'Conciliation' in settling the disputes.

Q.2. Define the terms 'Meditation' and 'Conciliation'. **(2 marks; 2019- June)**

Q.3. What is the object of Constituting Panel for Mediation and Conciliation under the Companies Act, 2013? Who can file application for mediation and conciliation?

(4 marks; 2015-Nov)

Answer:

Meaning of Mediation and Conciliation

In common parlance, mediation means intervention of some third party in a dispute with the intention to resolve the dispute. Similarly, conciliation means the powers of adjusting or settling disputes in a friendly manner through extra judicial means.

Mediation and Conciliation Panel [Sec. 442(1)] The Regional Director shall maintain a panel of experts to be called as the Mediation and Conciliation Panel consisting of such number of experts having such qualifications as is prescribed under Companies (Mediation and Conciliation) Rules, 2016. **Object of Constituting Panel [Sec. 442 (1)]** For mediation between the parties during the pendency of any proceedings before the Central Government, or NCLT.

Role of Mediator or Conciliator [Rule, 17 of Companies (Mediation and Conciliation) Rules, 2016]

The mediator or conciliator shall attempt to facilitate voluntary resolution of the dispute by the parties, and communicate the view of each party to the other, assist them in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise and generating options in an attempt to resolve the dispute, emphasising that it is the responsibility of the parties to take decision which affect them and he shall not impose any terms of settlement on the parities.

Provided that on consent of both the parties, the mediator or conciliator may impose such terms and conditions on the parties for early settlement of the dispute as he may deem fit.

Who can file application for mediation and conciliation

Any of the parties of the proceedings.

Q.4. What do you understand by the terms "Mediation" and "Conciliation"? Mention the provisions regarding Mediation and Conciliation Panel under the Companies Act, 2013.

(3 marks; 2017-Nov)

Answer:

Mediation and Conciliation Meaning:

(i) Mediation: In common parlance, Mediation means intervention of some third party in a dispute with the intention to resolve the dispute.

(ii) Conciliation: Conciliation means the process of adjusting or settling disputes in a friendly manner through extra juridical means.

Mediation and Conciliation Panel Provisions:

- The new provisions introduced by the Companies Act, 2013 has come into force with effect from 1st April, 2014 vide notification dated 26th of March, 2014. Sec. 442 of the Companies Act, 2013 deals with the constitution and functioning of the mediation and constitution penal in order to dispose the matter.
- Sec. 442 lays the following law with respect to the constitution and working of the Mediation and Conciliation Panel:

  1. Central Government to maintain the Penal of Mediators:

  - The Central Government shall maintain a penal of experts to be known as Mediation and Conciliation Penal for mediation between the parties during the pendency of any proceedings before the Central Government or the Appellate Tribunal under this Act.
  - Hence, it is important that the case should be pending before the Central Government or the Tribunal or the Appellate Tribunal under this Act.

  2. Penal consisting of experts:

  - The penal shall consist of such number of experts having such qualification as may be prescribed.

  3. Filing of Application:

  - Application for mediation and conciliation can be made by:

    (i) any parties to the proceedings (It shall be accomplished with such fees and in such form as may be prescribed)

    (ii) The Central Government or the Tribunal or the Appellate Tribunal before which any proceeding is pending mayi Suo moto refer any matter pertaining to such proceeding to such number of experts as it may deem fit.

  4. Appointment of experts from panel:

  - The Central Government or the Tribunal or the Appellate Tribunal before which any proceeding is pending may appoint one or more experts from the Panel as may be deemed fit.

  5. Fees, teams and conditions of the experts:

  - The fee and other terms and conditions of experts of the mediation and conciliation panel shall be such as may be prescribed.

  6. Procedure of the disposal of matter:

  - In order to dispose the matter, the Mediation and Conciliation Penal shall follow such procedure as may be prescribed.

  7. Period for the disposal of matter:

  - The Mediation and Conciliation Panel shall dispose of the matter referred to it within a period of three months from the date of such reference and forward its recommendations to the Central Government or the Tribunal or the Appellate Tribunal as the case may be.

  8. Filing of objection on the recommendation of the penal:

  - Any party aggrieved by the recommendation of the Mediation and Conciliation

Penal may be objections to the Central Government or the Tribunal or the Appellate Tribunal as the case may be.

443. POWER OF CENTRAL GOVERNMENT TO APPOINT COMPANY PROSECUTORS.

Notified Date of Section: 12/09/2013

444. APPEAL AGAINST ACQUITTAL. (2 QUESTIONS)

Notified Date of Section: 12/09/2013

Q.1. What are the powers of the Central Government under the Companies Act, 2013 regarding to Appeal against acquittal? (2 marks; 2018- Dec)

Answer:

According to Section 444 of the Companies Act, 2013, The Central Government may in any case arising under this Act direct:-

(a) Any Company Prosecutor or

(b) Authorise any other person either by name or by virtue of his office, to present an appeal from an order of acquittal passed by any court other than High Court.

Appeal presented by such prosecutor or other person shall be deemed to have been validly presented to the appellate court.

Q.2. What are the powers of the Central Government under the Companies Act, 2013 regarding appeal against acquittal? (2 marks; 2018-Nov)

Answer:

Power of the Central Government to appeal against acquittal:

According to Sec. 444 of the Companies Act, 2013, the Central Government may, in any case arising under this Act, direct:

(a) Any company prosecutor, or

(b) Authorise any other person either by name or by virtue of his office,to represent an appeal from an order of acquittal passed by any Court, other than a High Court.

Appeal presented by such prosecutor or other person shall be deemed to have been validly presented to the appellate Court.

445. COMPENSATION FOR ACCUSATION WITHOUT REASONABLE CAUSE.

Notified Date of Section: 12/09/2013

446. APPLICATION OF FINES.

Notified Date of Section: 12/09/2013

446 A. (1 QUESTION)

Notified Date of Section: 09/02/201

Q.1. State briefly the factors to be considered by the Court while deciding the amount of fine or imprisonment under section 446 A of the Companies Act, 2013. (4 marks; 2018 - Dec)

Answer:

(i) **Section 446A:** The court or the Special court, while deciding the amount of fine or imprisonment under this Act, shall have due regard to the following factors, namely -

(a)Size of the Company;

(b)Nature of business carried on by the company;

(c)Injury to public interest;

(d) Nature of the default, and

(e) Repetition of the default

446 B.

Notified Date of Section: 09/02/2018

447. PUNISHMENT FOR FRAUD. (1 QUESTION)

Notified Date of Section: 12/09/2013

Q.1. Explain the meaning of 'Fraud' in relation to the affairs of a company and the punishment provided for the same in Section 447 of the Companies Act, 2013.

(4 marks; 2015 - May)

Answer:

As per explanation to Sec. 447 of Companies Act, 2013

"Fraud" in relation to affairs of a company or anybody corporate, includes any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss.

Punishment for Fraud [Sec. 447 of Companies (Amendment) Act, 2017]

Without prejudice to any liability including repayment of any debt under this Act or any other law for the time being in force, any person who is found to be guilty of fraud involving an amount of at least ten lakh rupees or one per cent of the turnover of the company, whichever is lower, 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:

Provided that where the fraud in question involves public interest, the term of imprisonment shall not be less than three years:

Provided further that where the fraud involves an amount less than ten lakh rupees or one per cent of the turnover of the company, whichever is lower and does not involve public interest, any person guilty of such fraud shall be punishable with imprisonment for a term which may extend to five years or with fine which may extend to fifty lakh rupees or with both.

448. PUNISHMENT FOR FALSE STATEMENT. (2 QUESTIONS)

Notified Date of Section: 12/09/2013

Q.1. Mr. Z, a director of Southern Highway Tolls Private Limited, is duly authorized by the Board of Directors to prepare and file returns, report or other documents to the Registrar of Companies on behalf of the company. Though he filed all the required documents to Registrar in time, however, subsequently it was found that the filed documents were false and inaccurate in respect to material particulars (knowing it to be false) submitted to the Registrar. Discuss the penal provision under the Companies Act, 2013 in the light of the given situation. (4 marks; 2019 - June)

Q.2. Mr. Z, a director of Southern Highway Tolls Private Limited, is duly authorized by the Board of directors to prepare and file returns, report or other documents to the Registrar of Companies on behalf of the company. Though he filed all the required documents to Registrar in time, however, subsequently it was found that the filed documents were false and inaccurate in respect to material particulars (knowing it to be false) submitted to the Registrar. State the penal provision under the Companies Act, 2013? (4 marks; 2017-May)

Answer:

Penalty for false statement

According to Sec. 448 of the Companies Act, 2013, 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:

(a) Which is false in any material particulars, knowing it to be false; or

(b) Which omits any material fact, knowing it to be material, he shall be liable under Sec. 447.

Punishment for Fraud

As per Sec. 447, of Companies (Amendment) Act, 2017,

Without prejudice to any liability including repayment of any debt under this Act or any other law for the time being in force, any person who is found to be guilty of fraud involving an amount of at least ten lakh rupees or one per cent of the turnover of the company, whichever is lower, shall be punishable with imprisonment for 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:

Provided that where the fraud in question involves public interest, the term of imprisonment shall not be less than three years:

Provided further that where the fraud involves an amount less than ten lakh rupees or one per cent of the turnover of the company, whichever is lower, and does not involve public interest, any person guilty of such fraud shall be punishable with imprisonment for a term which may extend to five years or with fine which may extend to fifty lakh rupees or with both.

Present Case:

In the present case, Mr. Z a director of Southern Highway Tools Private limited filed returns, report or other documents to Registrar in time, however, subsequently it was found that the filed documents were false and inaccurate in respect to material particulars (knowing it to be false) submitted to the Registrar.

Hence, Mr. Z a director of Southern Highway Tools Private Limited shall be punishable with imprisonment and fine prescribed as aforesaid.

449. PUNISHMENT FOR FALSE EVIDENCE.

Notified Date of Section: 12/09/2013

450. PUNISHMENT WHERE NO SPECIFIC PENALTY OR PUNISHMENT IS PROVIDED.

Notified Date of Section: 12/09/2013

451. PUNISHMENT IN CASE OF REPEATED DEFAULT.

Notified Date of Section: 12/09/2013

452. PUNISHMENT FOR WRONGFUL WITHHOLDING OF PROPERTY. (2 QUESTIONS)

Notified Date of Section: 12/09/2013

Q.1. An officer of a company was allotted one room for two years in a guest house owned by the Company at some other city where he used to stay while on tour. It came to notice of the company that he had not vacated the said room after the expiry of two years and is holding the unauthorized possession of that room and has been permitting to stay outsiders in the said room, at a rent of Rs. 500 per day. The record shows that he had permitted the outsider for 45 days and collected Rs. 22,500 and retained the said amount with him. As per the letter of allotment, there was no such clause which can be invoked against him for making any recovery on account of such wrongful occupation.

Analyse in the given situation, whether manager of the company can seek recovery from the officer of the company under any of the provisions of his employment or the Companies Act. (5 marks; 2018 - Dec)

Answer:

Penalty for wrongful withholding of property: Section 452 of the Companies Act, 2013 provides for Penalty for wrongful withholding of property. According to the section:

(1) If any officer or employee of a company -

(a)Wrongfully obtains possession of any property, including cash of the company; or

(b) having any such property including cash in his possession, wrongfully withholds it or knowingly applies it for the purposes other than those expressed or directed in the articles and authorized by this Act, he shall, on the complaint of the company or of any member or creditor or contributory thereof, be punishable with fine which shall not be less than 1 lakh rupees but which may extend to 5 lakh rupees.

(2) The Court trying an offence 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.

Therefore, as per the provisions of the Companies Act, 2013 and not giving any emphasis on the terms of employment, the manager of the company can recover possession of the room and the cash wrongfully obtained and the benefits that have been derived from such property or cash.

Q.2. An officer of a company was allotted one room for two years in a guest house owned by the Company at some other city where he used to stay while on tour. It came to notice of the company that he had not vacated the said room after the expiry of two years and is holding the unauthorized possession of that room and has been permitting to stay outsiders in the said room, at a rent of Rs. 500 per day. The record shows that he had permitted the outsider for 45 days and collected Rs. 22,500 and retained the said amount with him. As per the letter of allotment, there was no such clause which can be invoked against him for making any recovery on account of such wrongful occupation. The Manager of the company seeks your advice as to whether the recovery can be made from him under any of the provisions of his employment or Companies Act.

(4 marks; 2017-May)

Answer:

Penalty for wrongful withholding of property

Sec. 452 of the Companies Act, 2013 provides for Penalty for wrongful withholding of property. According to the section:

1. If any officer or employee of a company:

(i) Wrongfully obtains possession of any property, including cash of the company; or

(ii) having any such property including cash in his possession, wrongfully withholds it or knowingly applies it for the purposes other than those expressed or directed in the articles and authorized by this Act, he shall, on the complaint of the company or of any member or creditor or contributory thereof, be punishable with fine which shall not be less than 1 lakh rupees but which may extend to five lakh rupees.

2. The Court trying an offence 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 two years.

Hence as per the provisions of the Companies Act, 2013 and not giving any emphasis on the terms of employment, the manager of the company can recover possession of the room and the cash wrongfully obtained and the benefits that have been derived from such property or cash.

453. Punishment for Improper Use of "Limited" or "Private Limited"

Notified Date of Section: 12/09/2013

454. ADJUDICATION OF PENALTIES

Notified Date of Section: 01/04/2014

454 A. PENALTY FOR REPEATED DEFAULT

NATIONAL COMPANY LAW TRIBUNAL AND APPELLATE TRIBUNAL

407. DEFINITIONS

Notified Date of Section: 12/09/2013

408. CONSTITUTION OF NATIONAL COMPANY LAW TRIBUNAL

Notified Date of Section: 12/09/2013

409. QUALIFICATION OF PRESIDENT AND MEMBERS OF TRIBUNAL.

Notified Date of Section: 12/09/2013

410. CONSTITUTION OF APPELLATE TRIBUNAL.

Notified Date of Section: 12/09/2013

411. QUALIFICATIONS OF CHAIRPERSON AND MEMBERS OF APPELLATE TRIBUNAL.

Notified Date of Section: 12/09/2013

412. SELECTION OF MEMBERS OF TRIBUNAL AND APPELLATE TRIBUNAL.

Notified Date of Section: 12/09/2013

413. TERM OF OFFICE OF PRESIDENT, CHAIRPERSON AND OTHER MEMBERS. (1 QUESTION)

Notified Date of Section: 12/09/2013

Q.1. Mr. D was appointed as a Technical Member of the National Company Law Tribunal (NCLT) on 1st July, 2012 for a period of 5 years. He will be completing 62 years on 30th June, 2017.

Whether he can be re-appointed on the NCLT on completion of his tenure in 2017?

(4 marks; 2017 - May)

Answer:

Under Sec. 413(2) of the Companies Act, 2013, a member of the Tribunal shall hold office as such unit he attains:

(a) In the case of the President, the age of sixty-seven years.

(b) In the case of any other member, the age of sixty-five years.

Present Case:

Mr. D was appointed as a technical Member of the NCLT on 1st July, 2012 for a period of 5 years. He will be completing 62 years on 30th June, 2017.

Therefore he can also be re-appointed after his initial term of five years is over. But since he shall be attaining the age of 65 years as on 30th June, 2020, he will have to step down from the post on his attaining the age of 65 years i.e. on 30m June, 2020.

Thus,

Mr. D can be re appointed on the NCLT on completion for next three years as he is attaining age of 65 years after three years.

414. SALARY, ALLOWANCES AND OTHER TERMS AND CONDITIONS OF SERVICE OF MEMBERS.

Notified Date of Section: 12/09/2013

415. ACTING PRESIDENT AND CHAIRPERSON OF TRIBUNAL OR APPELLATE TRIBUNAL

Notified Date of Section: 01/06/2016

416. RESIGNATION OF MEMBERS

Notified Date of Section: 01/06/2016

417. REMOVAL OF MEMBERS

Notified Date of Section: 01/06/2016

417 A.

418. STAFF OF TRIBUNAL AND APPELLATE TRIBUNAL

Notified Date of Section: 01/06/2016

419. BENCHES OF TRIBUNAL&

Notified Date of Section: 01/06/2016

420. ORDERS OF TRIBUNAL

Notified Date of Section: 01/06/2016

421. APPEAL FROM ORDERS OF TRIBUNAL (2 QUESTIONS)

Notified Date of Section: 01/06/2016

Q.1. Aggrieved by an Order of NCLT dated 05.05.2018, passed without the consent of the parties, Madhruk Ltd. Decided to file an appeal before NCLAT. Meanwhile, the employees and officers of the Company went on a strike from 10.05.2018 demanding higher pay and allowances and as a result of which, the operational and management activities were badly affected. The strike was called-off on 15.06.2018. Thereafter, the appeal was filed on 25.06.2018 before NCLAT with a prayer for condoning the delay in filing the appeal. A single judicial member of NCLT started the hearing. With reference to the provisions of the Companies Act, 2013, examine the following:

(i) Whether the appeal is admissible?

(ii) Maximum period allowed for condonation

(iii) Is the appeal transferable to a Bench consisting of two members? (8 marks; 2018-Nov)

Answer:

(i) **As per Sec. 421 of the Companies Act, 2013,** any person aggrieved by an order of the Tribunal may prefer an appeal to the Appellate Tribunal (AT). No appeal shall lie to the Appellate Tribunal from an order made by the Tribunal with the consent of parties.

In this case, Madhruk Ltd. decided to file appeal before Appellate Tribunal (NCLAT) without the consent of the parties. So, appeal filed is inadmissible.

(ii) Every appeal under Sub-section (1) (i.e. appeal to AT against order of Tribunal) shall be filed within a period of 45 days from the date on which a copy of the order of the Tribunal is made available to the person aggrieved and shall be in such form, and accompanished by such fees, as may be prescribed :

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days from the date aforesaid, but within a further period of not exceeding 45, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within that period.

In this case, order of NCLT has been received by Madhruk Ltd. on05.05.2018, so if it is aggrieved by the order can file appeal against such order in NCLAT within 45 days. The period of 45 days ends on 19th June, 2018. But due to strike of employees and officers of the company. The company can file appeal on 25.06.2018. So, the company can apply NCLAT for condonation delay for extending period of filing the appeal by application. If NCLAT if satisfied on the grounds provided by Madhruk Ltd., the NCLAT may give time for filing appeal of not exceeding

45 days further.

(iii) Where the appeal is entertained by a member, at any stage of the hearing of any such case or matter, it appears to the member that the case or matter is of such a nature that it ought to be heard by a bench consisting two Members, the case or matter as may be transferred by the President, or, as the case may be, referred to him for transfer, to such Bench as the President may deem fit.

Q.2. JSK, a shareholder of CRI (Private) Ltd. filed an application before erstwhile Company Law Board, alleging various acts of oppression and mis-management in the affairs of the Company and sought certain relief measures. The petition was transferred to NCLAT on its constitution. The NCLAT passed an order on 5th October, 2017 without the consent of the parties. Aggrieved by the order, the shareholder decided to prefer an appeal. Nevertheless the shareholder was suffering from low blood pressure. He was medically advised not to move and he did not move. Therefore, he preferred the appeal with NCLAT on 5'h December, 2017. Examine whether the appeal is admissible with reference to time limitation? Identify the provisions governing further appeal on the orders of NCLAT under Section 423 of the Companies Act, 2013. (8 marks; 2018-May)

Answer:

As per Section 421 of the Companies Act, 2013, any person aggrieved by an order of the tribunal may prefer an appeal to the Appellate Tribunal. No. appeal shall lie to the appellate Tribunal from an order made by the tribunal with the consent of parties.

Time Period of Appeal:

Every appeal under this Section (ie. 'appeal to Appellate Tribunal against order of Tribunal) 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 and shall be in such form and accompanished by such fees, as may be prescribed.

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty five days from the date aforesaid but within a further period of not exceeding forty five days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within that period.

Present Case:

In this case, JSK Ltd. a shareholder of CRI (Private) Ltd. is aggrieved by the order, of (NCLT) Tribunal. He want to file an appeal against the order of Tribunal, so that he can file appeal to NCLAT (Appellate Tribunal) within a period of forty five days from date of order (i.e. 5th October, 2017) of NCLT. But here, Mr JSK has filed appeal on 5th December, 2017, (beyond the period of forty five days) against order of NCLT reason being he was suffering from low blood pressure. So in light of above provisions time limit to file an appeal before Appellate Tribunal can be extended to further period of forty five days if it is satisfied that appellant was prevented by sufficient cause from filing the appeal within that period. Here, appellant was suffering from low blood pressure so it is a sufficient cause for exertion of time limit for further period of forty five days. So, the appeal made is admissible with reference to time limitation subject to request made to Appellate Tribunal for extension of time period.

As per Sec. 423 of the Companies Act, 2013, 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. Provided that the Supreme 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 of not exceeding sixty days.

422. EXPEDITIOUS DISPOSAL BY TRIBUNAL AND APPELLATE TRIBUNAL

Notified Date of Section: 01/06/2016

423. APPEAL TO SUPREME COURT

Notified Date of Section: 01/06/2016

424. PROCEDURE BEFORE TRIBUNAL AND APPELLATE TRIBUNAL

Notified Date of Section: 01/06/2016

425. POWER TO PUNISH FOR CONTEMPT

Notified Date of Section: 01/06/2016

426. DELEGATION OF POWERS

Notified Date of Section: 01/06/2016

427. PRESIDENT, MEMBERS, OFFICERS, ETC., TO BE PUBLIC SERVANTS

Notified Date of Section: 01/06/2016.

428. PROTECTION OF ACTION TAKEN IN GOOD FAITH

Notified Date of Section: 01/06/2016

429. POWER TO SEEK ASSISTANCE OF CHIEF METROPOLITAN MAGISTRATE, ETC

Notified Date of Section: 01/06/2016

430. CIVIL COURT NOT TO HAVE JURISDICTION

Notified Date of Section: 01/06/2016

431. VACANCY IN TRIBUNAL OR APPELLATE TRIBUNAL NOT TO INVALIDATE ACTS OR PROCEEDINGS

Notified Date of Section: 01/06/2016

432. RIGHT TO LEGAL REPRESENTATION

Notified Date of Section: 01/06/2016

433. LIMITATION

Notified Date of Section: 01/06/2016

434. TRANSFER OF CERTAIN PENDING PROCEEDINGS.

MISCELLANEOUS

455. DORMANT COMPANY (3 QUESTIONS)

Notified Date of Section: 01/04/2014

Q.1. JKL Research Development Limited is a registered Public Limited Company. The company has a unique business idea emerging from research and development in a new area. However, it is a future project and the company has no significant accounting transactions and business activities at present. The company desires to obtain the status of a 'Dormant Company'. Advise the company regarding the provisions of the Companies Act, 2013 in this regard and the procedure to be followed in this regard.

(4 marks; 2015 - May)

Answer:

As per Sec. 455(1) of Companies Act, 2013, where a company is formed and registered under this Act for a future project or to hold an asset or intellectual property and has no significant accounting transaction such a company or inactive company may make an application to the registrar in such manner as is prescribed under Companies (Miscellaneous) Rules, 2014 for obtaining the status of a dormant company.

As per Rule 3 of Companies (Miscellaneous) Rules, 2014

Application for obtaining status of dormant company is required to be made in form MSC-1 alongwith the fees. The fees ranges from two thousand rupees for a company with a share capital upto twenty five lakh rupees to twenty thousand rupees for a company which has share capital more than ten crore rupees;

Application for obtaining status of dormant company can be made only after obtaining special resolution approval of the shareholders or issuing notice to all the shareholders and obtaining consent of at least 3/4th of the shareholders in value terms.

Conditions

(i) No inspection, inquiry or investigation has been ordered or taken up or carried out against the company;

(ii) No prosecution has been initiated and pending against the company under any law;

(iii) The company is neither having any public deposits which are outstanding nor the company is in default in payment thereof or interest thereon;

(iv) The company is not having any outstanding loan, whether secured or unsecured **provided** that if there is any outstanding unsecured loan, the company may apply under this rule after obtaining

(v) There is no dispute in the management or ownership of the company and a certificate in this regard is enclosed with Form MSC-1;

(vi) The company does not have any outstanding statutory taxes, dues, duties etc. payable to the Central Government or any State Government or local authorities etc;

(vii) The company has not defaulted in the payment of workmen's dues;

(viii) The securities of the company are not listed on any stock exchange within or outside India.

Q.2. Dull Limited was not running its business since last 2 years. It had no significant accounting transactions during that period. Hence the company had applied and was granted the status of a 'dormant company' by the Registrar of Companies. Now the company has got some opportunity and recently started its operations. Therefore the company is intending to get back the status of an active company and approached you for your advice on the basis of the applicable provisions of the Companies Act, 2013 and appropriate Rule of the Companies (Registration Offices and Fees) Rules, 2014. Also state the power of the Registrar to remove the name of a company from the register of 'dormant company' and treat it as an active company. **(4 marks; 2016-Nov)**

Answer:

Application for seeking status of an active company: According to the Rule 8 of the Companies (Miscellaneous) Rules, 2014:

(a) **Filing of an application:** An application for obtaining the status of an active company shall be made in Form MSC - 4 along with fees as provided in the Companies (Registration Offices and Fees) Rules, 2014 and shall be accompanied by a return in Form MSC - 3 in respect of the financial year in which the application for obtaining the status of an active company is being filed:

However, the Registrar shall initiate the process of striking off the name of the company if the company remains as a dormant company for a period of consecutive 5 years.

(b) **Registrar to issue certificate:** The Registrar shall, after considering the application filed for obtaining the status of an active company, issue a certificate in Form MSC - 5 allowing the status of an active company to the applicant.

(c) **Filing of application to obtain status of an active company:** Where a dormant company does or omits to do any act mentioned in the Grounds of application in Form MSC -1 submitted to Registrarfor obtaining the status of dormant company, affecting its status of dormant company, the directors shall within 7 days from such event, file an application for obtaining the status of an active company.

(d) **Power of Registrar:** Where the Registrar has reasonable cause to believe that any company registered as 'dormant company' under his jurisdiction has been functioning in any manner, directly or indirectly, he may initiate the proceedings for enquiry under Sec. 206 of the Act and if, after giving a reasonable opportunity of being heard to the company in this regard, it is found that the company has actually been functioning, the Registrar may remove the name of such company from register of dormant companies and treat it as an active company.

Q.3. Gulmohar Ltd. is a company registered in India for last 5 years. Since last 2 financial years, it has not been carrying on any business or operations and has not filed financial statements and annual returns saying that it has not made any significant accounting transaction during the last two financial years. Considering the current situation, Directors of the Company is contemplating to apply to Registrar of Companies to obtain the- status of dormant or inactive company.

Advise them on:

(i) Whether Gulmohar Ltd. is eligible to apply to Registrar of Companies to obtain dormant status for the company?

(ii) Will your answer be different if Gulmohar Ltd. is continuing payment of fees to Registrar of Companies and payment of rentals for its office and accounting records for last two financials years?

(iii) Is special resolution in general meeting a pre-requisite to make an application to Registrar of Companies for obtaining the status of dormant company?

(iv) What will be your answer if it is found after making an application of dormant company to Registrar of Companies that an investigation is pending against the company which was ordered 6 months ago? **(8 marks; 2019-May)**

456. PROTECTION OF ACTION TAKEN IN GOOD FAITH

Notified Date of Section: 12/09/2013

457. NONDISCLOSURE OF INFORMATION IN CERTAIN CASES.

Notified Date of Section: 12/09/2013

458. DELEGATION BY CENTRAL GOVERNEMNT OF ITS POWERS AND FUNCTIONS.

Notified Date of Section: 12/09/2013

459. POWERS OF CENTRAL GOVERNMENT OR TRIBUNAL TO ACCORD APPROVAL, ETC., SUBJECT TO CONDITIONS AND TO PRESCRIBE FEES ON APPLICATIONS.

Notified Date of Section: 12/09/2013

460. CONDONATION OF DELAY IN CERTAIN CASES. (1 QUESTION)

Notified Date of Section: 12/09/2013

Q.1. Chairman of your company wants to know the procedure of condonation of delay by Central Government in filing the document with the Registrar of Companies. As a Company Secretary, prepare a note for consideration of the Chairman.

(8 marks; 2013 - Dec)

Answer:

1.	**Condonation of Delay in filling any document with ROC by central Govt. Sec. 460**	The Central Government may for reasons to be recorded in writing, condone the delay where any document required to be filed with the Registrar under any provision of the Act is not filed within the time specified therein.
2.	**Procedure for condonation by CG-**	**1. Board Meeting:** Convene a Board Meeting and pass a resolution for seeking condonation of delay in filing the document. **2. Application to CG with prescribed documents:** Submit an application to the Central Government, in pdf format, as attachment to prescribed form in this regard, indicating along with the reasons for such delay. The application should be accompanied by a copy of the Board Resolution seeking condonation of delay, latest audited financial statement (consolidated including financial statement), certified copy of the memorandum and articles of the association and filling fees.
		3. Condonation by CG: The Central Government may for reasons to be recorded on writing, condone the delay.

461. ANNUAL REPORT BY CENTRAL GOVERNMENT.

Notified Date of Section: 12/09/2013

462. POWER TO EXEMPT CLASS OR CLASSES OF COMPANIES FROM PROVISIONS OF THIS ACT.

Notified Date of Section: 12/09/2013

463. POWER OF COURT TO GRANT RELIEF IN CERTAIN CASES. (1 QUESTION)

Notified Date of Section: 12/09/2013

Q.1. It is apprehended by the Directors of Minu Ltd. that they are likely to be prosecuted for an offence under the Companies Act, 2013 which is not compoundable. Explain the provisions of the Companies Act, 2013 under which the Directors can seek relief from the liability for offence. What will be the position in case prosecution has already been launched?

(3 marks; 2015 - Dec)

Answer:

Relief under Section **463:** Under section 463(1) of the Companies Act, 2013 if in any proceeding for negligence, default, breach of duty, misfeasance or breach of trust against an officer of a company, it appears to the court hearing the case he is or may be liable in respect of the negligence,default, breach of duty, misfeasance or breach of trust, but that he has acted honestly and reasonably, and that having regard to all the circumstances of the case, including those connected with his appointment, he ought fairly to be excused, the court may relieve him, either wholly or partly, from his liability on such term, as it may think fit.

Provided that in a criminal proceeding under this sub-section the court shall have no power to grant relief from any civil liability which may attach to an officer in respect of such negligence, default, breach of duty, misfeasance or breach of trust.

In the given case, the offence is not compoundable i.e. it carries imprisonment as a punishment either alone or with a fine. In either case, it would indicate that a criminal liability is indicated. Hence, the court will not have the power to grant relief under section 463. However, the nature of the offence will have to be examined.

464. PROHIBITION OF ASSOCIATION OR PARTNERSHIP OF PERSONS EXCEEDING CERTAIN NUMBER (3 QUESTIONS)

Notified Date of Section: 01/04/2014

Q.1. An association of 120 persons has been formed with the object of acquisition of gain. Now, due to an internal mismanagement, the said association has applied for being wound up under the provisions of the Companies Act, 2013. Advise.

(3 marks; 2015 - Dec)

Answer:

- According to Section 464 of the Companies Act, 2013, no association or partnership consisting of more than prescribed number of persons shall be formed for the purpose of carrying on any business that has for its object the acquisition of gain by the association or partnership or by the individual members thereof, unless it is registered as a company under the Companies Act, or is formed under any other law for the time being in force. Further, the prescribed number of persons shall not exceed 100.
- The association as mentioned in the question exceed the prescribed number of members i.e., it consists of 120 members and it is not registered as a company under the Companies Act, 2013.
- Where an association is formed, which has membership in excess of the number aforementioned, will be an illegal association except it is registered as company under Companies Act, 2013.
- Such a body will have no legal existence and it cannot be wound up under the Companies Act, 2013, or even as an unregistered company. Neither any member of it would be able to sue it nor would it be able to sue the member.
- Further, every member of an association or partnership carrying on business in contravention of above law, shall be punishable with fine which may extend to one lakh rupees and shall also be personally liable for all liabilities incurred in such business.

Q.2. What do you understand by the term 'illegal association'?

(8 marks; 2008 - Dec) [CSEM - II]

Answer:

Illegal Association:

1.	**Provisionsof Section464 ofCompanies Act, 2013**	**Mandatoryrequirementof registration**	No association or partnershipconsisting of more than such numberof persons as may be prescribed shall be formed for the purpose ofcarrying on any business that has for its object the acquisition of gain by the association or partnership or by the individual members thereof, unless it is registered as a company under this Act or is formed under any other law for the time being **m** force. The number of persons which may be prescribed under thrs section shall not exceed 100.
		Exceptions	This section does not apply to: (a)Hindu Undivided Family or (b)An association or partnership formed by professionals who are governed by special Acts

			like LLP.
2.	**Rule 10 of Companies (Misc) Rules, 2014 as Notified on 1st April, 2014**	**Maximum number of members**	Any unregistered association shall be treated as illegal association provided such association has more than 50 members.
3.	**Companies Act, 2013**	**Maximum number of Partners**	Maximum number of partners of a partnership firm registered under Partnership Act other than LLP. should not exceed 50.
		Limit for banking and other business	As per Companies Act, 2013, no separate limit is specified for banking and other business; eariier it was 10 in case of banking business and 20 in case of other business.
4.	**Hindu Undivided Family Firms**	**Limit for members in Hindu Undivided Family**	If two or more joint Hindu family firms carry on business together and the combined number of major members exceeds 50, then their association will become illegal.
		Minor members of Joint families	In computing the number for illegal association, minor members of joint families are to be ignored,
		Minor members on attaining majority	If by reason of minor members of such joint families on attaining majority, the number of - persons exceeds the statutory limit, it will become an illegal association.
5.	**Effects of an Illegal Association**	**Consequences**	1.Cannot enter into any contract. 2.Cannot sue any member, or outsider, not even if the company is subsequently registered. 3.Cannot be sued by a member, or an outsider for recovery of any debts. 4.Cannot be wound up by an order of the Tribunal. In fact, the Tribunal, cannot entertain a petition for winding itp as an unregistered company, for if it did, it would be indirectly according recognition to the illegal association.
6.	**Penalty**	**Fine**	Every member of an illegal association shall be punishable with fine which may extend to ? 1 lakh and shall also be personally liable for all liabilities incurred in such business.

Note: However, an illegal association is liable to be taxed. [Kumara Swamy Chattiar Vs. Income Tax Officer (1957) I. T.R. 457]. The members of an illegal association are individually liable in respect of all acts or contracts made on behalf of the association: they cannot either individually or collectively, bring an action to enforce any contract so made, or to recover any debt due to the association. [Wilkinson Vs. Levison (1925)42 T.L.R. 97]

Q.3. The XYZ Traders Association was constituted by four joint Hindu families consisting of 25 major and 2 minors members. The Association was carrying on the business of trading as retailers with the object for acquisition of gains. The Association was not registered as a company under the Companies Act, 2013 or any other law.

State whether the XYZ Traders Association is having any legal status? Will there by any change in the status of this Association if the members of the XYZ Traders Association subsequently were reduced to 18? (5 marks; 2014 - Nov)

Miscellaneous

Answer:

As per Sec.464 of Act, 2013,

1. No association or partnership consisting of more than such number of persons as may be prescribed shall be formed for the purpose of carrying on any business that has for its object the acquisition of gain by the association or partnership or by the individual members thereof, unless it is registered as a company under this Act or is formed under any other law for the time being In force:

Provided that the number of persons which may be prescribed under this sub-section shall not exceed one hundred.

2. Nothing in sub-section (1) shall apply to:

(a) A Hindu undivided family carrying on any business; or

(b) An association or partnership, if it is formed by professionals who are governed by special Acts.

3. Every member of an association or partnership carrying on business in Contravention of sub-section (1) shall be punishable with fine which may extend to one lakh rupees and shall be also personally liable for all liabilities Incurred in such business.

Further, Rule 10 of the Companies (Miscellaneous) Rules, 2014, provides that no association or partnership shall be formed, consisting of more than fifty persons for the purpose of carrying on any business that has for its objects the acquisition of gain by the association or partnership or by individual members thereof, unless it is registered as a company under the Act or Is formed under any other law for the time being in force.

Present Case: Thus, as per Sec. 464 of Companies Act, 2013, HUF being exempt, XYZ Traders Association is having a legal status. Also as per Companies (Miscellaneous) Rules, 2014, Since the member of members is below fifty, XYZ Traders Association Is having a legal status.

And this legal status will continue even if member of members falls to 18.

465. REPEAL OF CERTAIN ENACTMENTS AND SAVINGS.

466. DISSOLUTION OF COMPANY LAW BOARD AND CONSEQUENTIAL PROVISIONS

Notified Date of Section: 01/06/2016

467. POWER OF CENTRAL GOVERNMENT TO AMEND SCHEDULES.

Notified Date of Section: 12/09/2013

468. POWERS OF CENTRAL GOVERNMENT TO MAKE RULES RELATING TO WINDING UP.

Notified Date of Section: 12/09/2013

469. POWER OF CENTRAL GOVERNMENT TO MAKE RULES.

Notified Date of Section: 12/09/2013

470. POWER TO REMOVE DIFFICULTIES.

Notified Date of Section: 12/09/2013

PRODUCER COMPANY

Q.1. Write short note on the following:
(a) Producer Companies **(4 marks; 2017 - June)**

Answer:

Producer Companies:

The Companies (Amendment) Act, 2002 has introduced provisions relating to Producer Companies vide Sections 581A to 581ZT under Part-IX A of the Companies Act, 1956. Section 465 of the Companies Act, 2013, deals with the provisions relating to repeal of certain enactments and savings. However, Section 465(1) of the Companies Act, 2013 has retained the provisions relating to Producer Companies and clarifies that these provisions shall continue to be in force in a manner as if the Companies Act, 1956 has not been repealed until a special Act is enacted for Producer Companies.

In view of the explicit provisions contained in the **Companies Act, 2013,** the Producer Companies are continued to be governed by the **Companies Act, 1956 (Section 581A to 581ZT)** for the time being. Thus, under this topic 'Producer Companies', wherever the word 'Act' is used, it refers to the **Companies Act, 1956.**

It must be understood that the concept of Producer Companies has not taken off despite there being enough potential in view of some of the irritants like restricted tenure of directors of maximum five years. People who have for long been associated with co-operative and other such movements in India have found that the tenure of five years is too short and would force people out of the producer companies. The tenure should be suitably enhanced. The Government has done well to retain the old provisions of **Companies Act, 2013,** but should give a try to remove the irritants so that the movement takes off.

Q.2. Is it legally necessary for the every producer company to appoint a whole-time secretary under the provision of The Companies Act, 2013? **(2 marks; 2013 - Dec)**

Answer:

Section 465 of the Companies Act, 2013, provides that the Companies Act, 1956 shall stand repealed. However, Section 465(1) provides that the provisions of Companies Act, 1956 shall be applicable mutatis mutandis (means same to same, in exactly similar manner) to a Producer Company. Section 581X of the Companies Act, 1956 provides that every producer company having an average turnover exceeding Rs. 5 crores in each of the three consecutive financial years shall have a whole time secretary who is a member of ICSI.

Q.3. A producer company wants to issue bonus shares. You are required to state the relevant provisions of the Companies Act, 2013 in this regard. **(2 marks; 2014 - June)**

Answer;

- Producer Companies are still governed by the Companies Act, 1956 because Section 465(1) of the Companies Act, 2013 provides that provisions of the Companies Act, 1956 shall mutatis mutandis be applicable to the Producer Companies.
- As per provisions of Section 581ZJ of the Companies Act, 1956, any producer company may, upon recommendation of the Board and passing of Resolution in the general meeting, issue bonus shares by capitalization of amounts from General Reserves.
- Referred to in Section 581 ZJ, Bonus shares should be issued in proportion to the shares held by the members on the date of issue of such shares.

Q.4. Explain the provisions under the Companies Act for amendment of articles of association of a producer company. **(2 marks; 2015 - June)**

Answer:

Amendment of Memorandum and Articles of Association of a Producer Company:

- A producer company may, by special resolution, (objects of a producer company), alter its objects specified in the memorandum.

- A copy of the memorandum as amended, together with a copy of the special resolution duly certified by two directors, shall be filed with the Registrar within thirty days from the date of adoption of the resolution.
- With a view to alter the memorandum so as to change the address of the producer company, from the jurisdiction of one Registrar to the jurisdiction of another Registrar, a special resolution will have to be passed and copies of the special resolution certified by two directors of the producer company shall be filed with both the Registrars, presumably with copies of the altered memorandum within thirty days.
- Each Registrar will record the same and thereafter it will be the responsibility of the Registrar from whose jurisdiction the address (the place) has been shifted to forthwith forward to the other Registrar all the documents with him relating to the producer company concerned.
- In case the change involves shifting of the producer company from one state to another, the confirmation of the NCLT is necessary.

Q.5. Is it legally necessary for the every producer company to appoint a whole-time secretary under the provision of the Companies Act, 1956? (2 marks; 2016 - June)

Answer:

Under Section 581X of the Companies Act, 1956 every producer company having an average turnover exceeding Rs. 5 crores in each of three consecutive financial years shall have a whole time secretary who is a member of ICSI.

Q.6. Is it obligatory for every producer company to appoint a whole-time Secretary under the provisions of the Companies Act, 1956? (2 marks; 2016 - Dec)

Answer:

Please refer 2016 - June

Q.7. Is it obligatory for a Producer Company to have internal audit of its accounts for financial year 2016-17? (2 marks; 2018 - Dec)

Answer:

Yes as per Section 581ZF of the Companies Act, 1956, eve/y Producer Company is required to have internal audit of its accounts carried out by a Chartered Accountant at such intervals and in such manner as may be specified in the articles.

Q.8. Under provisions of Companies Act, 1956, relation to producer company, examine whether the office of director of such company shall fail vacant in the following circumstances:

(a) X, a Director of P.K.R. Ltd., a producer company has made a default in payment of loan taken from a company and default continues for 60 days.

(b) Z, a Director of the above company could not call the Annual General Meeting for the company due to some natural calamity which occurred three days before the schedule date. (4 marks; 2015 - Dec)

Answer:

Producer Company - Vacation of Office of a Director:

(a) According to provisions of Companies Act, 1956, as contained in Section 581Q, if the producer company in which a director has made a default in repayments of any advances or loans taken from any company or institution or any other person-and such-default continues for 90 days, the office of such director shall become vacant. In the given case the default on the part of X, the director continues for less than 90 (i.e. only 60 days) days, the office of director shall not fall vacant.

(b) The office of director of a producer company shall become vacant if the Annual General Meeting or extraordinary general meeting of the producer company, in which he is a director, is not called in accordance with the provisions of this Act except due to natural calamity or such other reason. In the given case since the Annual General Meeting could not be held due to some natural calamity, the office of Z, the director shall not fall vacant. This is an exception.

Q.9. A producer company wants to amend its Memorandum and Articles of Association. The director of the company approaches you for advice in this regard. Advise the director about the procedure to be followed for amending the Memorandum and Articles of Association of the company. (5 marks; 2008-Nov)

Answer:

Amendment of Memorandum (Sec. (581H)

A producer company shall not alter the conditions contained in its memorandum except in the cases, by the mode and to the extent for which express provision is made in this Act.

Alteration of Object Clause

A producer company may, by special resolution, not inconsistent with Sec. 581B, alter its objects specified in its memorandum.

A copy of the amended memorandum, together with a copy of the special resolution duly certified by two directors, shall be filed with the Registrar within thirty days from the date of adoption of resolution.

Alternation of Registered Office Clause

In case of transfer of the registered office of a producer company from the jurisdiction of one Registrar to another, certified copies of the special resolution certified by two directors shall be filed with both the Registrars within thirty days, and each Registrar shall record the same, and thereupon the Registrar from whose jurisdiction the office is transferred, shall forthwith forward to the other Registrar all documents relating to the producer company.

The alteration of the provisions of memorandum relating to the change of the place of its registered office from one State to another shall not take effect unless it is confirmed by the Company Law Board on petition.

Procedure for Amending Articles of Association [Sec, 581.1]

Any amendment to the articles should be proposed by not less than 2/3rd of the elected directors or by not less than 1 /3rd of the members of the producer company and adopted by the members by a special Resolution. A copy of the amended articles together with the copy of the special resolution, both duly certified by 2 directors should be filed with the Registrar within 30 days from the date of adoption.

Q.10. A Producer Company wants to issue bonus shares. You are required to state the relevant provisions of the Companies Act, 1956 in this regard. (5 marks; 2009-May)

Answer:

Provision related to issue of Bonus Shares [Sec. 581 ZJ]

A producer company may issue Bonus shares by capitalisation of amounts from General Reserves. The Bonus shares shall be issued in proportion to the shares held by the Members as on the date of the issue of bonus Shares. The issue of Bonus Shares shall require

(a) Recommendation of the Board; and
(b) Passing of a resolution in the general meeting.

Q.11. A producer company proposes to amend the objects specified in its Memorandum of Association and certain provisions in its Articles of Association. The Company also proposes to shift its registered office from the State of Kerala to Tamil Nadu. Explain the requirements under the provisions of the Companies Act, 1956 to give effect to these proposals. (8 marks; 2012-Nov)

Answer:

Amendment of MOA and AOA

Please refer 2008 - Nov [6] (a) on page no. 238 Shifting of Registered office of Producer company.

The Registered Office of Producer Company from Kerala to Tamil Nadu requires their MOA to be amended.

Legal Provision: Producer companies are required to comply with the provisions of Sec. 581H

contained in part IXA of the Companies Act, 1956. As per Sec. 581ZQ, the producer companies are also required to comply with the other provisions of the Companies Act in so for as the same are not varied by, or are inconsistent with the provisions of part IXA. Hence,

Legal Requirements u/s 581 H - The requirements u/s 581 H are:

1. Special resolution for alteration of Registered Office Clause of the MOA is required to be passed.

2. A copy of the amended MOA enclosed with a copy of special resolution passed, as above, duly certified by 2 directors shall be filed with ROC, Kerala and ROC, Tamil Nadu both, within 30 days [proviso to Sec 581 M (2)].

3. Alteration of MOA is required to be confirmed by NCLT on petition [Sec. 581 H(4)]

Q.12. NKM Producer Company passed a resolution at its general meeting on 30th April 2013 to reconvert the producer company into inter-state co-operative society under the Provisions of the Companies Act. 1956. Advise the Company, as a professional, regarding the method to be followed for re-conversion of Producer Company to inter-state co-operative society under the above Act. (8 marks; 2013-Nov)

Answer:

Reconversion of Producer Company into Inter State Co-operative Society:

1. A producer company may make an application to the High Court for being converted into an ISCS only if it was formed as a producer company by way of conversion of a society into a producer company u/s 581J.

2. The application may be made by the members or creditors:

- **Members** - The application shall be made with the consent of atleast 2/3rd of members, present and voting in the general meeting.
- **Creditors** -The application shall be made by creditors representing 3/4th invalue of total creditors.

3. The High Court shall direct that a meeting of members/ creditors shall be held.

The meeting shall be conducted in such manner as may be directed by the High Court.

4. The reconversion must be approved by:

- members representing 3/4th in value of members, present and voting; or
- Creditors representing 3/4th in value of creditors, present and voting.

5. The High Court may stay the commencement or continuation of any suit or proceeding against the company.

6. If the reconversion is approved by the required majority, the-High Court shall have the discretion to sanction reconversion.

7. If the reconversion is sanctioned by the High Court, it shall be binding on:

(a) All the members;

(b) All the creditors; and

(c) The Producer Company.

8. Every producer company which has been sanctioned re-conversion by the High Court, shall make an application, under the Multi-State Cooperative Societies Act, 2002 (39 of 2002) or any other law for the time being in force for its registration as multi-State co-operative society or co-operative society, as the case may be, within six months of sanction by the High Court and file a report thereof to the High Court and the Registrar of Companies and to the Registrar of the co-operative societies under which it has been registered as a Multi-State Co-operative Society or Co-operative Society, as the case may be.

Q.13. In the case of a producer company, the auditor is required to report on additional matters apart from the provisions contained in Sec. 227 of the Companies Act, 1956. State the additional matters on which the auditor has to report in the case of a producer company. **(4 marks; 2014-May)**

Answer:

Additional matters on which auditor has to report [Sec. 581ZG]:

(a) The amount of debts due along with particulars of baddebts if any;

(b) The verification of cash balance and securities;

(c) The details of assets and liabilities;

(d) All transactions which appear to be contrary to the provisions of this part;

(e) The loans given by the producer company to the directors;

(f) The donations or subscriptions given by the producer company;

(g) Any other matter as may be considered necessary by the auditor.

Q.14. A group of 8 individuals together with a producer institution approached the Registrar for incorporation of a producer company under Sec. 581 of the Companies Act, 1956. Can the Registrar go ahead with the registration and incorporation? Discuss. **(4 marks; 2014-Nov)**

Answer:

Under Sec. 581 of the Companies Act, 1956, formation of a producer company and its registration is contained. As per Sec. 581, the application for being 'producers' include:

Individuals -10 or more being 'producers' or 2 or more producer institutions or a combination of above. Since we are approaching a registrar, we must ensure that a group of 8 individuals together with atleast 2 producer institution should approach.

Thus, **Sec. 581(c) of Companies Act, 1956** is not complied with and so registrar should not go ahead with registration and incorporation as it contravenes provisions of 581(c).

Q.15. Explain the provisions under the Companies Act, 1956 for amendment of Articles of Association of a producer company. **(4 marks; 2014-Nov)**

Answer:

Sec. 5811 provides that amendment of articles shall be proposed by not less than 2/3rd of elected directors or by not less than 1 /3rd of members of Producing Company. The Amendments must be adopted by members by special resolution.

A copy of amended articles together with the copy of special resolution, both duly certified by two directors shall be filed with registrar within 30 days.

Q.16. A producer company has received applications from Mr. Ramanathan, a Director of the company, and Mr. Prem, a member of the Company, for grant of loan of Rs. 2,00,000 and Rs. 25,000 respectively. Discuss the relevant provisions of the Companies Act, 1956 as to how the applications for grant of loan will be disposed of by the Company. **(5 marks; 2009 - Nov)**

Answer:

Loan to Mr Ramanathan, a Director of the Company

The following provisions prevail

(i) **Sec. 581R:** As per Sec. 581R, the Board is authorised to do all such acts and things as the company is entitled to do. However, the Board shall not sanction any loan or advance, in connection with the business activities of the producer Company to any director or his relative.

(ii) **Sec. 581S:** As per Sec. 581S, the members may sanction a loan to a director in Annual General Meeting. Further, the conditions and limits of loan shall also be specified in the resolution so passed in the AGM. As per Sec. 581ZG, it shall be duty of the auditor to report on

the loans given by the Producer Company to its directors.

(iii) **Sec. 581ZK:** As per Sec. 581ZK, any loan or advance to any director or his relative shall be granted only after the approval by the Members in general meeting.

In the present case : It is permissible for the Board to give a loan of Rs. 2,00,000 to Mr. Ramanathan, a director, only if such a loan is approved by the members in the AGM, and the conditions and limits of loan are specified in the resolution so passed in the annual general meeting.

Loan to Mr. Prem, a Member of the Company: The Board may, provide financial assistance to the Members of the Producer Company after the approval by Members in General Meeting by way of:

(i) Credit facility, to any member, in connection with the business of the Producer Company, for a period not exceeding 6 months.

(ii) -Loans and advances, against security specified in articles to any Member, repayable within a period exceeding 3 months but not exceeding 7 years from the date of disbursement of such loan or advances.

Present Case: Loan of Rs. 25,000 to Mr. Prem can be made provided that, such loan is secured by any security specified in the articles; such loan is repayable after 3 months but within 7 years.

Q.17. Under provisions of Companies Act, 1956, relating to producer company, examine whether the office of director of such company shall fall vacant in the following circumstances:

(i) X a Director of ABC Ltd., a producer company has made a default in payment of loan taken from a company and default continues for 60 days.

(ii) Z a Director of the above company could not call the Annual General

Meeting for the company due to some natural calamity occurred three days before the Schedule date. **(4 marks; 2010-Nov)**

Answer:

(i) Provision

According to Sec. 581Q the office of a director of a Producer Company shall become Vacant if a director has made a default in repayment of any advances of loans taken from any company or institution or any other person and such default continues for 90 days.

Present Case: in the given case the default on the part of **X,** the director continues for less than 90 (i.e. only 60 days) days, the office of director shall not fall vacant.

(ii) Provision

The office of director of a producer company shall become Vacant if the AGM or EGM of the producer company, in which he is a director, is not called in accordance with the provisions of this Act except due to natural calamity or such other reason.

Present Case:

In the given case since the AGM could not be held due to some natural calamity, the office of Z, the director shall not fall vacant. This is an exception.

Q.18. Southern India Sugar Producer Company Limited, having paid-up capital of Rs. 5 lakh and free reserves of Rs. 3 lakh, propose to make the following loans and investments:

(i) Loan of Rs. 2 lakh to Mr. Ram, a member of the Company, for a period of one year and a loan of Rs. 1 lakh to Mr. Shekhar, a Director of the Company for a period of six months;

(ii) Investment of Rs. 3 lakh in the equity shares of XYZ Marketing Limited.

State the restrictions, if any, in this regard and also the legal requirements to be complied with by the Company under the provisions of the Companies Act, 1956.

(8 marks; 2013-May)

Answer:

(i) Please refer 2009 - Nov [6] (b) on page no. 245

(ii) Investment in other companies:

As per Sec. 581ZL of the Companies Act, 1956, any Producer Company, either by itself or together with its subsidiaries, may invest, by way of subscription, purchase or otherwise, shares in any other company other than a producer company for an amount not exceeding thirty per cent of the aggregate of its paid-up capital and free reserves. Further, the provision provides that a producer company may, by special resolution passed in its general meeting and with prior approval of the Central Government, invest in excess of the limits.

Present Case:

In the present case, the Southern India Sugar Producer Company Limited cannot invest an amount exceeding thirty per cent of the aggregate of its paid-up capital and free reserves i.e. Rs. 2,40,000/- in XYZ Marketing Limited. However, the company may invest in excess of the limits (more than 2,40,000) by special resolution passed in its general meeting and with prior approval of the CG.

Q.19. DHP Producer Company Limited, a producer company is having an average turnover of Rs. 7 crores in the last five years. Referring to the provisions of the Companies Act, 1956, answer the following:

(A) Is it obligatory for the company to appoint a whole time secretary?

(B) What consequences will follow in case the company does not comply with the provisions in relation to the above? **(4 marks; 2015-May)**

Answer:

(A) Provision

Where average annual turnover of a producer company exceeds five crore rupees in each of three consecutive financial years, it shall have a whole-time secretary. Who possesses membership of company secretaries under Company Secretaries Act, 1980.

Conclusion: As per the above provision it is obligatory for DHP Producer Company Limited to appoint a whole time secretary.

(B) Provision

If a producer company fails to comply with this, the company and every officer of the company who is in default, shall be punishable with fine which may extend to five hundred rupees for every day during which the default continues:

In any proceedings against a person in respect of an offence, under this section, it shall be a defense to prove that all reasonable efforts to comply with the provisions of section were taken or that the financial position of the company was such that it was beyond its capacity to engage a whole-time secretary.

Q.20. Ideal Producer Co. Ltd. was incorporated on 1st April, 2009. Its paid up capital of Rs. 10 Lakh consists of 1 lakh equity shares of Rs. 10 each held by 100 individuals. There are 6 directors on its Board. Referring to the provisions of the Companies Act, 1956, answer the following:

(i) What is the quorum for the Annual General Meeting?

(ii) What is the quorum for the Board Meeting?

(iii) The Board of Directors wants to co-opt one expert in the field of agronomics, as Director on its Board. Whether is it permissible?

(iv) Is it obligatory for this company to have internal audit of its accountsfor Financial Year 2015-16? **(8 marks; 2015-Nov)**

Answer:

(i) **As per Sec. 581 Y of the Companies Act, 1956,** unless the Articles requires a larger number, one fourth of the total number of members of the producer company shall be the quorum at a general meeting. In this case, the company has got 100 members and hence, the quorum is 25.

(ii) **Sec. 581 V of the Companies Act, 1956,** provides that the quorum for a meeting of the Board shall be one third of the total strength of directors, subject to a minimum of three.

In the given case, 1 /3 of 6 directors comes to 2, but minimum required is 3, hence, the quorum will be 3 directors for a board meeting.

(iii) **Sec. 581P of the Companies Act, .1956,** empowers the Board of Directors of a producer company to co-opt one or more experts as director, but not exceeding one fifth of the total number of directors. As there are 6 directors in the given case, hence, co-opting one expert on the Board will be in order.

(iv) **Yes, as per section 581ZF of the Companies Act, 1956,** every producer company is required to have internal audit of its accounts carried out by a Chartered Accountant at such intervals and in such manner as may be specified in the Articles.

Q.21. The Articles of Association of Coimbatore Milk Producers Limited restricts the membership to producers. You are required to answer the following questions explaining the relevant provisions of the Companies Act, 1956.

(i) Mr. Gopal, one of the members proposes to transfer part of his shares. State the steps to be taken by Mr. Gopal to give effect to the proposed transfer.

(ii) Mr. Ramu, one of the members, nominated his son, Mr. Krishnan to been titled to his shares in the event of his death. Mr. Ramu died. State the action that can be taken by the producer company in case Mr. Krishnan is not a producer. **(4 marks; 2016-May)**

Answer:

(i) Steps to be taken to give effect to the proposed transfer:

- **As per Sec. 581 ZD[1] &(2), of the Companies Act, 1956** member is required to get approval of the board for transfer.
- Transfer full or part of his shares to active member with any special rights at par value.
- Member is to transfer shares only at par value.

Mr. Gopal may transfer the part of his shares, after obtaining the previous approval of the Board.

(ii) Actions to be undertaken:

According to Section 581 ZD (3) every member shall within three months of his becoming a member of Producer Company nominate, as specified in articles, a person to whom his shares in the producer company shall vest in the event of death. The nominee shall become entitled to all the rights in the shares of the producer company in the event of death of the member. The Board of Directors of the producer company shall transfer the shares of Mr. Ramu to his nominee Mr. Krishnan.

Present Case:

The nominee is not a producer, action may be taken by the company under proviso to Section 581ZD(4). The Board of Directors of the producer company shall direct Mr. Krishnan to surrender the shares together with special rights. The surrender may be made either at par value or such other value as may be determined by the Board of Directors of the producer company.

Q.22. AVM Producer Company Ltd. seeks your advice on the following aspects of the working of a Producer company under the Companies Act, 1956:

(i) Criteria for appointment of Secretary as also the legal position, if its financial position is unsatisfactory.

(ii) Can the Board of Directors of the company direct its member to surrender his shares to the company, if so, under what circumstances?

(iii) Provisions relating to donation to any institution, as also to a political party.

(iv) Provisions relating to investment of general reserves, as also investment in the shares of a company, other than a Producer company. **(8 marks; 2016-May)**

Answer:

(i) **Appointment of Secretary [Sec. 581 x]** Every Producer Company having an average annual turnover exceeding five crore rupees in each of three consecutive financial year shall have a whole time secretary, who possesses membership of the Institute of Company Secretaries of India constituted under the Company Secretaries Act, 1980.

If a producer company fails to comply with this, the company and every officer of the company who is in default shall be punishable with fine which may extend to five hundred rupees for every day during which the default continues.

In any proceedings against a person in respect of an offence, under this section, it shall be a defense to prove that all reasonable efforts to comply with the provisions of section were taken or that the financial position of the company was such that it was beyond its capacity to engage a whole-time secretary.

(ii) **Surrender of shares [Sec. 581 ZD (5)]** Where the Board of a producer company is satisfied that—

(a) Any member has ceased to be a primary producer; or

(b) Any member has failed to retain his qualifications to be a member as specified in articles, the Board shall direct the surrender of shares together with special rights, if any, to the producer company at par value or such other value as may be determined by the Board:

Provided that the Board shall not direct such surrender of shares unless the member has been served with' a written notice and given an opportunity of being heard.

(iii) Donations [Sec. 581ZH]

Producer Co. may by special resolution make donation to any institution for the purpose of:

- Promoting the social and economic welfare of producer member or producers or general public.
- Promoting mutual assistance principles.

  Provided that the aggregate amount of all such donation and subscription in any financial year shall not exceed three per cent of the net profit of the producer company in the financial year immediately preceding the financial year in which the donation or subscription was made.

  Further, no producer company shall make directly or indirectly to any political party or for any political purpose to any person any contribution or subscription or make available any facilities including personnel or material.

(iv) Investment of General Reserves [Sec. 581ZL]

The general reserves of any producer company shall be invested to secure the highest returns available from approved. Securities, fixed deposits, units, bonds issued by government or Co-operative or scheduled bank.

- Producer company can invest or purchase shares of other company other than a producer Co. specified under sub section (2) or capital under sub section (3) for an amount not exceeding 30% of the aggregate of its paid up capital and free reserves.

Q.23. Examine whether the office of the director of the below mentioned producer company shall fall vacant in the following circumstances under theCompanies Act, 1956/2013.

(i) Mr. Right a director of Strawberry Limited a producer company has made a default in payment of loan taken from a company and the default continued for 60 days.

(ii) Mr. Pure a director of the. above company could not call an annual general meeting for the company due to some natural calamity occurred three days before the scheduled date.

(4 marks; 2017-Nov)

Answer:

Producer Company - Vacation of Office of a Director:

(i) **According to provisions of Companies Act, 1956, as contained in Section 581Q,** if the producer company in which a director has made a default in repayment of any advances or loan taken from any company or institution or any other person and such default continues for 90 days, the office of such director shall become vacant.

In the given case the default on part of Mr. Right, the director continues for less than 90 days (i.e. only 60 days), the office of director shall not fallvacant.

(ii) The office of director of a producer company shall become vacant if the AGM or EGM of the producer company, in which he is a director, is not called in accordance with the provisions of this Act except due to natural calamity or such other reason.

In the given case since the AGM could not be held due to some natural calamity, the office of Mr. Pure, the director shall not vacant. This is an exception.