

Any person so appointed shall, on ceasing to hold such appointment, give to the company and the Registrar a notice to that effect and the Registrar shall register such notice.

As per Rule 9 the notice of appointment or cessation of a receiver of, or of a person to manage, the property, subject to charge, of a company shall be filed with the ROC in Form No. CHG. 6 along with fee.

**Que. No. 19] Write a short note on: Company's Register of Charges**

Explain the provision relating to inspection of copies of the instrument creating charges and the register of maintained by the company. CS (Inter) - Dec 1999 (6 Marks)

**Ans.: Company's Register of Charges [Section 85] & [Rule 10]:**

- (1) Every company shall keep at its registered office a register of charges in Form No. CHG. 7 which shall include therein all charges and floating charges affecting any property or assets of the company or any of its undertakings, indicating in each case such particulars as may be prescribed.
- (2) The entries in the register of charges maintained by the company shall be made forthwith after the creation, modification or satisfaction of charge, as the case may be.
- (3) Such register of charges shall contain the particulars of all the charges registered with the Registrar on any of the property, assets or undertaking of the company and the particulars of any property acquired subject to a charge as well as particulars of any modification of a charge and satisfaction of charge.
- (4) All the entries in the register shall be authenticated by a director or the secretary of the company or any other person authorized by the Board for the purpose.
- (5) The register of charges shall be preserved permanently and the instrument creating a charge or modification thereon shall be preserved for a period of 8 years from the date of satisfaction of charge by the company.
- (6) A copy of the instrument creating the charge shall also be kept at the registered office of the company along with the register of charges.

**Inspection of Charges:** The register of charges and instrument of charges shall be kept open for inspection during *business hours* by members, creditors or any other person subject to reasonable restriction as the company by its article impose. The register of charges and the instrument of charges kept by the company shall be open for inspection-

- (a) by any member or creditor of the company without fees
- (b) by any other person on payment of prescribed fee.

**Que. No. 20] What are the consequences of non-registration of a charge which requires registration under Section 77?**

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

**Ans.: Following are the consequences of non-registration of charges:**

- (1) The charge will be void as against the liquidator if the company goes into liquidation and against creditors, but against them only. In other words unregistered charge shall not be taken into account by the liquidator.
- (2) The charge is good against the company and the amount becomes payable immediately.
- (3) Until liquidation, the person seeking to enforce such a charge, has available to him all remedies of a mortgage against the company, though not against other creditors.
- (4) Subsequent charge holder gets better title if the charge is not registered.

- (5) During liquidation the charge-holder (creditor) assumes the status of an unsecured creditor, as the charge is void against liquidator and creditors.
- (6) The charge-holder (creditor) has no lien on the title deeds or documents deposited with him as the deposit is only ancillary to the void charge.
- (7) Although a security becomes void by non-registration, it does not affect the contract or obligation of the company to repay the money thereby secured. In fact, Section 77 provides that where a charge becomes void by non-registration, the money becomes immediately payable and the company cannot repudiate it on the ground of non-registration.
- (8) If any company contravenes any provision relating to 'creation & registration of charges', the company shall be punishable with fine which shall not be less than ₹ 1,00,000 but which may extend to ₹ 10,00,000 and every officer of the company who is in default shall be punishable with

- Imprisonment for a term which may extend to 6 months or
- Fine which shall not be less than ₹ 25,000 but which may extend to ₹ 1,00,000 or
- Both.

**Que. No. 21] Distinguish between: Mortgage and Charge**

CS (Executive) - June 2008 (4 Marks)

CS (Executive) - Dec 2016 (4 Marks)

**Ans.: Following are main points of distinction between mortgage & charge:**

Points	Mortgage	Charge
<b>Meaning</b>	A mortgage is the transfer of an interest in specific immovable property for the purpose of securing payment of money advanced.	Although in a charge, the property is made a security for the payment of the loan, yet the transaction does not amount to mortgage.
<b>Transfer of interest</b>	In mortgage there is transfer of interest in the property.	In charge there is no transfer of any interest in the property.
<b>Created</b>	A mortgage can only be created by act of parties.	A charge may be created by act of parties or by operation of law.
<b>Registration</b>	A mortgage deed must be registered and attested by two witnesses.	A charge need not be made in writing, and if reduced to writing, it need not be attested or registered.
<b>Foreclosure</b>	In certain types of mortgage the mortgagee can foreclose the mortgaged property.	The charge-holder cannot foreclose though he can get the property sold as in a simple mortgage.
<b>Personal liability</b>	In a mortgage, there can be security as well as personal liability.	In a charge the remedy of the charge-holder is against the property only.

**Que. No. 22] Distinguish between: 'Notice of charge' & 'Satisfaction of charge'**

CS (Executive) - June 2016 (4 Marks)

**Ans.: Following are main points of distinction between notice of charge & satisfaction of charge:**

Points	Notice of charge	Satisfaction of charge
<b>Meaning</b>	When company taken a loan against some of the property of the company, giving it as security then company is required to notify the ROC. Such intimation to ROC is known as notice of charge.	When company repays a loan and relieves the security against which loan was raised then company is required to notify the ROC. Such intimation to ROC is known as notice of satisfaction of charge.

Points	Notice of charge	Satisfaction of charge
<b>Form for notice</b>	For registration of charge, the particulars of the charge together with a copy of the instrument, if any, creating or modifying the charge in Form No. CHG. 1 (for other than debentures) or Form No. CHG. 9 (for debentures including rectification), duly signed by the company and the charge-holder shall be filed with the ROC within a period of 30 days of the date of creation or modification of charge along with the prescribed fee.	The company shall give intimation to the Registrar of the payment or satisfaction in full of any charge within a period of 30 days from the date of such payment or satisfaction in Form No. CHG. 4 along with the fee.
<b>Certificate of registration</b>	Where a charge is registered with the Registrar, he shall issue a certificate of registration of such charge in Form No. CHG. 2. Where the particulars of modification of charge is registered, the Registrar shall issue a certificate of modification of charge in Form No. CHG. 3.	Where the Registrar enters a memorandum of satisfaction of, he shall issue a certificate of registration of satisfaction of charge in Form No. CHG. 5.

### SUMMARY OF VARIOUS FORMS RELATING TO 'CHARGE'

<b>Form No. CHG. 1</b>	Registration of charge creating or modifying for other than Debentures.
<b>Form No. CHG. 2</b>	Issue of certificate of registration of charge by ROC.
<b>Form No. CHG. 3</b>	Issue of certificate of registration of modification of charge by ROC.
<b>Form No. CHG. 4</b>	Intimation to ROC for satisfaction of charge.
<b>Form No. CHG. 5</b>	Certificate of registration of satisfaction of charge.
<b>Form No. CHG. 6</b>	Notice of appointment or cessation of a receiver by company to ROC.
<b>Form No. CHG. 7</b>	Register of charges to be kept by company.
<b>Form No. CHG. 8</b>	The application for condonation of delay to the Central Government.
<b>Form No. CHG. 9</b>	Registration of charge creating or modifying for debentures including rectification
<b>Form No. CHG. 10</b>	The application to ROC for delay in registration of charges beyond 30 days from the date of creation of charges but up to 300 days.
<b>Form No. CHG. 28</b>	The order passed by the Central Government for condonation of delay to be filed with ROC



## ALLOTMENT & ISSUE OF CERTIFICATES

### This Chapter Covers:

- Allotment of shares
- Notice of allotment
- General principles regarding allotment
- Statutory provisions regarding allotment
- Allotment of shares/debentures to be listed on the stock exchanges
- Effect of irregular allotment
- Revocation by applicant
- Ultra vires allotment
- Allotment procedure
- Return of allotment
- Share certificate
- Share warrant
- Difference between share certificate and share warrant
- Personation of shareholder
- Calls and forfeiture
- Requisite of a valid call
- Reissue of forfeited shares
- Surrender of shares

**Note:** In this chapter, unless otherwise stated 'Rule' means the Companies (Share Capital & Debentures) Rules, 2014.

### ALLOTMENT OF SHARES

**Que. No. 1]** What do you mean by allotment of shares? State the general principal regarding allotment.

**Ans.:** "Allotment of shares" means the act of appropriation by the board of directors of the company out of the previously un-appropriated capital of a company of a certain number of shares to persons who have made applications for shares. It is on allotment that shares come into existence.

**Notice of Allotment:** An allotment is the acceptance of an offer to take shares by an applicant, and like any other acceptance it must be communicated. Thus, a binding contract between the company and the applicant could emerge only when the allotment is made by a resolution of the Board of directors and notice of such allotment has been given to the allottee.

#### General principles regarding allotment:

Following are the general principles with regard to allotment of shares :

- Allotment should be made by proper authority.
- Allotment of shares must be made within a reasonable time.
- Allotment should be absolute and unconditional.
- Allotment must be communicated.
- Allotment against application only.
- Allotment should not be in contravention of any other law.

**Que. No. 2]** Discuss the statutory provisions regarding allotment of securities.

**Write a short note on: Return of allotment**

**Ans.:** Allotment of securities by company [Section 39(1)]: Allotment of any securities of a company offered to the public for subscription shall not be made unless the amount stated in the prospectus as the minimum subscription has been subscribed and minimum application money have been received by the company.

**Minimum Application Money [Section 39(2)]:** The amount payable on application on every security shall not be less than 5% of the nominal amount of the security or such other percentage or amount, as may be specified by the SEBI.

As per SEBI (Disclosure & Investor Protection) Guideline, 2009, application money should not be less than 25% of the issue price.

**Money to be returned if minimum application money is not received [Section 39(3)] & [Rule 11] Companies (Prospectus & Allotment of Securities) Rules, 2014:** If the stated minimum amount has not been subscribed and the sum payable on application is not received within a period of 30 days from the date of issue of the prospectus, or such other period as may be specified by the SEBI, the amount so received shall be returned within 15 days from the closure of the issue. If any such money is not so repaid, the directors of the company who are officers in default shall jointly and severally be liable to repay that money with interest at 15% p.a.

**Return of allotment [Rule 12 of the Companies (Prospectus & Allotment of Securities) Rules, 2014]:**

- (1) Whenever a company having a share capital makes any allotment of its securities, the company shall file with the ROC a return of allotment in Form No. PAS. 3 within 30 days.
- (2) There shall be attached to the Form No. PAS. 3 a list of allottees stating their names, address, occupation, and number of securities allotted to each of the allottees and the list shall be certified as being complete and correct as per the records of the company.
- (3) In the case of securities allotted as fully or partly paid up for consideration other than cash, there shall be attached to the Form No. PAS. 3 a copy of the contract, duly stamped,

together with any contract of sale if relating to a property or an asset, or a contract for services or other consideration.

- (4) Where a contract is not reduced to writing, the company shall furnish along with the Form No. PAS. 3 complete particulars of the contract stamped as per the Indian Stamp Act, 1899.
- (5) A report of a registered valuer in respect of valuation of the consideration shall also be attached along with the contract.
- (6) In the case of issue of bonus shares, a copy of the resolution passed in the general meeting authorizing the issue of such shares shall be attached to the Form No. PAS. 3.
- (7) In case of right issue of shares by a company other than a listed company, there shall be attached to Form No. PAS. 3, the valuation report of the registered valuer.

#### Judicial Views:

The Supreme Court held that the exchange was not liable to file any return of the forfeited shares when the same were re-issued. The Court observed that when a share is forfeited and re-issued, there is no allotment, in the sense of appropriation of shares out of the authorized and un-appropriated capital. [Sri Gopal Jalan & Co. v. Calcutta Stock Exchange Association Ltd. 1963-(033)-Com Cases-0862- SC]

Allotment of shares against promissory notes shall not be valid. [Chokkalingam v. Official Liquidator AIR 1944 Mad. 87]

**Que. No. 2A]** On receipt of 85% of the minimum subscription stated in the prospectus, Little Stars Ltd. allotted 200 shares to Ranjit and the money was deposited in a scheduled bank. Later on, it was revealed that 40% of the amount withdrawn was for acquisition of fixed assets for the company. Ranjit, knowing these facts, refused to accept the allotment contending that the allotment was irregular under the provisions of the Companies Act, 2013. As an expert on company law advise Ranjit. CS (Executive) - Dec 2014 (4 Marks)

**Ans.:** As per Section 39, no allotment of any securities of a company offered to the public for subscription shall be made unless -

- (i) The amount stated in the prospectus as the minimum amount has been subscribed and
- (ii) The sums payable on application for the amount so stated have been paid to and received by the company by cheque or other instrument.

As per SEBI-ICDR Regulation, the minimum subscription for public company issuing shares to public is 90%.

Minimum subscription received must be 90% of the public issue. If the subscription is less than 90%, shares cannot be allotted and application money received must be refunded as stated below:

- (a) **Non-underwritten issue:** Within 15 days from the date of closure of the issue.
- (b) **Underwritten Issue:** Within 70 days from the date of closure of the issue if underwriters fail to make up shortfall within 60 days of the closure of issue.

If application money is not refunded within the period stated above, interest is payable for the delay.

Thus, allotment of shares to Ranjit is void and he can refuse to accept the shares.

**Que. No. 3]** What is a share certificate? Also state the provisions relating to issue of share certificate.

**Ans.:** A share certificate is a certificate issued to the members by the company under its common seal, if any, specifying the number of shares held by him and the amount paid on each share.

**Issue of share certificate [Section 46(1)]:** A share certificate has to be issued under the common seal, if any, of the company or signed by 2 directors or by a director and the Company Secretary, specifying the shares held by any person which shall be *prima facie* evidence of the title of the person to such shares.

The certificate is the only documentary evidence of title in the possession of the shareholder. But it is not a warranty of title by the company issuing it.

**Certificate of shares [Rule 5]:**

- (1) Where a company issues any share capital, share certificates shall be issued –
  - (a) in pursuance of a resolution passed by the Board and
  - (b) on surrender to the company of the letter of allotment or fractional coupons of requisite value (except in case of issues against letters of acceptance or of renunciation, or in cases of issue of bonus shares)

However, if the letter of allotment is lost or destroyed, the Board may impose reasonable terms to seek supporting evidence and indemnity and the payment of out-of-pocket expenses in investigating evidence.

- (2) Every certificate of share or shares shall be in Form No. SH. 1 or as near thereto as possible and shall specify the names of the persons in whose favour the certificate is issued, the shares to which it relates and the amount paid-up thereon.
- (3) Every share certificate shall be issued under the common seal, if any, of the company, which shall be affixed in the presence of, and signed by–
  - (a) Two directors (one of whom should be person other than managing director or whole time director) duly authorized by the Board of Directors and
  - (b) The Company Secretary or any person authorized by the Board for the purpose

However, if company does not have a common seal, the share certificate shall be signed by two directors or by a director or the Company Secretary, whenever the company has appointed a Company Secretary.

In case of a OPC, every share certificate shall be issued under the seal, if any, of the company, which shall be affixed in the presence of and signed by one director or a person authorized by the Board of Directors and the Company Secretary or any other person authorized by the Board. If OPC does not have common seal, the share certificate shall be signed by the persons in the presence of whom the seal is required to be affixed.

**Explanation:** A director shall be deemed to have signed the share certificate if his signature is printed as a facsimile signature by means of any machine, equipment or other mechanical means such as engraving in metal or lithography, or digitally signed, but not by means of a rubber stamp. The director shall be personally responsible for permitting the affixation of his signature and the safe custody of any machine, equipment or other material used for the purpose.

- (4) The particulars of every share certificate issued shall be entered in the Register of Members.

**Que. No. 4]** The authorized signatory of a company issued a share certificate in favour of X, which apparently complied with the company's article as it purported to be signed by two directors and the secretary and it had the company's common seal affixed to it. In fact, the secretary had forged the signatures of the directors and affixed the seal without any authority. Will the share certificate be binding upon the company?

CS (Inter) – June 1999 (8 Marks)

**Ans.:** According to Rule 5 of the Companies (Share Capital & Debentures) Rules, 2014, every share certificate shall be issued under the common seal, if any, of the company, which shall be affixed in the presence of, and signed by–

- (a) Two directors (one of whom should be person other than managing director or whole time director) duly authorized by the Board of Directors and
- (b) The Company Secretary or any person authorized by the Board for the purpose

However, if company does not have a common seal, the share certificate shall be signed by two directors or by a director or the Company Secretary, if any.

If the signatures of directors are forged then share certificate will not be binding upon the company because forgery is **nullity at law**. Thus, if forged the signatures of the directors appears on share certificate it will not be binding upon the company.

**Que. No. 5]** When can a company issue 'renewed or duplicate' share certificate?

**Ans.:** Issue duplicate share certificate [Section 46(2)]: A duplicate certificate of shares may be issued, if such certificate:

- (a) is proved to have been lost or destroyed or
- (b) has been defaced, mutilated or torn and is surrendered to the company.

**Issue of renewed or duplicate share certificate [Rule 6]:**

- (1) In respect of share certificates which are defaced, mutilated, torn or old, decrepit, worn out share certificates new share certificates can be exchanged if original share certificates are surrendered to the company. Similarly, new share certificates on sub-division or consolidation can be obtained only if old share certificates are surrendered to the company.

The company may charge a fee up to ₹ 50 per certificate issued on splitting or consolidation or in replacement of share certificates that are defaced, mutilated, torn or old, decrepit or worn out.

Where a certificate is issued in any of the circumstances specified above, the company shall be stated on the face of it and be recorded in the Register maintained for the purpose, that it is "Issued in lieu of share certificate No..... sub-divided/replaced/on consolidation".

A company may replace all the existing certificates by new certificates upon sub-division or consolidation of shares or merger or demerger or any reconstitution without requiring old certificates to be surrendered.

- (2) If share certificates are lost or destroyed, duplicate share certificates can be issued by Board's consent and on payment of fees up to ₹ 500 per certificate. While issuing such duplicate share certificate the company may require supporting evidence and indemnity and the payment of out-of-pocket expenses in investigating the evidence produced.

Where duplicate share certificates are issued, it shall be stated prominently on the face of it and be recorded in the Register maintained for the purpose, that it is "duplicate issued in lieu of share certificate No....." and the word 'duplicate' shall be stamped or printed prominently on the face of the share certificate.

In case **unlisted companies**, the duplicate share certificates shall be issued within a period of 3 months and in case of **listed companies** such certificate shall be issued **within 15 days**, from the date of submission of complete documents with the company respectively.

- (3) The particulars of every duplicate share certificate issued shall be entered forthwith in a Register of Renewed & Duplicate Share Certificates maintained in Form No. SH. 2 indicating against the name of the person to whom the certificate is issued, the number

and date of issue of the share certificate in lieu of which the new certificate is issued, and the necessary changes indicated in the Register of Members by suitable cross-references in the "Remarks" column.

The register shall be kept at the registered office of the company or at such other place where the Register of Members is kept and it shall be preserved permanently and shall be kept in the custody of the Company Secretary or any other person authorized by the Board for the purpose.

All entries made in the Register of Renewed & Duplicate Share Certificates shall be authenticated by the Company Secretary or such other person as may be authorized by the Board.

**Issuing duplicate share certificates to defraud [Section 46(5)]:** If a company with intent to defraud issues a duplicate certificate of shares, the company shall be punishable with fine which shall not be less than **5 times the face value** of the shares involved in the issue of the duplicate certificate but which may extend to **ten times the face value** of such shares or **₹ 10 Crores whichever is higher** and every officer of the company who is in default shall be liable for action u/s 447, for fraud.

**Que. No. 6] What are the provisions relating to maintenance of share certificate forms and related books and documents under the Companies (Share Capital & Debentures) Rules, 2014?**

**Ans.: Maintenance of share certificate forms and related books and documents [Rule 7]:**

- (1) All blank forms to be used for issue of share certificates shall be printed and the printing shall be done only on the authority of a resolution of the Board.

The blank form shall be consecutively machine numbered and the forms and the blocks, engravings, facsimiles and hues relating to the printing of forms shall be kept in the custody of the Company Secretary or such other person as authorized by the Board.

- (2) The following persons shall be responsible for the maintenance, preservation and safe custody of all books and documents relating to the issue of share certificates, including the blank forms of share certificates namely:

- (a) The committee of the Board, if so authorized by the Board or where the company has a Company Secretary, the Company Secretary or
- (b) Where the company has no Company Secretary, a Director specifically authorized by the Board for such purpose.

- (3) All books shall be preserved in good order not less than **30 years** and in case of **disputed cases**, shall be preserved **permanently**, and all certificates surrendered to a company shall immediately be defaced by stamping or printing the word 'CANCELLED' in bold letters and may be destroyed after the expiry of **3 years** from the date on which they are surrendered, under the authority of a resolution of the Board and in the presence of a person duly appointed by the Board in this behalf.

**Que. No. 7] Write a short note on: Time of issue of certificate of securities**

**Ans.: Time limit for issuance of share certificates [Section 56(4)]:** Every company must deliver the certificates of all securities allotted, transferred or transmitted:

- (a) Within a period of **2 months** from the date of incorporation, in the case of subscribers to the memorandum.
- (b) Within a period of **2 months** from the date of allotment, in the case of any allotment of any of its shares.

- (c) Within a period of **1 month** from the date of receipt by the company of the instrument of transfer or the intimation of transmission
- (d) Within a period of **6 months** from the date of allotment in the case of any allotment of debenture. However, where the securities are dealt with in a depository, the company shall intimate the details of allotment of securities to depository immediately on allotment of such securities.

**Que. No. 8] Write a short note on: Split Certificate**

**Ans.:** A split certificate means a separate certificate claimed by a shareholder for a portion of his holding. The advantages of a split certificate are that the shareholder may benefit in case of a transfer by way of sale or mortgage in small lots and the right to multiply the certificates into as many shares held by the shareholder.

**Que. No. 9] A share certificate of the company is an official publication?**

**CS (Inter) - June 2004 (4 Marks)**

**Ans.:** The question whether a share certificate is an official publication was considered by the Ministry of Corporate Affairs and has clarified vide its Circular as follows:

*"The shares in a company are movable property transferable in the manner provided in the articles of the company".*

Section 44 provides that a certificate under the common seal of the company specifying any share held by any member shall be *prima facie* evidence of the title of the member to such share. Thus, shares are movable property transferable in the manner provided in the articles of the company and that the share certificates are certificates of title and are movable property but are not publications in the nature of prospectus, balance sheet, profit and loss account, notice or advertisement.

The conclusion reached, therefore, is that the share certificate is not an official publication.

**Que. No. 10] Write a short note on: Legal effect of share certificate**

**Ans.:** A share certificate is *prima facie* evidence to the title of the person whose name is entered on it. It means that the share certificate is a statement by the company that the moment when it was issued, the person named in it was the legal owner of the shares specified in it, and those shares were paid-up to the extent stated. It does not constitute title but it is merely evidence of title. It is, however a statement of considerable importance, for it is made with the knowledge that other persons may act upon it in the belief that it is true and this fact brings into operation the doctrine of estoppel. As a result, a share certificate once issued by the company binds it in two ways, namely:

- (a) by estoppel as to title, and
- (b) by estoppel as to payment.

**Estoppel as to Title:** A share certificate once issued binds the company in two ways. In the first place, it is a declaration by the company to the entire world that the person in whose name the certificate is made out and to whom it is given is a shareholder in the company. In other words the company is estopped from denying his title to the shares.

**Estoppel as to Payment:** If the certificate states that on each of the shares full amount has been paid, the company is estopped as against a *bona fide* purchaser of the shares, from alleging that they are not fully paid.

If a person knows that the statements in a certificate are not true, he cannot claim an estoppel against the company.

Despite everything, a certificate must be issued by someone who has the authority. For example, where the secretary forged the signature of two directors in a company, the company had refused to register the holder of shares as a member. Further a certificate is not evidence as to the equitable interest in shares. Also, where an individual is aware of the false statements in a certificate, he will not be entitled to claim an estoppel.

**Que. No. 11] Write a short note on: Personation of Shareholder**

**Ans.: Punishment for personation of shareholder [Section 57]:** If any person deceitfully personates as owner of any security or interest or receive money due to owner, he shall be punishable:

- with imprisonment for a term which shall not be less than 1 year but which may extend to 3 years and
- with fine which shall not be less than ₹ 1 lakh but which may extend to ₹ 5 lakhs.

## CALLS & FORFEITURE

**Que. No. 12] Write a short note on: Requisites of a valid call**

**Ans.:** Following are the requisites of a valid call:

- (1) **Board of Directors to make calls on shares:** The power to make calls is exercised by the Board in its meeting by means of a resolution. In making a call the Board, must observe the provisions of the articles, otherwise the call will be invalid, and the shareholder is not bound to pay. A proper notice must be given, and the notice must specify the amount called up and manner i.e. the date for payment and place and to whom it is to be paid. It may be emphasized that the time and place at which the call is to be paid are essential ingredients of a valid call.
- (2) **Calls to be made bona fide in the interest of the company:** The power to make call is in the nature of trust and must be exercised only for the benefit of the company, and not for the private ends of the directors. If the call is made for the personal benefit of directors, the call will be invalid. In *Alexander v. Automatic Telephone Co., (1900) 2 Ch. 56*, the directors of the company paid nothing on their shares but did not disclose this fact to the shareholders and called on them to pay certain amount partly as allotment money and partly as call money. The directors were held guilty of breach of trust and the call was held invalid.
- (3) **Calls must be made on uniform basis [Section 49]:** Calls on same class of shares must be made on a uniform basis. Hence, a call cannot be made only on some of the members unless they constitute a separate class. In other words, there cannot be any discrimination between shareholders of the same class as regards amount and time of payment of call.
- (4) **Notice of calls:** The notice of call must specify the exact amount and time of payment.
- (5) **Time limitations for receiving the call money:** If the issuer proposes to receive subscription monies in calls, it shall ensure that the outstanding subscription money is called within 12 months from the date of allotment of the issue.

Usually Articles of association of companies provide for the manner in which calls should be made. They follow the pattern set out in Regulations 13 to 18 of Table F of Schedule I appended to the Companies Act, 2013:

- (a) For each call at least 14 days notice must be given to members.
- (b) An interval of 1 month is required between two successive calls and not more than 1/4<sup>th</sup> of the nominal value of shares can be called at one time. However, companies may have their own articles and raise the limit.

- (c) The Board of directors has the power to revoke or postpone a call after it is made.
- (d) Joint shareholders are jointly and severally liable for payment of calls.
- (e) If a member fails to pay call money he is liable to pay interest not exceeding the rate specified in the articles or terms of issue or such lower rate, as the Board may determine. The directors are free to waive the payment of interest wholly or in part.
- (f) If any member desires to pay the call money in advance, the directors may at their discretion accepted any interest not exceeding the rate specified in the articles.
- (g) A defaulting member will not have any voting right till call money is paid by him.

**Que. No. 12A] Well-done Ltd. wants to make a first call of ₹ 30 on equity share of nominal value of ₹ 100 each on 16<sup>th</sup> October, 2016. Can it do so? Further, if the company proposes to make second call on 7<sup>th</sup> November, 2016, will it be permitted to do so?**

CS (Executive) – Dec 2011 (4 Marks)

**Ans.:** Usually Articles of association of companies provide for the manner in which calls should be made. They follow the pattern set out in Regulations 13 to 18 of Table-F of Schedule-I appended to the Companies Act, 2013. Table F make the following provisions in this regard –

- (i) For each call at least 14 days notice must be given to members.
- (ii) An interval of 1 month is required between two successive calls and not more than 1/4<sup>th</sup> of the nominal value of shares can be called at one time. However, companies may have their own articles and raise the limit.

If Well-done Ltd. has adopted provisions of Table F then, first call of ₹ 30 cannot be made as it exceeds 1/4<sup>th</sup> of the nominal value of shares. Further, it cannot make second call on 7<sup>th</sup> November, 2016 as interval between two successive calls will be less than 1 month.

If Well-done Ltd. has its own article then it has to observe the provisions contained in its article.

**Que. No. 13] Write a short note on: Calls-in-Arrear**

**Ans.:** When calls are made upon shares allotted, the shareholders holding the shares are bound to pay the call money within the date fixed for such payment. If a shareholder makes a default in sending the call money within the appointed date, the amount thus failed is called calls-in-arrear.

**Interest on calls-in-arrear [Regulation 16 of Table F]:** If a call is not paid before or on the day appointed for payment, the shareholder shall pay interest from the day appointed for payment thereof to the time of actual payment at 10% p.a. or at such lower rate, as the Board may determine. The Board shall be at liberty to waive payment of any such interest.

**Que. No. 14] Write a short note on: Calls-in-Advance**

**Ans.:** A company may receive from a shareholder the amount remaining unpaid on shares. This is known as calls-in-advance.

**Company to accept unpaid share capital, although not called up [Section 50]:** The company may, if so authorized by its articles, accept from any member, calls-in-advance i.e. the amount remaining unpaid on any shares. However, person paying calls-in-advance have voting right in respect of amount paid-up on shares only.

**Interest on calls-in-advance [Regulation 18 of Table F]:** The Board may receive from any member calls in advance and may pay interest at a rate not exceeding 12% p.a. The Company is liable to pay interest on the amount of calls-in-advance from the date of receipt of the amount till the date when the call is due for payment. *No dividend can be paid on calls-in-advance.*

Que. No. 15] Distinguish between: Calls-in-Advance & Calls-in-Arrear

CS (Executive) - Dec 2008 (3 Marks)

Ans.: Following are the main points of distinction between calls-in-advance & calls-in-arrear:

Point	Calls-in-Advance	Calls-in-Arrear
Meaning	A company may receive from a shareholder the amount remaining unpaid on shares. This is known as calls-in-advance.	When calls are made upon shares allotted, the shareholders holding the shares are bound to pay the call money within the date fixed for such payment. If a shareholder makes a default in sending the call money within the appointed date, the amount thus failed is called calls-in-arrear.
Interest	Regulation 18 of Table F of the Companies Act, 2013 provides that the Board may receive from any member calls in advance and may pay interest at such rate not exceeding 12% p.a. The Company is liable to pay interest on the amount of calls-in-advance from the date of receipt of the amount till the date when the call is due for payment.	Regulation 16 of Table F of the Companies Act, 2013 provides that, if a call is not paid before or on the day appointed for payment, the shareholder shall pay interest from the day appointed for payment to the time of actual payment at 10% p.a. or at such lower rate, as the Board may determine.
Nature	Interest on calls-in-advance is expenses and debited to profit & loss account.	Interest on calls-in-arrear is income and credited to profit & loss account.

Que. No. 16] What is 'forfeiture of shares'? State the procedure for forfeiture of shares.

CS (Inter) - June 2007 (10 Marks)

What are the important rules relating to forfeiture of shares?

CS (Executive) - Dec 2010 (4 Marks)

Ans.: Forfeiture of shares means taking back of shares by the company from the shareholders for default in payment of calls-in-arrear. For a valid forfeiture, satisfaction of following conditions is necessary:

- (1) **AOA must authorize the forfeiture of shares:** Where power is given in the articles, it must be exercised in accordance with the regulation regarding notice, procedure and manner stated therein; otherwise the forfeiture will be void. If Articles authorize, the forfeiture shall include forfeiture of all dividends declared in respect of the forfeited shares.
- (2) **Resolution for forfeiture:** If the defaulting shareholder does not pay the amount within the specified time as required by the notice, the directors may pass a resolution forfeiting the shares.
- (3) **Proper notice:** Before the shares of a member are forfeited, a proper notice to that effect must have been served. A notice shall name a further 14 days from the date of service of the notice on or before which the payment is to be made. The notice must also mention that in the event of non-payment, the shares will be liable to be forfeited.
- (4) **Power of forfeiture must be exercised bona fide and for the benefit of the company:** The power to forfeit be exercised *bona fide* and for the benefit of the company. The power of forfeiture cannot be exercised to relieve unwilling shareholders from the liability of making the payment. Such a shareholder continues to be responsible for the unpaid part of the shares.

- (5) **Forfeiture of fully paid shares:** The clauses of Table F on forfeiture do not make specific provision for forfeiture of fully paid up shares. On the other hand in *Shyam Chand vs. Calcutta Stock Exchange Association* [1945] 2 I.L.R. Cal 313, it was held that fully paid up shares could be forfeited in cases like expulsion of members where the articles authorize.

Que. No. 17] Write a short note on: Forfeiture of shares CS (Inter) - Dec 1997 (5 Marks)

Ans.: If a shareholder fails to pay the allotment money and/or calls made on him his shares are liable to be forfeited. Forfeiture of shares may be said to be the compulsory termination of membership by way of penalty for non-payment of allotment and/or any call money.

Table F permits the directors to forfeit shares for non-payment of calls. Regulations 28 to 34 contains the following provisions in relation to forfeiture of shares:

- (1) If a member fails to pay any call on the day appointed for payment, the Board may serve a notice requiring payment of the call, together with any interest which may have accrued.
- (2) The notice shall name a further period of 14 days from the date of service of the notice for payment of call.
- (3) If amount is not paid even after such notice then shares in respect of which the call was made shall be liable to be forfeited by passing board resolution.
- (4) A forfeited share may be sold or otherwise disposed of on such terms and in such manner as the Board thinks fit. At any time before a sale or disposal as aforesaid, the Board may cancel the forfeiture on such terms as it thinks fit.
- (5) A person whose shares have been forfeited shall cease to be a member in but shall remain liable to pay to the company all monies which were payable by him in respect of the shares. The liability of such person shall cease if and when the company shall have received payment in full of all such monies in respect of the shares.
- (6) A duly verified declaration in writing by a director, the manager or the secretary that a share has been duly forfeited shall be conclusive evidence of the facts of such forfeiture. The company may receive the consideration, if any, given for the share on any sale or disposal thereof and may execute a transfer of the share in favour of the person to whom the share is sold or disposed of. The transferee shall thereupon be registered as the holder of the share.

Que. No. 17A] A public limited company incorporated under the Companies Act, 2013 may amend its articles of association so as to confer upon it power to forfeit the shares of those members who have defaulted in the payment of calls made by the company.

CS (Executive) - Dec 2015 (5 Marks)

Ans.: A company may if authorized by its articles, forfeit shares for non-payment of calls and the same will not require confirmation of the Court. Where power is given in the articles, it must be exercised strictly in accordance with the regulations regarding notice, procedure and manner stated therein, otherwise the forfeiture will be void. Forfeiture will be effected by means of Board resolution. The power of forfeiture must be exercised bona fide and in the interest of the company.

Thus, a company may amend its article of association so as to confer it power to forfeit the shares of those members who have defaulted in payment of calls made by the company.

**Que. No. 18] Write a short note on: Re-issue of forfeited shares**

**Ans.: Re-issue of forfeited shares [Regulation 31 of Table F]:** Forfeited share may be sold or otherwise disposed of on such terms and in such manner as the Board thinks fit. Thus, even though originally shares cannot be issued at discount, but forfeited shares can be issued at discount.

Some important points relating to re-issue of forfeited shares:

- ◆ The amount receivable on re-issue of such shares together with the amount already received from the defaulting member shall not be less than the face value of the shares.
- ◆ If forfeited shares are re-issued at a discount, the amount of discount can, in no case, exceed the amount credited to "shares forfeited account".
- ◆ Discount allowed on re-issue should be less than the forfeited amount
- ◆ After reissue of forfeited shares amount left in 'shares forfeited account' which will be transferred to 'capital reserve account' which will appear under the head "Reserves & Surplus".

**Que. No. 19] A public limited company forfeited 80 equity shares and re-issued the same which resulted in earning a surplus of ₹ 2,000. The company did not file return of allotment with the Registrar of Companies in respect of re-issued shares. Explain whether the company has contravened any provision of the Companies Act, 2013 by non-filing of the return.**

CS (Inter) - Dec 2007 (4 Marks)

**Ans.:** Shares forfeited by a company may either be cancelled or re-issued to another person at the discretion of the Board. Generally, such shares are re-issued at a discount which cannot exceed the amount already paid on such shares. This is done by a Board resolution.

If the shares are re-issued at a price more than the face value, the excess of the proceeds of sale is not payable to the former owner, if the articles provide otherwise. The excess of the proceeds so retained shall constitute a premium and must therefore be transferred to the securities premium account.

A listed company for reissuing forfeited shares should comply with the relevant clause of the listing agreement and due approval of the regional stock exchange and others as well.

**No return of allotment in respect of re-issue of forfeited shares:** No return of allotment of the shares re-issued need to be filed with the Registrar. Such re-issue, in fact, cannot be called allotment.

**Que. No. 20] Write a short note on: Surrender of shares**

**Ans.:** The Companies Act, 2013 does not contain any provision on surrender of shares. Table F of the First Schedule also does not give power to a company to accept surrender of its shares as it does not contain provision on this subject.

But, articles usually empower the companies to accept surrender of shares.

It is not open to a shareholder to surrender his shares at will, especially when he has to meet future calls, and it is not open to the company to accept a surrender of shares unless the act of the company can be brought within the rule relating to forfeiture of shares.

A surrender of shares releasing the shareholder from further liability in respect of the shares, is equivalent to a purchase of the shares by the company, and is therefore illegal and null and void. Thus, a surrender of shares is not valid merely because the articles of the company authorize the Board to accept surrender of shares, unless it can be shown that the surrender took place in circumstances, which would have justified forfeiture.

There can be no valid surrender of shares that are not fully paid except where shares are lawfully forfeited, as it involves reduction of capital requiring the sanction of the Court.

**Que. No. 21] A company has forfeited shares of a defaulting shareholder for non-payment of call money. However, the defaulting shareholder approaches the Board after forfeiture of shares to cancel the said forfeiture. What should the Board do? Give your advice.**

CS (Executive) - June 2010 (4 Marks)

**Ans.:** In case, the defaulting shareholder approaches the board after forfeiture to cancel the forfeiture, the board is empowered to cancel such forfeiture and claim due amount with interest.

**Que. No. 22] Distinguish between: Forfeiture of shares & Surrender of shares**

CS (Inter) - Dec 2007 (4 Marks)

**Ans.:** Following are the main points of distinction between forfeiture & surrender of shares:

Points	Forfeiture of Shares	Surrender of Shares
<b>Meaning</b>	Forfeiture of shares means taking back of shares by the company from the shareholders for default in payment of calls on shares.	Surrender of shares means giving back shares to the company by the shareholder.
<b>Initiative</b>	In case of forfeiture, the company takes the initiative.	In case of surrender of shares initiative is taken by shareholder.
<b>Reason</b>	Shares can be forfeiture for default in payment of calls-in-arrear.	Shares can be surrendered for other reason also e.g. for exchange into new shares.
<b>Object</b>	The object of forfeiture is to penalize a member for non-payment of call.	The object of surrender of shares is to hand over the shares due non-payment of call or other reasons.
<b>Proper notice</b>	Before the shares of a member are forfeited, a proper notice to that effect must have been served. Regulation 29 of Table F provides that a notice shall name a further 14 days from the date of service of the notice on or before which the payment is to be made. The notice must also mention that in the event of non-payment, the shares will be liable to be forfeited.	No notice is required in case of surrender of shares.

**Que. No. 23] Write a short note on: Lien on a share**

CS (Inter) - June 2000 (5 Marks)

CS (Executive) - June 2011 (3 Marks)

**Ans.:** Lien means to withhold the property of another for the lawful debts. A lien, like a mortgage or pledge, is a form of security. It is equitable charge on the shares to secure any debts due from member of the company. A company can enforce its lien on shares by the sale of those shares after giving 14 days notice in case the member defaults in payment of amount due against him. The proceeds of the sale shall be applied in payment of such part of the amount in respect which the lien exists. The residue, if any, shall be paid to the person entitled to the shares at the date of the sale.

As per Regulation 9 of the Table F, the company shall have a first and paramount lien on partly paid up shares only. Company cannot exercise lien on fully paid up shares. A company can exercise lien on every partly paid up share for all monies payable in respect of such partly paid up shares. However, the Board of directors may at any time declare any share to be wholly or in part exempt from the provisions of this clause.

The company's lien on a share shall also extend to all dividends payable and bonuses declared from time to time in respect of partly paid up shares.

A company cannot enforce its lien by forfeiting the shares. By virtue of this lien, the company has prior right to the shares over any creditor to whom they are given as security for a loan, unless the company was given prior notice of an existing mortgage or pledge of these shares.

**Que. No. 24] Distinguish between: Lien & Forfeiture**

**Ans.:** The following are the main points of distinction between lien and forfeiture:

Points	Lien	Forfeiture
<b>Meaning</b>	Lien means to withhold the property of another for the lawful debts. A lien, like a mortgage or pledge, is a form of security. It is equitable charge on the shares to secure any debts due from member of the company.	If a shareholder fails to pay the allotment money or calls made on him his shares are liable to be forfeited. Forfeiture of shares may be said to be the compulsory termination of membership by way of penalty for non-payment of allotment and/or any call money.
<b>Nature</b>	Lien is a form of security for a debt.	Forfeiture is a penal proceeding.
<b>Reduction of capital</b>	Lien never involves a reduction of capital because the shares are sold if the member makes defaults in payments.	Forfeiture involves reduction of capital if forfeited shares are not reissued.
<b>Amount of sale proceeds of shares</b>	In case of lien, the shareholder is entitled to receive the excess amount than the amount due.	In case of forfeiture nothing is payable to shareholder.

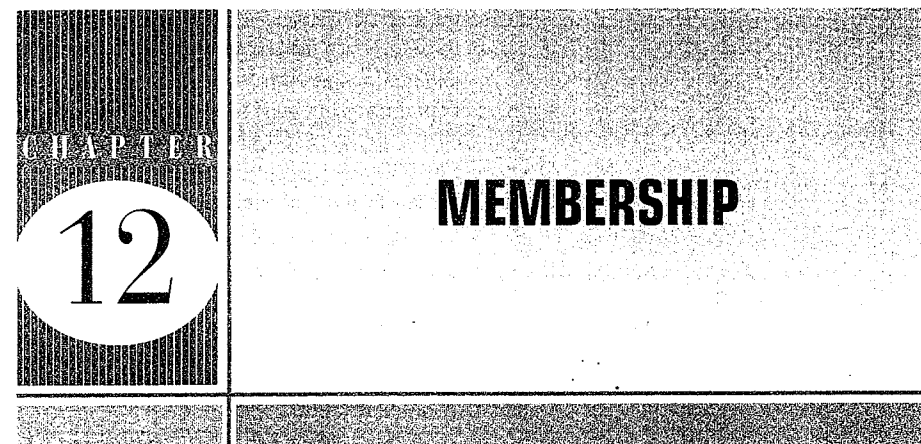
**Que. No. 25] Kailash, an employee of Sweetwill Ltd. met with an accident and died. The accident occurred when Kailash was on company's duty. He held 100 shares partly paid. Normally the company has a first and permanent lien on the shares. The Board of Directors however, relaxed the said provision with regard to these shares as a goodwill gesture on the part of the company. Is the action of the company valid? State the reasons.**

**Whether company's lien can be extended to dividends payable on such shares?**

**Ans.:** A company cannot have lien on shares unless provided in the AOA. As per Regulation 9 of Table F, the company has first and paramount lien on every partly paid up share for all moneys payable to the Company. However the Board of Directors may at any time exempt from the said provision.

Hence, the decision of the Board of Directors of Sweetwill Ltd. to relax the provisions of lien in respect of shares held by Kailash is in order and valid as per Regulation 9 of Table F.

Further the company's lien is extended to all dividends payable on such shares.



### This Chapter Covers:

- > Definition of member
- > Modes of acquiring membership
- > Who may become member?
- > Minimum number of members
- > Cessation of membership
- > Expulsion of members
- > Personation and Penalty
- > Register of members
- > Rights of members
- > Variation of Members Rights
- > Liabilities of members

**Que. No. 1] In what manner 'membership' in a company can be sought?**

CS (Inter) – June 2000 (4 Marks), CS (Inter) – Dec 2000 (3 Marks)

CS (Inter) – Dec 2003 (4 Marks)

CS (Executive) – June 2009 (8 Marks)

**Write a short note on: Modes of acquiring membership** CS (Inter) – June 2007 (3 Marks)

**Ans.:** As per Section 2(55), a person may acquire the membership of a company:

- (1) By subscribing to the MOA (*deemed membership*) or
- (2) By agreeing in *writing* to become a member:
  - By making an application for allotment of shares or
  - By executing an instrument of transfer of shares or
  - By consenting to the transfer of share of a deceased member in his name or
  - By acquiescence or estoppel.

- (3) Every person holding equity share capital of the company and whose name is entered as beneficial owner in the records of the depository shall be deemed to be the member of the concerned company.

The person desirous of becoming a member of a company must have the legal capacity of entering into an agreement in accordance with the provisions of the Indian Contract Act, 1872. Section 11 of the said Act lays down that, every person is competent to contract who:

- Is of the age of majority according to the law to which he is subject.
- Is of sound mind.
- Is not disqualified from contracting by any law to which he is subject.

**Que. No. 2]** The name of Akhil is found entered in the register of member of a company. But Akhil contends that he is not a member of the company. The company maintains that Akhil has orally agreed to become a member and, hence, his name was entered in the register of members. Is the contention of Akhil valid?

CS (Inter) – June 2001 (5 Marks), June 2007 (5 Marks)

**Ans.:** Contention of Akhil is valid. As per Section 2 (55), a person may acquire the membership of a company by agreeing in writing to become a member. Oral agreement is not valid.

**Que. No. 3]** RSP Ltd., allotted 500 fully paid-up shares of ₹ 100 each to Z, a minor, in response to his application without knowing that he was a minor and entered his name in the Register of Members. Later on, the company came to know of this fact. The company cancelled the allotment and struck-off his name from the Register of Members and also forfeited his entire share money. He filed a suit against the action of the company. Decide whether Z would be given any relief by the Court under the provisions of the Companies Act, 2013.

**Ans.:** A minor being incompetent to contract, cannot be member of a company. It is true that the Companies Act, 2013 prescribes no qualification for membership but membership entails an agreement and this agreement can be enforced in the Court. Therefore, the contractual capacity as envisaged by the Indian Contract Act, 1872 should be taken into consideration. It has been held in *Mohri Bibi vs. Dharmadas Ghose* (1930) that since a minor has no contractual capacity, the agreement with a minor is void. Therefore, a minor or a lunatic cannot enter into an agreement to become a member of a company.

In the case *Palaniappa vs Official Liquidator* AIR 1942, it was observed that if the directors allot share to a minor in response to his application, without knowing that he was a minor and enter his name in the Register of Members, the company can eschew the allotment and strike the name of the minor off the Register of Members. But the company must refund the entire money to the minor, which it obtained in relation to the shares allotted.

On the basis of above decision the contention of Z is not valid. The company is empowered to cancel the allotment and strike the name of Z off the Register of Member. But the decision of the company to forfeit the entire share money of Z is wrong. The company must refund the money to the Z.

**Que. No. 4]** Subscribers to memorandum are deemed to be members of the company.  
Comment.

CS (Inter) – Dec 2001 (5 Marks)

CS (Executive) – Dec 2008 (5 Marks)

**Ans.:** In the case of a subscriber, no application or allotment is necessary to become a member. By virtue of his subscribing to the memorandum, he is deemed to have agreed to become a

member and he becomes *ipso facto* member on the incorporation of the company and is liable for the shares he has subscribed.

A subscriber to the memorandum cannot rescind the contract for the purchase of shares even on the ground of fraud by the promoters. [*Re. Metal Constituents Co.*, (1902) 1.Ch. 707.]

**Money payable by member under memorandum or article [Section 10(2)]:** All monies payable by any member to the company under the memorandum or articles shall be debt due from him to the company.

Further, a subscriber to the memorandum must pay for his shares in cash even if the promoters have promised him the shares for services rendered in connection with the promotion of the company. Again, he must take the shares directly from the company, and not through transfer from other member. When a person signs a memorandum for any number of shares he becomes absolutely bound to take those shares and no delay will relieve him from that liability unless he fulfils the obligation. His liability remains right up to the time when the company goes into liquidation and he is bound to bring the money for which he is liable to pay to the creditors of the company.

**Que. No. 5]** All the shareholders of a company are members and all the members of a company are shareholders. Comment.

CS (Executive) – Dec 2008 (5 Marks)

**Ans.:** The members of a company are the persons who constitute the company. In the case of a company limited by shares, the shareholders are the members.

The terms 'members' & 'shareholders' are usually used interchangeably as there can be no membership except through the medium of shareholding. Thus, generally speaking every shareholder is a member and every member is a shareholder. ¶

However, there may be exceptions to this statement, which are explained below:

- (1) A person may be a holder of shares by transfer but will not become its member until the transfer is registered in the books of the company in his favour and his name is entered in the register of members.
- (2) Similarly, a member who has transferred his shares, though he does not hold any shares yet he continues to be member of the company until the transfer is registered and his name is removed from the register of members.
- (3) In a company limited by guarantee, the persons who are liable under the guarantee clause in its MOA are members of the company.
- (4) In an unlimited company, the members are the persons who are liable to the company, each in proportion to the extent of their interests in the company, to contribute the sums necessary to discharge in full, the debts and liabilities of the company, in the event of its being wound-up.

**Que. No. 6]** Who may become a member?

Can following become member of company?

- A partnership firm
- A private limited company

Four types of persons, viz., a Section 8 company, an insolvent individual, a trade union and a pawnee, apply for membership in your public limited company. Will you accept them as members of your company? Why?

CS (Executive) – June 2010 (4 Marks)

**Ans.:** Subject to the MOA & AOA, any person who is competent to contract can become a member of a company. However, it is important to note the following points in relation:

- (1) **Company as a member of another company:** A company can become a member of any other company. However, it must be authorized by its MOA to invest in the shares in other companies. A subsidiary company cannot become a member of its holding company. Where a subsidiary company had become the member of the holding company before it became the subsidiary, it can continue to be a member of holding company. But subsidiary company shall not have any voting rights in respect of shares held in the holding company. [Section 19]
- (2) **Partnership firm as a member:** A partnership firm is not a legal person and cannot become a member of a company. *However partnership firm can become member of Section 8 company i.e. non-profit making company.*
- (3) **Limited liability partnership:** Being an incorporated body under the statute, LLP can become a member of a company.
- (4) **Section 8 company:** A non-profit making company licensed u/s 8 can become a member of another company if it is authorized by its MOA to invest into shares of the other company.
- (5) **Foreigners as members:** A foreigner may take shares in an Indian company and become a member subject to the provisions of the **Foreign Exchange Management Act, 1999**, but in the event of war with his country, he becomes an alien enemy and his power of voting and his rights to receive notices are suspended.
- (6) **Minor as member:** A member who is not competent to contract e.g., a minor cannot become a member of a company. Consequently, an agreement by a minor to take shares is void *ab initio*. It has been held that an agreement in writing for a minor to become a member may be signed on behalf of the minor by his lawful guardian and the registration of transfer of shares in the name of the minor, acting through his or her guardian, especially where the shares are fully paid cannot be refused on the ground of the transferee being a minor. [Miss Nandita Jain vs. Bennett Coleman & Co. Ltd. Appeal No. 27 of 1972 dated 17-2-78]
- (7) **Insolvent as member:** An insolvent may be a member of a company as long as he is on the register of members. He is entitled to vote, but he loses all beneficial interest in the shares and company will pay dividend on his shares to the Official Assignee or Receiver.
- (8) **Pawnee:** A pawnee cannot be treated as the holder of the shares pledged in his favour, and the pawner continues to be a member and can exercise the rights of a member.
- (9) **Receiver:** A receiver whose name is not entered in the register of members cannot exercise any of the membership rights attached to a share unless in a proceeding to which company is a party and an order is made therein.
- (10) **Persons taking shares in fictitious names:** A person who takes shares in the name of a fictitious person, becomes liable as a member besides incurring criminal liability under Section 38, wherein punishment provided is imprisonment up to 5 years.
- (11) **Trade union as member:** A trade union registered under the Trade Union Act, 1926 can be registered as a member and can hold shares in a company in its own corporate name.

**Que. No. 7] Fortune Ltd. refused to enter the name of the minor son of a deceased member in the register of members on the ground that the minor cannot enter into a contract as per Section 11 of the Indian Contract Act, 1872. The shares are fully paid-up. Comment on the decision of the company.**

CS (Executive) – Dec 2009 (4 Marks)

**Ans.:** A member who is not competent to contract e.g., a minor cannot become a member of a company. Consequently, an agreement by a minor to take shares is void *ab initio*.

However, it has been held that an agreement in writing for a minor to become a member may be signed on behalf of the minor by his lawful guardian and the registration of transfer of shares in the name of the minor, acting through his or her guardian, especially where the shares are fully paid cannot be refused on the ground of the transferee being a minor. [Miss Nandita Jain v. Bennett Coleman & Co. Ltd. Appeal No. 27 of 1972 dated 17-2-78]

**Que. No. 8] John, who is a member of Alex Ltd., is of unsound mind. Can the shareholder of unsound mind exercise his voting rights in respect of his membership in the said company? Give your advice.**  
CS (Executive) – June 2011 (4 Marks)

**Ans.:** The person desirous of becoming a member of a company must have the legal capacity of entering into an agreement in accordance with the provisions of the **Indian Contract Act, 1972**. **Section 11** of the said Act lays down that, every person is competent to contract who

- (a) Is of the age of majority according to the law to which he is subject.
- (b). Is of sound mind
- (c). Is not disqualified from contracting by any law to which he is subject.

Since, John is person of unsound mind he cannot exercise his voting rights in respect of his membership in the said company.

**Que. No. 9] Rahees, who is a member of Vivek Ltd., a public company, has very recently become an insolvent. Can the insolvent Rahees continue as a member of the company?**

CS (Executive) – June 2011 (4 Marks)

**Ans.:** An insolvent may be a member of a company as long as he is on the register of members. He is entitled to vote, but he loses all beneficial interest in the shares and company will pay dividend on his shares to the Official Assignee or Receiver.

**Que. No. 10] ABC & Co., a partnership firm applied for shares in XYZ Ltd. The company allotted the shares required by the partnership firm. In the given context, what is the liability of the partners and the partnership firm?**

CS (Executive) – Dec 2013 (4 Marks)

**Ans.:** A partnership firm is not a legal person and cannot become a member of a company. However partnership firm can become member of Section 8 company i.e. non-profit making company.

Hence, on the given case the allotment of shares made by the XYZ Ltd. to the ABC & Co., a partnership firm is invalid and void. Hence, there is no liability of partners and the partnership firm.

**Que. No. 11] Write a short note on: Joint Members**

**Ans.:** If more than one person apply for shares in a company and shares are allotted to them, each one of such applicant becomes a member.

- ◆ Joint members can insist on having their names registered in any order they may require.
- ◆ They may also have their holding split into several joint holdings with their names in different orders so that all of them may have a right to vote as first named holding in one or the other joint holdings.
- ◆ Each of the joint holders of share is a member of the company, but joint holders are counted as one member for the purpose of determining the maximum number of members.
- ◆ Notices and other documents required to be served by the company will be deemed to be properly served if the service is effected on the first named joint-holder.

- ◆ Unless instructions in writing have been received to the contrary, the company, can pay dividend to the first named shareholder.
- ◆ Unless the Articles otherwise provide, any joint shareholder is entitled to be present in any general meeting and take part in the proceedings and vote on resolutions on show of hands.
- ◆ In the event of poll, voting right can be exercised only by one of the joint shareholders.
- ◆ Joint members are liable jointly and severally to pay calls on the shares held by them.
- ◆ Proxy form to be valid must be signed by all joint shareholders.

**Que. No. 12] Explain when a person ceases to be a member of the company.**

CS (Inter) - Dec 2007 (4 Marks)

CS (Executive) - Dec 2010 (8 Marks)

**Ans.:** A person ceases to be a member of a company when his name is removed from its register of members, which may occur in any of the following situations:

- ◆ He transfers his shares to another person.
- ◆ His shares are forfeited.
- ◆ His shares are sold by the company to enforce a lien.
- ◆ He dies (his estate, however, remains liable for calls)
- ◆ He is adjudged insolvent and the Official Assignee disclaims his shares.
- ◆ His redeemable preference shares are redeemed.
- ◆ He rescinds the contract of membership on the ground of fraud or misrepresentation or a genuine mistake.
- ◆ His shares are purchased either by another member or by the company itself under an order of the Tribunal.
- ◆ The member is a company which is being wound-up in India, and the liquidator disclaims the shares.
- ◆ The company is wound up.

Though one ceases to be a member, he remains liable as a contributory and is also entitled to share in the surplus, if any.

**Que. No. 13] Can member be expelled from company? Discuss with reference to a case law.**

CS (Inter) - Dec 2003 (4 Marks), June 2007 (4 Marks)

**Thrive Ltd. is a public limited company, incorporated under the Companies Act, 2013. The Board of directors of the said company has recently decided to insert an article in its articles of association relating to expulsion of a member by the Board of directors of the company where the directors were of the view that the activities or conduct of such a member was detrimental to the interests of the company. Is the Board's decision valid in the eye of law?**

CS (Executive) - June 2011 (4 Marks)

**Ans.:** A controversy had arisen as to whether a public limited company had powers to insert an article in its AOA relating to expulsion of a member by the Board of Directors of the company where the directors were of the view that the activities or conduct of such a member was detrimental to the interests of the company.

The MCA clarified that an article for expulsion of a member is opposed to the fundamental principles of the Company Jurisprudence and is *ultra vires* the company, the reason being that

such a provision against the provisions of the Companies Act relating to the rights of a member in a company.

According to **Section 6**, the Act overrides the MOA and AOA and any provision contained in these documents repugnant to the provisions of the Companies Act, 2013 is void.

Thus, any assumption of the powers by the Board of Directors to expel a member by alteration of Articles of Association shall be illegal and void.

The Supreme Court in the case of *Bajaj Auto Ltd. vs. N.K. Firodia* [1971] 41 Comp. Cas. 1, has laid down the law as to the conditions on the basis of which directors could refuse a person to be admitted as a member of the company. The principles laid down by the Supreme Court in this case, even though pertain to the refusal by a company to the admission of a person as a member of the company, are applicable even with greater force to a case of expulsion of an existing member. As, under Article 141 of the Constitution, the law declared by the Supreme Court is binding on all Courts within the territory of India, any provision pertaining to the expulsion of a member by the management of a company which is against the law as laid down by the Supreme Court will be illegal and *ultra vires*. In the light of the aforesaid position, it is clarified that assumption by the Board of directors of a company of any power to expel a member by amending its articles of association is illegal and void.

**Que. No. 14] Write a short note on: Register of Members**

The register of members is a *prima facie* evidence of membership. Comment.

CS (Inter) - Dec 2005 (5 Marks)

**Ans.:** Register of Members [Section 88]:

- (1) Every company shall keep and maintain the following registers:
  - (a) Register of members indicating separately for each class of equity and preference shares held by each member residing in or outside India.
  - (b) Register of debenture holders and
  - (c) Register of other security holders.
- (2) Every register maintained as above shall include an index of the names included therein. The register and index of beneficial owners maintained by a depository u/s 11 of the Depositories Act, 1996, shall be deemed to be the corresponding register and index for the purposes of this Act.
- (3) Foreign Register

Provisions of the Companies (Management & Administration) Rules, 2014

Register of Members [Rule 3]:

- (1) Every company limited by shares shall from the date of its registration maintain a register of its members in **Form No. MGT. 1**.
- (2) In the case of a company not having share capital, the register of members shall contain the following particulars, in respect of each member:-
  - (a) Name of the member; address (registered office address in case the member is a body corporate); e-mail address; Permanent Account Number or CIN; Unique Identification Number, if any; Father's/Mother's/Spouse's name; Occupation; Status; Nationality; in case member is a minor, name of the guardian and the date of birth of the member; name and address of nominee;
  - (b) Date of becoming member
  - (c) Date of cessation

- (d) Amount of guarantee, if any
- (e) Any other interest if any and
- (f) Instructions, if any, given by the member with regard to sending of notices etc.

#### Maintenance of the Register of members etc. u/s 88 [Rule 5]:

Every company shall maintain the registers u/s 88 in the following manner:

- (1) The entries in the registers of members shall be made **within 7 days** after the Board of Directors or its duly constituted committee approves the allotment or transfer of shares, debentures or any other securities.
- (2) The registers shall be maintained at the **registered office** of the company unless a **special resolution** is passed in a general meeting authorizing the keeping of the register at any other place within the city, town or village in which the registered office is situated or any other place in India in which **more than 1/10<sup>th</sup>** of the total members entered in the register of members reside.
- (3) An entry in the register has to be made **within 7 days** after approval by the Board or committee.
- (4) If any change occurs in the status of a member or debenture holder or any other security holder whether due to death or insolvency or change of name or due to transfer to **Investor Education Protection Fund** or due to any other reason, entries thereof explaining the change shall be made in the respective register.
- (5) If any rectification is made in the register of members by the company pursuant to any order passed by the competent authority, the necessary reference of such order shall be indicated in the respective register.
- (6) If any order is passed by any judicial or revenue authority or by SEBI or Tribunal attaching the shares, debentures or other securities and giving directions for remittance of dividend or interest, the reference of such order shall be indicated in the respective register.
- (7) In case of listed companies, the particulars of pledge, charge, lien or hypothecation created by the promoters on their holdings shall be entered in the register within 15 days from such an event.
- (8) If promoters of any listed company, which has formed a joint venture company with another company have pledged or hypothecated or created charge or lien in respect of any security of the listed company in connection with such joint venture company, the particulars shall be entered in the register within 15 days from such event.

#### Authentication [Rule 5]:

- (1) The entries in the registers maintained u/s 88 and index included therein shall be authenticated by the **Company Secretary** or by any other person authorized by the Board, and the date of the board resolution authorizing the same shall be mentioned.
- (2) The entries in the foreign register shall be authenticated by the **Company Secretary** or person authorized by the Board.

**Register of debenture holders or any other security holders [Rule 4]:** Every company which issues or allots debentures or any other security shall maintain a separate register of debenture holders or security holders, as the case may be, for each type of debentures or other securities in **Form No. MGT. 2**.

#### Que. No. 15] Write a short note on: Index of Members

**Ans.:** Every register of shareholder and other security holder shall include an index of the names included therein. [Section 88(2)]

**Index of names to be included in Register [Rule 6 of the Companies (Management & Administration) Rules, 2014]:**

- (1) Every register of members shall include an index of the names entered in the respective registers and the index shall, in respect of each folio, contain sufficient indication to enable the entries relating to that folio in the register to be readily found.  
However, the maintenance of index is not necessary in case the number of members is **less than 50**.
- (2) The company shall make the necessary entries in the index simultaneously with the entry for allotment or transfer of any security in such Register.

Inspection must be allowed of the Index in the same manner as applicable to the register of members.

#### Que. No. 16] Write a short note on: Place of keeping and inspection of the Registers of Members

**Ans.:** **Place of keeping of registers & returns [Section 94 (1)]:** The registers required to be kept and maintained by a company u/s 88 (i.e. *Register of Members and Register of debenture holders and other securities holders*) and copies of the annual return shall be kept at the registered office of the company.

However, such registers or copies of return may also be kept at any other place in India where more than 1/10<sup>th</sup> of the total members reside. Such decisions should be approved by a **special resolution**.

**Inspection of registers & returns [Section 94(2)]:** The registers and their indices except when they are closed and 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 (2 hours on every working day) without payment of any fees and by *any other person* on payment of *prescribed fees*. (₹ 50 for each inspection) [Rule 14(1)]

**Copies of registers & returns [Section 94(3)]:** Any member, debenture-holder, other security holder or beneficial owner or any other person may:

- (a) Take extracts from any register, or index or return without payment of any fee or
- (b) Require a copy of any such register or entries therein or return on payment of prescribed fees. (₹ 10 for each page) [Rule 14(2)]

**Penalty [Section 94(5)]:** If any inspection or the making of any extract or copy required under this section is refused, the company and every officer of the company who is in default shall be liable, for each such default, to a penalty of ₹ 1,000 for every day subject to a maximum of ₹ 1,00,000 during which the refusal or default continues.

**Remedy [Section 94(5)]:** The Central Government may also, by order, direct an immediate inspection of the document, or direct that the extract required shall forthwith be allowed to be taken by the person requiring it.

#### Que. No. 17] The register of members is a *prima facie* evidence of membership. Comment. CS (Inter) - Dec 2005 (5 Marks)

**Ans.:** **Registers, etc., to be evidence [Section 95]:** The registers, their indices and copies of annual returns maintained u/ss 88 & 94 shall be *prima facie* evidence of any matter directed or authorized to be inserted therein by or under this Act.

A register of members is *prima facie* evidence of the truth of its contents. Accordingly, if a person's name, to his knowledge, is there in the register of members of a company, he shall be deemed to be a member and onus lies on him to prove that he is not a member. He must promptly appeal to the Tribunal or a competent Court outside India specified by the Central Government by notification, in respect of foreign members or debenture holder residing outside India for rectification of the register u/s 59 to take his name off the register, failing which the doctrine of holding out will apply.

The plaintiff applied for 4,000 shares in a company but no allotment was made to him. Subsequently 4,000 shares were transferred to him without his request and his name was entered in the register of members. The plaintiff knew it but took no steps for rectification of the register of members. The company went into liquidation and he was held liable as a contributory. The Court held "when a person knows that his name is included in the register of shareholders and he stands by and allows his name to remain, he is holding out to the public that he is a shareholder and thereby he loses his right to have his name removed." [Re. M.F.R.D. Cruz, A.I.R. 1939 Madras 803]

**Que. No. 18] Explain the circumstances under which register of members may be rectified and state the procedure therefor.**

CS (Inter) - Dec 1998 (8 Marks), Dec 2004 (8 Marks)

**Ans.:** Rectification of register of members [Section 59]: Register of members can be rectified in following cases:

- ◆ If the name of any person is entered in the register of members without sufficient cause or
- ◆ If the name of any person is omitted from register of members without sufficient cause or
- ◆ If a default is made, or unnecessary delay takes place in entering in the register

In such case aggrieved person or any member of the company, or the company may appeal in prescribed form to the Tribunal, or to a competent Court outside India for rectification of the register.

The Tribunal will hear the parties to the appeal. The Tribunal may by order, either dismiss the appeal or direct that the transfer or transmission shall be registered by the company within a period of 10 days of the receipt of the order. The Tribunal may also direct rectification of the records of the depository or the register and direct the company to pay damages, if any, sustained by the party aggrieved.

**Que. No. 19] Mohan applied for 4,000 shares in a company but no allotment was made to him. Subsequently 4,000 shares were transferred to him without his request and his name was entered in the register of members. Mohan knew it but took no steps for rectification of the register of members. Subsequently, the company went into liquidation and he was held liable as a contributory. Now Mohan wants to apply the Court for rectification of register of members. Can he do so? Explain.**

CS (Executive) - Dec 2012 (4 Marks)

**Ans.:** When a person knows that his name is included in the register of shareholders and he stands by and allows his name to remain, he is holding out to the public that he is a shareholder and thereby he loses his right to have his name removed. [Re. M.F.R.D. Cruz, A.I.R. 1939 Madras 803]

Thus, Mohan's application will be refused by the Court.

**Que. No. 20] X had applied for the allotment of 1,000 shares in a company. No allotment of shares was made to him by the company. Later on, without any further application from X, the company transferred 1,000 partly-paid shares to him and placed his name in the Register of Members. X, knowing that his name was placed in the Register of Members, took no steps to get his name removed from the Register of members. The company later on made final call. X refuses to pay for this call. Referring to the provisions of the Companies Act, 2013, examine whether his (X's) refusal to pay for the call is tenable and whether he can escape himself from the liability as a member of the company.**

**Ans.:** According to Section 95, the register of member is a *prima facie* evidence of the truth of its contents. The contents of the register of members are of decisive importance in determining as to who were the shareholders of the company at a crucial time. Accordingly, if a person's name, to his knowledge, is entered in the register, he shall be deemed to be a member. In the given case X knows that his name is included in the register of shareholders and stands by and allows his name to remain, he is holding out to the public that he is shareholder and thereby he will be liable as shareholder.

**Que. No. 21] A finance company lent a certain sum of money to Modern Garments Ltd., a company manufacturing garments, at an agreed rate of interest, to be repaid as per the schedule attached to loan agreement. The borrowing company made payments of the first 3 instalments contained in the schedule and thereafter could not make any payment due to its working capital problem. The lending company sent registered letters demanding the payments. It is contended by the borrowing company that the lending company agreed in a meeting to accept shares of the borrowing company in settlement of unpaid balance of the loan and accrued interest. Thereupon the borrowing company allotted shares to the lending company and share certificate to that company register post. The lending company seeks to get register of member of Modern Garments Ltd. rectified and contends that it never applied for any shares in the borrowing company and it was just unilateral allotment. Will the lending company succeed?**

CS (Inter) - Dec 2002 (5 Marks)

**Ans.:** The facts of the given case are similar to *Indglobal Investment & Finance Ltd. vs. Rajasthan Breweries Ltd.*, where in it was held that there was not written application for allotment of shares. Section 2 (55) stipulates that a person to become member should agree in writing for allotment of shares. Non-compliance with provisions of law is a sufficient cause to order rectification of register of members.

Thus, in above case, the borrowing company was directed to rectify the register of members by cancelling the shares allotted and effect reduction of shares capital to that extent.

**Que. No. 22] Write a short note: Foreign Register**

**Ans.:** Foreign Register [Section 88 (4)]: A company may, if so authorized by its articles, keep in any country outside India, a part of the register called "foreign register" containing the names and particulars of the members, debenture holders, other security holders or beneficial owners residing outside India.

**Foreign register of members, debenture holders, other security holders or beneficial owners residing outside India. [Rule 7 of the Companies (Management & Administration) Rules, 2014]:** The company shall, within 30 days from the date of the opening of any foreign register, file with the Registrar notice of the situation of the office in Form No. MGT. 3 along with the fee where such register is kept; and in the event of any change in the situation of such office or of

its discontinuance, shall, within 30 days from the date of such change or discontinuance, as the case may be, file notice in **Form No. MGT. 3** with the Registrar of such change or discontinuance.

A foreign register is deemed to be a part of the company's principal register and it should be kept in the same manner as the principal register and be likewise open to inspection.

A duplicate of such register should be maintained at the registered office in India and all entries made in the foreign register should be made in the duplicate register at the registered office as soon as possible.

A company may discontinue a foreign register at any time but all the entries made in it must be transferred to the principal register.

The decision of a competent Court in the State or Country in which a foreign register is kept, with regard to its rectification, shall be as effective as if it were a decision of a competent Court in India, if the Central Government, by notification in the Official Gazette, so directs.

**Que. No. 23] Register of Members can be closed by the company at any time. Comment.**

CS (Inter) - June 1999 (5 Marks)

**Ans.: Power to close register of members or debenture holders or other security holders [Section 91]:** A company may close the register of members or the register of debenture holders or the register of other security holders for any period or periods not exceeding in the aggregate 45 days in each year, but not exceeding 30 days at any one time, subject to giving of previous notice of at least 7 days or such lesser period as may be specified by SEBI for listed companies.

**Closure of register of members or debenture holders or other security holders [Rule 10 of the Companies (Management & Administration) Rules, 2014]:**

A company closing the register of members or the register of debenture holders or the register of other security holders shall give at least 7 days previous notice as specified by SEBI by advertisement at least once in a vernacular newspaper in the vernacular language and at least once in English language at the place where the registered office of the company is situated and publish the notice on the website as may be notified by the Central Government and on the website of the Company.

The above provisions shall not be applicable to a private company provided that the notice has been served on all members of the private company not less than 7 days prior to closure of the register of members or debenture holders or other security holders.

**Que. No. 24] Write a short note on: Preservation of Registers of members**

**Ans.: Preservation of register of members etc. and annual return [Rule 15 of the Companies (Management & Administration) Rules, 2014]:**

- (1) The register of members along with the index shall be preserved permanently and shall be kept in the custody of the **Company Secretary** of the company or any other person authorized by the Board for such purpose; and
- (2) The register of debenture holders or any other security holders along with the index shall be preserved for a period of 8 years from the date of redemption and shall be kept in the custody of the **Company Secretary** of the company or any other person authorized by the Board for such purpose.
- (3) Copies of all **Annual Returns** and copies of all certificates and documents required to be annexed thereto shall be preserved for a period of 8 years from the date of filing with the Registrar.
- (4) The foreign register of members shall be preserved permanently, unless it is discontinued and all the entries are transferred to any other foreign register or to the principal register.

Foreign register of debenture holders or any other security holders shall be preserved for a period of 8 years from the date of redemption of such debentures or securities.

- (5) The foreign register shall be kept in the custody of the **Company Secretary** or person authorized by the Board.

**Que. No. 25] Write a short note on: Rights of Members**

**Ans.:** When a person becomes a member he is entitled to exercise all the rights of a member. So long a person's name stands registered in the books as a member, even if he has sold the share and has given the share certificates and the blank transfer deed duly signed, he alone is entitled to exercise the rights of membership.

**Individual Rights:** Members of a company enjoy certain rights in their individual capacity, which they can enforce individually. These rights are contractual rights and cannot be taken away except with the written consent of the member concerned. These rights can be categorized as under:

- (1) Right to receive copies of the following documents from the company:
  - Abridged balance-sheet and profit & loss account
  - Report of the Cost Auditor
  - Contract for the appointment of the managing director/manager
  - Notices of the general meetings
- (2) Right to inspect statutory registers/returns and get copies thereof on payment of prescribed fee. The members have been given right to inspect the following registers etc.:
  - Debenture trust deed
  - Register of charges
  - Register & index of members and debenture holders
  - Annual Returns
  - Minutes Book
  - Register of Contracts, Companies and Firms in which directors are interested
  - Register of directors
  - Register of Directors Shareholdings
- (3) Right to attend meetings of the shareholders and exercise voting rights at these meetings either personally or through proxy.
- (4) **Other Rights:** Over and above the rights enumerated at Item Nos. 1 to 3 above, the members have the following rights:
  - To receive share certificates
  - To transfer shares
  - To receive dividend
  - To have rights shares
  - To appoint directors
  - To share the surplus assets on winding up
  - Right of dissentient shareholders to apply to court

**Collective Membership Rights:** Members of a company have certain rights which can be exercised by members collectively i.e. by majority of members.

- Right to be exercised collectively in respect of making application to the Central Government for investigation of the affairs of the company and for appointment of Government directors.
- Right to make application collectively to the Tribunal for oppression & mismanagement.

**Que. No. 26] Write a short note on: Variation of Members Rights**

**Write a short note on: Rights of Dissident Members**

CS (Executive) - Dec 2013 (4 Marks)

**Ans.:** Member's rights are determined by the Companies Act, 2013, MOA & AOA of the company and the terms of issue of shares.

Rights attached to a class of shares are known as "class rights".

Member's rights relate to dividend, voting at members' meetings and return of capital. Preference shareholders may have rights to a fixed amount or a fixed rate of dividend or to cumulative dividend.

**Variation of Shareholders Rights [Section 48(1)]:** The rights attached to the shares of any class can be varied with the consent in writing of the holders of **not less than 3/4<sup>th</sup>** of the issued shares of that class or with the sanction of a **special resolution** passed at a separate meeting of the holders of the issued shares of that class. Further, the variation of rights of shareholders can be effected only:

- If provision with respect to such variation is contained in the MOA of the company or
- In the absence of any such provision in a MOA or AOA of the company, if such a variation is not prohibited by the terms of issue of the shares of that class.

However, if variation by one class of shareholders affects the rights of any other class of shareholders, the consent of 3/4<sup>th</sup> of such other class of shareholders shall also be obtained and the provisions of this section shall apply to such variation.

**Rights of Dissident Members [Section 48(2)]:** Where the rights of any class of shares are varied, the holders of **not less than 10%** of the issued shares of that class can apply to the Tribunal to have the variation cancelled.

Where any such application is made to the Tribunal, the variation will not be effective unless and until it is confirmed by the Tribunal.

The above application shall be made **within 21 days** after the date on which the consent was given or the resolution was passed.

**Que. No. 27] Write a short note on: Nomination of Shares/ Debentures**

CS (Inter) - June 2000 (4 Marks)

**Ramesh, a shareholder in Mod Ltd., desires to nominate his wife Radha as a nominee in respect of his shareholdings. Can Mod Ltd. accept the nomination so made? Advise the company.**

CS (Inter) - June 2005 (4 Marks)

**Ans.:** **Power to nominate [Section 72]:** Every holder of securities of a company may, at any time, nominate, in the prescribed manner, any person to whom his securities shall vest in the event of his death.

When the securities of a company are held by more than one person jointly, the joint holders may together nominate, in the prescribed manner, any person to whom all the rights in the securities shall vest in the event of death of all the joint holders.

Where a nomination has been made, the nominee will be entitled to all the rights in respect of shares in the event of death of the shareholder as against the legal representative/legal heirs of the deceased member.

When the nominee is a minor, it shall be lawful for the holder of the securities, making the nomination to appoint, in the prescribed manner, any person to become entitled to the securities of the company, in the event of the death of the nominee during his minority.

**Nomination by securities holders [Rule 19 of the Companies (Share Capital & Debentures) Rules, 2014]:**

- (1) Any holder of securities of a company may, at any time, nominate, in Form No. SH.13, any person as his nominee in whom the securities shall vest in the event of his death.
- (2) On the receipt of the nomination form, a corresponding entry shall forthwith be made in the relevant register of securities holders, maintained u/s 88.
- (3) Where the nomination is made in respect of the securities held by more than one person jointly, all joint holders shall together nominate in Form No. SH.13 any person as nominee.
- (4) The request for nomination should be recorded by the Company within a period of **2 months** from the date of receipt of the duly filled and signed nomination form.
- (5) In the event of death of the holder of securities or where the securities are held by more than one person jointly, in the event of death of all the joint holders, the person nominated as the nominee may upon the production of such evidence as may be required by the Board, elect, either-
  - (a) to register himself as holder of the securities or
  - (b) to transfer the securities, as the deceased holder could have done.
- (6) If the person being a nominee, so becoming entitled, elects to be registered as holder of the securities himself, he shall deliver or send to the company a notice in writing signed by him stating that he so elects and such notice shall be accompanied with the death certificate of the deceased share or debenture holder(s).
- (7) All the limitations, restrictions and provisions of the Act relating to the right to transfer and the registration of transfers of securities shall be applicable to any such notice or transfer as aforesaid as if the death of the share or debenture holder had not occurred and the notice or transfer were a transfer signed by that shareholder or debenture holder, as the case may be.
- (8) A nominee will be entitled to the same dividends or interests and other advantages to which he would have been available to deceased shareholder.
- (9) A nomination may be cancelled, or varied by nominating any other person in place of the present nominee by giving a notice to the company in Form No. SH. 14.
- (10) The cancellation or variation shall take effect from the date on which the notice of variation or cancellation is received by the company.
- (11) When the nominee is a minor, the holder of the securities, may appoint a person in Form No. SH. 14, who shall become entitled to the securities of the company, in the event of death of the nominee during his minority.

**Que. No. 28] Write a short note on: Liability of Members**

**Ans.:** The liability of a member depends on the nature of the company. If the company is registered with unlimited liability, every member is liable in full for all the debts of the company contracted during the period of his membership. Where the company is limited by guarantee, each member will be bound to contribute in the event of winding up a sum specified in the liability clause of the memorandum of association. In case of company limited by shares, each

member is bound to contribute the full nominal value of shares and his liability ends there. If before the full nominal value of the shares is paid, the company goes into liquidation, the member becomes liable as contributory to pay the balance when called upon to pay, by the liquidator of the company.

Where a company has been got incorporated by furnishing any false or incorrect information or representation or by suppressing any material fact or information in any of the documents or declaration filed or made for incorporating such company or by any fraudulent action, the Tribunal may, on an application made to it, on being satisfied that the situation so warrants, direct that liability of the members shall be unlimited. [Section 7(7)]

If a member ceased to be member of a company within one year prior to the commencement of the winding up of the company he is liable to pay on the shares which he held to the extent of the amount unpaid thereon, if:

- (i) on the winding up, debts exist which were incurred while he was a member, and
- (ii) it appears to the Tribunal that the present members are not able to satisfy the contribution required from them in respect of their shares.

A person is liable as member in spite of a valid transfer of shares by him, if the name of the transferee is not placed on the register of members, in place of the transferors' name. If a person applies for shares in the name of a fictitious person or a person not in existence or uses another person's name for himself, or uses an *alias*, and shares are allotted in that name or *alias*, he will be liable as a member.

# CHAPTER 13

## TRANSFER & TRANSMISSION OF SECURITIES

### This Chapter Covers:

- > Provision regulating transfer of Securities
- > Nomination of shares/debentures
- > Stamp duty payable and affixation/cancellation of shares
- > Transfer of debentures
- > Power of board of directors to refuse registration
- > Statutory remedy against refusal
- > Transfer of securities of a public companies
- > Transfer of shares during winding up
- > Rights of transferor
- > Lost transmission deed
- > Transmission of shares
- > Transfer of shares in depository mode

### TRANSFER OF SECURITIES

Que. No. 1] State the provision under the Companies Act, 2013 regulating transfer of securities.

What is 'transfer of shares'?

CS (Inter) – June 2000 (2 Marks)

Ans.: Transfer of securities [Section 58(2)]: The securities or other interest of any member in a public company shall be freely transferable. The Board of directors or the concerned depository has no discretion to refuse or withhold transfer of any security. The transfer has to be effected automatically and immediately.

Any contract or arrangement between two or more persons in respect of transfer of securities shall be enforceable as a contract.

Instruments of transfer to be presented to the company [Section 56(1)]: A company, shall not register a transfer of securities unless a proper instrument of transfer in Form No. SH. 4

duly stamped, dated and executed by or on behalf of the transferor and the transferee has been delivered to the company by the transferor or transferee within a period of 60 days from the date of execution along with the certificate relating to the securities or letter of allotment of securities.

**Registration of partly paid up shares - Notice to the transferee [Section 56(3)]:** Where an application is made by the transferor for transfer of partly paid shares, the company shall give the notice of the application, in Form No. SH. 5 to the transferee. Such partly paid shares can be transferred if the transferee gives no objection to the transfer within 2 weeks from the receipt of notice.

**Time limit for delivery of certificates [Section 56(4)]:** Every company deliver the certificates of securities allotted, transferred or transmitted, within a period of 1 month from the date of receipt of the instrument of transfer or the intimation of transmission, in case of transfer or transmission of shares. This restriction as to time will not apply if transfer or transmission is prohibited by any provision of law or any order of Court, Tribunal or other authority.

**Transfer of securities by legal representative [Section 56(5)]:** The transfer of any security or other interest of a deceased person in a company made by his legal representative shall be valid as if he had been the holder at the time of the execution of the instrument of transfer.

**Que. No. 2] Dinesh, one of the joint holders of shares of a company, sent a requisition to the company to split the shares equally amongst him and the other joint holders, by issuing fresh share certificates. State whether the company is bound to comply with this requisition.**  
CS (Inter) - Dec 2007 (4 Marks)

**Ans.:** Where the shares of the company are held in joint names and one of these joint holders makes a request to the company to split the shares among the joint holders, the company shall not be bound to do so unless the transfer deed duly executed jointly by all the joint holders duly stamped and executed are lodged with the company together with relevant share certificates in terms of Section 56 of the Companies Act, 2013.

**Que. No. 3] Anant buys 20 shares of a public company from Basant through a stock broker. Anant receives the share certificate and the blank transfer deed countersigned by Basant but does not lodge the transfer deed for registration. Examine the legal effect of unregistered transfer between the transferor and the transferee.**

CS (Inter) - Dec 2007 (4 Marks)

**Ans.:** There is binding contract and the title of the transferee is complete and he became equitable beneficial owner of the shares even though the transfer has not been lodged with the company. However, it was held that the transferee becomes the member of a company only when the transfer of shares is registered by the company. Pending registration, the transferor is trustee of the shares for the transferee and the transferor continues to be the holder of the shares until his name is struck off the register of member and the name of the transferee entered in his place. [*Hardoon vs. Belilios*]

**Que. No. 4] Write a short note on: Transfer of Share Warrants**

Layman is a holder of a share warrant in Ontime Fliers Ltd., a public limited company. Unfortunately, Layman is unaware of any of the formalities to be complied with for transferring the said share warrant. Advise him about the formalities to be completed in this regard.

CS (Executive) - June 2010 (4 Marks)

**Ans.:** A share warrant is transferable by mere delivery of the warrants without execution of any written instrument of transfer being registered by the company. The bearer of a share warrant is not a member of the company unless otherwise so provided in the articles of the company.

**Que. No. 5] Write a short note on: Loss of Transfer Deed**

Sudesh sent an envelope to Nova Technology Ltd. on 6th June 2015. The envelope contained a duly executed transfer deed along with relevant share certificate. On an enquiry, it was learnt that the envelope has not been delivered to the company and the same may have been lost in postal transit. Sudesh seeks your advice as a Company Secretary, as to how to obtain a duplicate share certificate from the company in lieu of the lost one.

CS (Inter) - June 2004 (6 Marks)

**Ans.:** It is sometimes found that the transfer documents sent to companies are lost in transit or otherwise. In such a case, the company may receive a request from the transferee by way of an application carrying adequate stamp duty.

The procedure in above case is as under:

- (1) An application in writing should be made by the transferee, which should bear required stamp duty for an instrument of transfer.
- (2) The board of directors of the company should be satisfied that the instrument of transfer signed by the transferor and by the transferee has been lost. The proof may be in the form of an affidavit from the transferor or the transferee and supported by the purchase or sale note of the broker and the registration receipt issued by the postal authorities.
- (3) In addition, the company can take an indemnity to safeguard its position.

After getting all the above stated condition complied with, the company may issue a duplicate share certificate in lieu of the lost one.

**Que. No. 6] Can a private or public company refuse to transfer shares? What are the remedies available against refusal under the Companies Act, 2013?**

**Directors have uncontrolled and unfettered powers to refuse registration of transfer of shares. Comment.**  
CS (Inter) - June 2007 (5 Marks)

**Ans.:** Refusal of registration by private company [Section 58(1)]: If a private company limited by shares refuses to register the transfer or the transmission of any securities or interest of a member, it shall, within a period of 30 days from the receipt of transfer deed send notice of the refusal to the transferee and the transferor or to the person giving intimation of transmission giving reasons for such refusal.

**Refusal of registration by public company [Section 58(4)]:** A public company may on sufficient cause, refuse, to register the transfer of securities within a period of 30 days from the date on which the instrument of transfer, or the intimation of transmission, is delivered to the company. In such a case the public company may send an intimation of the refusal.

**Remedy against refusal [Section 58(3), (5) & (6)]:** If a private company limited by shares refuses to register the transfer or transmission, the transferee may appeal to the Tribunal against the refusal within 30 days from the date of receipt of the notice or in case no notice has been sent by the company, within 60 days from the date on which the instrument of transfer or the intimation of transmission, was delivered to the company.

If a public company without sufficient cause refuses to register the transfer of securities within 30 days from the date on which the instrument of transfer or the intimation of transmission, is delivered to the company, the transferee may, within 60 days of such refusal or where no intimation has been received from the company, within 90 days of the delivery of the instrument of transfer or intimation of transmission, appeal to the Tribunal.

The Tribunal, while dealing with an appeal, after hearing the parties, either dismiss the appeal, or by order-

- (a) Direct that the transfer or transmission shall be registered and the company shall comply with order within 10 days of the receipt of the order or
- (b) Direct rectification of the register and also direct the company to pay damages sustained by any party aggrieved.

**Judicial Views:**

- ◆ Refusal to register share transfer on suspicion that the employee if admitted as a member will attend general meetings of the company and may create nuisance by raising irrelevant issues and also obtain access to the records to the company as a shareholder is not a valid reason. [*Appeal to the CLB No. 27, of 1975 dated 17th August, 1976, Shri Nirnal Kumar v. Jaipur Metal and Electrical Limited*]
- ◆ The mere attempts of a person to wind up a company more than once cannot be a ground for refusing to register transfer by the directors. [*Rangpur Ten Association Ltd. v. Makkan Lal Samaddar (1979), 43 Com Cases 58*].
- ◆ Where the appellant transferee and respondent company were in the same line of business and were rivals, the refusal on the ground of rivalry will be justified in terms of the decision rendered by the Supreme Court in the Bajaj Auto Case. Under these circumstances, the investment cannot be considered to have been made *bona fide* with the intention of making profits. The respondent company is entitled to refuse the registration even in the absence of an enabling provision in articles in view of the provisions of Section 111(2) [Corresponds to section 58(3) and 58(4) of the Companies Act, 2013] [*Modi Carpets Ltd. v. Trans-Asia Carpets Ltd., Appeal No. 2 of 1980 decided on 26-12-1981 (CLB)*].
- ◆ The appeal against the refusal by the respondent company to register transfer of shares was allowed by the CLB (Now Tribunal) on the ground that the refusal of the respondent to register transfer of shares in favour of the appellant was based on the decision of the Transfer Committee, a sub-committee of the Board of directors and not that of the Board of directors as such, and, therefore, the said decision was not a valid and legal decision. [*Shri T.N. Kuriakos v. Premier Tyres Ltd., decided on 13-6-1983 (CLB)*]

Que. No. 7] An employee of a company purchased certain shares of his company through a member of a stock exchange and lodged with the company an application for transfer of shares in his (employee's) name. The company refused to execute the transfer on the suspicion that the employee, if admitted as a member of the company, will create nuisance in general meetings and seek access to the records of the company. Decide giving reasons:

- (i) Whether the company's contention shall be tenable and
- (ii) What is the remedy available to the employee in the given case?

CS (Executive) – June 2015 (4 Marks)

Ans.: As per Section 58(4), a public company may on sufficient cause, refuse, to register the transfer of securities within a period of 30 days from the date of receipt of instrument of transfer. In such a case the public company may send an intimation of the refusal.

However, in *Shri Nirnal Kumar vs. Jaipur Metal and Electrical Limited* it was held that refusal to register share transfer on suspicion that the employee if admitted as a member will attend general meetings of the company and may create nuisance by raising irrelevant issues and also obtain access to the records to the company as a shareholder is not a valid reason.

Thus, the company's contention is not tenable.

**Remedy:** If a public company without sufficient cause refuses to register the transfer of securities within 30 days from the date of receipt of instrument of transfer, the transferee may, within 60 days of such refusal or where no intimation has been received from the company, within 90 days of the delivery of the instrument of transfer appeal to the Tribunal.

Que. No. 8] Write a short note on: Forged Transfer

A forged transfer is nullity. Comment.

CS (Executive) – Dec 2014 (4 Marks)

Ans.: It may happen that a forged instrument of transfer is presented to the company for registration. In order to avoid the consequences which will follow a forged transfer, companies normally write to the transferor about the lodgment of the transfer instrument so that he can object if he wishes.

The company informs him that, if no objection is made by him before a day specified in the notice, it would register the transfer. The consequences of a forged transfer are detailed hereunder:

- (1) A forged transfer is a nullity and, therefore, the original owner of the shares continues to be the shareholder and the company is bound to restore his name on the register of members. A forged document never has any legal effect. It can never move ownership from one person to another, however, genuine it may appear. Thus, a forged instrument of transfer leaves the ownership of the shares exactly where it always was in the so-called transferor.
- (2) It follows that if a company registers a forged transfer, the true owner can apply so as to be replaced on the register and his name will be restored. But, the company does not incur any liability in damages by putting the name on the register.
- (3) However, if the company issues a share certificate to the transferee and he sells the shares to an innocent purchaser, the company is liable to compensate such a purchaser, if it refuses to register him as a member, or if his name has to be removed on the application of the true owner.
- (4) If the company is put to loss by reason of the forged transfer, as it may have paid damages to an innocent purchaser, it may recover the same independently from the person who lodged the forged transfer.

Que. No. 9] Arun buys 300 shares of a company from Barun on the faith of a share certificate issued by the company. Arun submits to the company a transfer deed, duly executed, along with Barun's share certificate for transferring the shares in his name. The company discovers that the certificate in the name of Barun has been fraudulently obtained and refuses to register the transfer. Is Arun entitled to get the shares transferred in his name?

CS (Inter) – June 2001 (6 Marks), June 2005 (6 Marks)

Smart, a registered shareholder of Dowitt Ltd. left his share certificate with his broker. A forged transfer deed in favour of Ramesh, accompanied by these share certificates were lodged with the company for registration. The Company Secretary, who had certain doubts, wrote to Smart informing him of the proposed transfer and in the absence of a reply within the stipulated time, registered Ramesh as a shareholder by endorsing the share certificate. Subsequently, Ramesh sold the said shares to John and John's name was placed in the register of shareholder. Later on, Smart discovered that forgery has taken place. What remedy does Smart have? Advise Smart.

CS (Inter) – June 2002 (6 Marks), Dec 2002 (5 Marks)

Ans.:

- (1) A forged transfer is a nullity and, therefore, the original owner of the shares continues to be the shareholder and the company is bound to restore his name on the register of members. A forged document never has any legal effect. It can never move ownership from one person to another, however, genuine it may appear. Thus, a forged instrument of transfer leaves the ownership of the shares exactly where it always was in the so-called transferor.
- (2) However, if the company issues a share certificate to the transferee and he sells the shares to an innocent purchaser, the company is liable to compensate such a purchaser, if it

refuses to register him as a member, or if his name has to be removed on the application of the true owner.

- (3) If the company is put to loss by reason of the forged transfer, as it may have paid damages to an innocent purchaser, it may recover the same independently from the person who lodged the forged transfer.

As per the facts given in the case, since there is forged transfer in the name of Barun, company can refuse to transfer the shares in favour of Arun who is innocent purchaser. The company is liable to compensate a purchaser i.e. Arun, if it refuses to register him as a member and any such compensation or damages paid to Arun can be recovered by the company from Barun.

**Que. No. 10] How you will deal as Company Secretary with the situation where death of transferor or transferee takes place before registration of transfer?**

Ajay sold his shares and executed a transfer deed in favour of Vijay. The documents were lodged for transfer with the company. However, before effecting and registering the transfer by the company, Ajay, the transferor passed away. What is the impact of the death of Ajay on the registration of transfer of shares in favour of Vijay, if the death of Ajay is:

- (i) Intimated to the company before the registration; and
- (ii) Intimated to the company after registration of the transfer of the shares in favour of Vijay?

If Vijay dies before registration of the transfer of shares, what will be the consequences:

- (i) If the death of Vijay is intimated to the company before registration of transfer and
- (ii) If the death of Vijay is not intimated to the company before the registration of transfer?

CS (Inter) - June 1998 (8 Marks)

Ans.:

(A) Where the transferor dies:

- If the company has no notice of his death the company would obviously register the transfer.
- But, if the company has notice of his death, the proper course is not to register until the legal representative of the transferor has been referred to.

(B) Where the transferee dies:

- If the company has no notice of his death the company would obviously register the transfer.
- If the company has notice of his death, a transfer of shares cannot be registered in the name of the deceased. With the consent of the transferor and the legal representatives of the transferee, the transfer may be registered in the names of the later. But if there is a dispute, an order of Court will have to be insisted upon.

**Que. No. 11] A transfer deed was executed by a mother of a minor as his natural guardian and the company had registered the transfer of shares covered by the transfer deed. Now, the minor's father requests the company to substitute the name of mother with his name. The company expresses its inability. What is the remedy available to the father of the minor?**

CS (Inter) - Dec 2002 (3 Marks)

Ans.: Where a transfer was effected by a mother of a minor as his natural guardian, a petition by the father of the minor that he alone could be regarded as natural guardian and transfer

must be set aside was rejected. The CLB pointed out that if there was anything wrong done by the petitioner's wife, he should seek his remedy against her in an appropriate Court, so far as the company was concerned when properly executed transfer deed under the signature of minor's mother submitted to the company and transfer effected, the petitioner could not make a grievance that the entries made in the register of members were without sufficient cause. [Jonas Hemant Bhutta vs. Surgiplast Ltd.]

**Que. No. 12] Write a short note on: Blank Transfer**

Ans.: When a shareholder signs the transfer form without filling in the name of the transferee and the date of execution and hands it over with the share certificate to the transferee to enable him to deal with the shares, he is said to have made a 'blank transfer'.

Shares are usually transferred in blank when a shareholder borrows money on its security, e.g., by pledging the shares; the pledgor make default in payment of the amount due at the time appointed for repayment, the pledgee or the holder of the share certificate and the blank transfer instrument has implied power to fill up the blanks in the instrument by inserting the date and his own name as transferee and to get himself registered as a member of the company. The pledgor is under an implied obligation not to prevent or delay such registration.

**Que. No. 13] Write a short note on: Transposition of names**

A, B & C are joint holders of shares of Carehead Ltd. The joint holders now ask the company for altering or rearranging the serial order of their names in the register of members of the company. In reply, the company intends to ask the joint holders to execute a transfer deed for transposition of names in the register of members. Advise the company on the course of action.

CS (Executive) - Dec 2012 (4 Marks)

Ans.: In the case of joint shareholders, one or more of them may require the company to alter or rearrange the serial order of their names in the register of members of the company. In this process, there will be need to make changes in the share certificates issued to them. If the company provides in its articles that the senior-most among the joint holders will be recognized for all purposes like service of notice, a copy of balance sheet, profit and loss account, voting at a meeting etc., the request of transposition may be duly considered and approved by the Board or other authorized officer of the company.

Since, no transfer of any interest in the shares takes place on such transposition, the question of insisting on filling transfer deed with the company, may not arise. Transposition does not also require stamp duty. The Stock Exchange Division of the Department of Economic Affairs has clarified that there is no need of execution of transfer deed for transposition of names if the request for change in the order of names was made in writing, by all the joint holders. If transposition is required in respect of a part of the holding, execution of transfer deed will be required.

## TRANSMISSION OF SHARES

**Que. No. 14] What do you understand by 'Transmission of Shares'?**

CS (Inter) - Dec 2002 (3 Marks)

CS (Executive) - Dec 2009 (2 Marks)

Ans.: Transmission of shares refers to those cases where a person acquires an interest in property by operation of law, such as by right of inheritance or succession or by reason of the insolvency or lunacy of the shareholder or by purchase in a Court-sale. Transmission of shares takes place

when the registered shareholder dies or is adjudicated as an insolvent, or if the shareholder is a company, it goes into liquidation.

For transmission, instrument of transfer is not required and merely an application addressed to the company by the legal representative is sufficient.

Articles of companies generally provide for formalities to be observed for transmission of shares. In the absence of such provision in the articles of the company Table F Regulations 23 to 27 of the Schedule I will govern the procedure for transmission.

According to these regulations, the legal representatives are entitled to the shares held by deceased member and the company must accept the evidence of succession e.g., a succession certificate or letter of administrations or probate or any other evidence properly required by the Board of directors. He is, however, not a member of the company by reason only of being the legal owner of the shares. But he may apply to be registered as a member. On the contrary, instead of being registered himself as a member, he may make such transfer of the shares as the deceased or insolvent member could have made. The Board of directors also has the same right to decline registration as they would have had in the case of transfer of shares before death. But, if the company unduly refuses to accept a transmission, the same remedies are available to the legal representative as in the case of a transfer namely, an appeal to the Tribunal under Section 58.

**Que. No. 15] Distinguish between: Transfer of Shares & Transmission of Shares**

CS (Inter) – Dec 2004 (4 Marks), June 2006 (5 Marks)

CS (Executive) – Dec 2013 (4 Marks), Dec 2014 (4 Marks)

CS (Executive) – Dec 2016 (4 Marks)

Ans.: Following are the main points of distinction between transfer & transmission of shares:

Points	Transfer of Shares	Transmission of shares
<b>Meaning</b>	Transfer of shares means the transfer of the ownership of the shares from one person to another person.	Transmission of shares refers to those cases where a person acquires an interest in property by operation of law, such as by right of inheritance or succession or by reason of the insolvency or lunacy of the shareholder or by purchase in a Court-sale.
<b>How it is done</b>	Transfer takes place by a voluntary act of the transferor.	Transmission is the result of the operation of law.
<b>Instrument of transfer</b>	An instrument of transfer is required in case of transfer.	No instrument of transfer is required in case of transmission.
<b>Nature</b>	Transfer is a normal course of transferring property.	Transmission takes place on death or insolvency of a shareholder.
<b>Consideration</b>	Transfer of shares is generally took place for some consideration.	Transmission of shares is generally took place without any consideration.
<b>Stamp duty</b>	Stamp duty is payable on transfer of shares by a member.	No stamp duty is payable on transmission of shares.

**Que. No. 16] Grace Ltd., a public limited company has received an application from Rosy for transmission of certain shares in her name. Rosy, being a widow of a shareholder, applies for transmission of the shares standing in the name of her deceased husband without producing a succession certificate. Can the company transfer the shares of the deceased member? Discuss.**

CS (Executive) – Dec 2009 (4 Marks)

Ans.: If a widow applies for transmission of the shares standing in the name of her deceased husband without producing a succession certificate and if the AOA of the company so autho-

rizes, the directors may dispense with the production of succession certificate, probate or letter of administration upon such terms as to indemnity as the directors may consider necessary, and transmit the shares to the widow of the deceased by obtaining an indemnity bond.

Thus, Grace Ltd. can transmit the shares of deceased husband to a widow without producing a succession certificate.

**Que. No. 17] Write a short note on: Transmission of joint holdings**

1,000 shares of Astro Ltd. are registered in the name of the three persons P, Q & R jointly. Interestingly, the articles of the company provide that the survivors shall be the person to be recognized by the company as having any title to the shares of the company. Unfortunately, P & Q died in an air crash. In these circumstances, R, being the survivor claims to be the full owner of the said shares. However, the legal heirs of P & Q are also making counter claims. Who will succeed? Explain.

CS (Executive) – Dec 2012 (4 Marks)

Ans.: In case some shares are registered in joint names and the articles of the company provide that the survivor shall be the only person to be recognized by the company as having any title to the shares, the company is justified in refusing to register the transmission of title by operation of law in favour of the son of the deceased holder even though he may obtain succession certificate from the Court.

**Que. No. 17A] Examine the validity of transfer and transmission of shares in favour of a minor under the provisions of the Companies Act, 2013.**

CS (Executive) – Dec 2015 (4 Marks)

Ans.: **Transfer and transmission of shares in favour of minor:** A person who is not competent to contract e.g., a minor cannot become a member of a company. Consequently, an agreement by a minor to take shares is void *ab-initio*. However, it has been held that an agreement in writing for a minor to become a member may be signed on behalf of the minor by his lawful guardian and the registration of transfer of shares in the name of the minor, acting through his or her guardian, especially where the shares are fully paid cannot be refused on the ground of the transferee being a minor. [Miss Nandita Jain vs. Bennett Coleman & Co. Ltd. Appeal No. 27 of 1972 dated 17.2.78]

Thus, if shares are fully paid-up, such shares can be transferred in name of minor.

Similarly, if shares fully paid-up, such shares can be transmitted in name of minor. [Saroj vs. Britannia Industries Ltd., Appeal No. 5/80 decided on 14.12.81 by CLB]

## DEPOSITORY

**Que. No. 18] Write a short note on: Transfer of shares in depository mode**

Ans.: Depository system maintains the ownership records of securities in the book entry form while in physical mode every share transfer is required to be accomplished by physical movement of share certificates to, and registration with the company concerned. The process of physical movement of share certificates often involves long delays and a significant portion of transactions end up as bad deliveries due to the faulty completion of paperwork, or signature differences with the specimens on record with the companies, or for other procedural lapses. Investors also face problems on account of loss of share certificates, forgery and mutilation. The significant time involved in effecting ownership changes also impounds a substantial volume of shares at any given time leading to lower trading volumes. As part of capital market reform,

the Government introduced Depositories Act, 1996 to provide for legal framework for setting up of depositories to record the ownership details in book entry form.

**Que. No. 19] What are the benefits of 'depository system'?**

CS (Executive) – Dec 2010 (8 Marks), Dec 2012 (4 Marks)

**Ans.:** The benefits from the depository system are following:

- ◆ It reduces the cost of issue and transfer of securities by eliminating stamp duty.
- ◆ It reduces the scope for theft, forgery damage
- ◆ It eliminates bad deliveries.
- ◆ It entitles all the rights associated with the securities immediately
- ◆ It enhances the velocity and hence liquidity in the market. The investors can trade in securities immediately on allotment without waiting for receipt of security certificates.
- ◆ It makes faster disbursement of rights, bonus, etc. possible.
- ◆ It reduces brokerage.
- ◆ It eliminates problems relating to change of address of investor, transmission etc.
- ◆ It eliminates problems relating to selling securities on behalf of a minor.

**Que. No. 20] Distinguish between: Shares in physical form and Shares in dematerialized form**  
CS (Executive) – June 2008 (4 Marks)

**Ans.:** Following are the main points of distinction between 'Shares in physical form' and 'Shares in dematerialized form':

Points	Shares in physical form	Shares in dematerialized form
<b>Nature</b>	Share certificates are issued in physical form.	No physical scrips are in existence. Only electronic record is maintained by depository.
<b>Account</b>	No necessity of opening accounts.	It is necessary to open a demat account.
<b>Time in transfer</b>	Transfer of shares takes longer time due to physical movement of documents.	Since there is electronic transfer, it takes effect immediately.
<b>Stamp duty</b>	To transfer shares in held in physical form, stamp duty has to be paid.	No stamp duty is payable for transferring the share in dematerialized form.
<b>Theft &amp; forgery</b>	There are chances of theft and forgery.	The chance of theft and forgery are remote.
<b>Bad delivery</b>	There are chances of bad delivery.	There are no chances of bad delivery.

**Que. No. 21] Distinguish between: Beneficial owners under depository mode and Registered owners under depository mode**  
CS (Inter) – June 2008 (4 Marks)

CS (Executive) – Dec 2012 (4 Marks)

**Ans.:** Registered Owner & Beneficiary Owner

All the public limited companies are required by the Companies Act, 2013 to maintain an index of members, wherein they are required to keep a record of the owners of the company. With the concept of dematerialization of securities and transfer of shares through book entry system coming up, registered owners are NSDL & CDSL only.

So, in the index of members of any company, there are only two registered owners, i.e. the two depositories. The depositories keep a track of all the clients through the depository participants.

Therefore, the registered owners are the depositories whereas the beneficiary owners are the people who are holding the securities at any given point of time.

Whenever a company declares a bonus issue, the securities are transferred in the name of the two depositories and they further transfer it to the clients through their participants. Therefore, the depositories are known as the registered owners and the investors are known as the beneficiary owners as they get the benefits of all the corporate actions.

Further, if a company declares a cash dividend, then the details of the holdings by the investors is given by the respective depository participants to the depository so that the details can further be given to the RTA (Registrar & Transfer Agents) which would facilitate them to directly transfer the amount to the bank account of the investor/holder through the ECS (Electronic Clearing System) system.

For having a security of a company in demat form, first a company has to opt for the same. A company can do so by getting itself registered with at least one of the depositories.

For this, the company has to transfer all its shares to the depository. For differentiating among all the companies, International Securities Identification Number (ISIN) is assigned to them which are unique in nature.

**Que. No. 22] Write a short note on: Pledging of securities in dematerialized form**

CS (Inter) – Dec 2005 (5 Marks), June 2006 (4 Marks)

**Ans.:** Securities held in demat mode can be pledged. A Beneficial Owner (BO) can, not only pledge his demat securities, but, may also be able to obtain higher loan amounts, with lower rate of interest. Moreover, procedure for pledging securities in demat form is very convenient, both, for the pledgor and the pledgee.

**Procedure for pledging securities:**

- ◆ The pledgor and the pledgee must have BO accounts with CDSL. These accounts can be with the same DP or with different DPs.
- ◆ The pledgor has to fill up the Pledge Request Form (PRF) in duplicate available with his DP.
- ◆ On receipt of the PRF, the pledgor's DP shall verify that the securities can be pledged.
- ◆ The DP then sets up a pledge request in the depository system and a unique Pledge Sequence No. (PSN) will be generated. The PSN number should be recorded on the PRF.
- ◆ Authorized official of the DP should sign the PRF and stamp it. A copy of the PRF is then given to the pledgor.
- ◆ One copy of PRF (with the PSN) should be sent to the pledgee by the Pledgor. The Pledgee will then countersign the PRF for acceptance/rejection of the pledge request and submit the PRF to his DP.
- ◆ The pledgee's DP has the facility to access the request. Based on copy of PRF the pledgee's DP either accepts or rejects the pledge request.

When dematerialized securities are pledged, they remain in the pledgor BOs demat account but they are blocked so that they cannot be used for any other transaction.

**Que. No. 23] Write a short note on: Fungibility** CS (Executive) – June 2013 (4 Marks)

**Ans.:** As per Section 9 of the Depositories Act, 1996 all securities held in a depository are fungible. That is all certificates of the same security are inter-changeable in the sense that investors lose the right to obtain the exact certificate they surrender at the time of entry into depository. It is like withdrawing money from the bank without bothering about the distinctive number of the currencies.

## MEETINGS

## This Chapter Covers:

- Meetings – Meaning
- Kinds of company meetings
- Meetings of committees of directors
- Requisites of valid general meeting
- Quorum
- Proxy
- Voting
- Chairman
- Resolutions
- Resolutions by Postal Ballot
- Adjournment
- Minutes

Note: In this chapter, unless otherwise stated 'Rule' means the Companies (Management & Administration) Rules, 2014.

Que. No. 1] Enumerate the different types of meetings under the Companies Act, 2013.

CS (Executive) – June 2013 (4 Marks)

Ans.: Meetings under the Companies Act, 2013 may be classified as:

I. Shareholders Meetings:

- ◆ Annual General Meetings [Section 96]
- ◆ Extraordinary General Meetings
  - Convened by directors

- Convened by directors on the requisition of the shareholders u/s 100

◆ Class Meeting of Shareholders.

II. Meetings of the Debenture holders

III. Meetings of creditors & contributories

- Meetings of creditors for purpose other than winding up.
- Meetings of creditors for winding up.
- Meetings of contributories in winding up.

IV. Board Meetings of the Board of Directors

V. Meetings of the Board Committees

Que. No. 2] Every Company must hold annual general meeting in every calendar year.

CS (Inter) – Dec 2000 (8 Marks), Dec 2006 (5 Marks)

CS (Executive) – June 2014 (5 Marks)

The gap between two AGM can never exceed 15 months.

CS (Executive) – June 2015 (5 Marks)

Ans.: Annual general meeting (AGM) is an important annual event where members get an opportunity to discuss the activities of the company.

Annual General Meeting [Section 96(1)]: Every company, other than OPC is required to hold an AGM every year. Following are the key provisions regarding the holding of an AGM:

Holding of AGM:

1. Annual general meeting should be held once every year.
2. First AGM of the company should be held within 9 months from the closing of the first financial year. Hence, it shall not be necessary for the company to hold any AGM in the year of its incorporation.
3. Subsequent AGM should be held within 6 months from the closing of the financial year.
4. The gap between two AGM should not exceed 15 months.

Que. No. 3] Write a short note on: Extension of validity period of AGM

Ans.: In case, it is not possible for a company to hold an annual general meeting within the prescribed time, the Registrar may, for any special reason, extend the time within which any AGM shall be held. Such extension can be for a period not exceeding 3 months. [Proviso to Section 96(1)]

No such extension of time can be granted by the Registrar for the holding of the first AGM.

It has been clarified by the Ministry of Corporate Affairs that delay in completion of audit of the annual accounts of the company does not ordinarily constitute a special reason justifying the extension of time for holding its annual general meeting.

Que. No. 4] Accounting year of Devdatta Ltd. ends on 30th June, 2014. It is required to hold an AGM by 31st December, 2014. Due to some reason, the AGM could not be held in December, 2014. On an application, the ROC granted permission to hold the meeting in February, 2015. The AGM was duly held in February, 2015. Has the company complied with the requirements of holding AGM every year? Will it amount to contravention of the provisions of Section 96?

CS (Inter) – Dec 2004 (5 Marks), June 2007 (5 Marks)

CS (Executive) – Dec 2011 (4 Marks)

96 P

Ans.: As per Section 96, every company, other than OPC is required to hold an AGM every year. The AGM should be held on the earliest of the following dates:

- (1) 15 months from date of the last AGM
- (2) The last day of the calendar year
- (3) 6 months from the close of the financial year.

In the event of any difficulty in holding an AGM the ROC may grant an extension of time for any special reason by 3 months. In such situation if company doesn't hold AGM in particular year, it will not be treated that company has contravened Section 96.

Thus, due to extension granted by ROC, if Devdatta Ltd. do not hold meeting in calendar year 2014, it will not amount to contravention of Section 96.

Que. No. 5] Asia Pacific Co. Ltd., called its AGM on 30-9-2014 and adjourned it to 31-12-2014 due to delay in completion of audit of accounts for the year ended 31-3-2014. At the adjourned meeting, the meeting was further adjourned to 31-3-2015. Subsequently, the AGM was held on 28-1-2015. State whether the company has complied with Section 96 and, if not, whether the company is liable to default and conviction.

CS (Inter) - June 2005 (8 Marks)

Ans.: As per Section 96, every company, other than OPC is required to hold an AGM every year. The AGM should be held on the earliest of the following dates:

- (1) 15 months from date of the last AGM
- (2) The last day of the calendar year
- (3) 6 months from the close of the financial year.

An AGM can be adjourned but such adjourned AGM should also be held within the latest day on which meeting should have been held.

In given case, since Asia Pacific Co. Ltd. has not held adjourned AGM within statutory time, the company is liable to default and conviction.

Que. No. 6] Write a short note on: Time & place for holding an AGM

Ans.: Time & place for holding an AGM [Section 96(2)]: An AGM can be called during business hours, that is, between 9 a.m. and 6 p.m. on any day that is not a National Holiday.

An AGM can be held at the registered office of the company or at some other place within the city, town or village in which the registered office of the company is situate.

However, AGM 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.

The Central Government is empowered to exempt any company from these provisions, subject to such conditions as it may impose.

'National Holiday' means and includes a day declared as national holiday by the Central Government.

**Some important points:**

- ◆ If any day is declared by the Central Government to be a national holiday after the issue of the notice convening such meeting, it shall not be deemed to be a national holiday.
- ◆ The prohibition does not extend to EGM. Thus, EGM can be held on national holiday.
- ◆ There is no contravention if an adjourned meeting accidentally comes to be held on a national holiday.

Que. No. 7] An AGM of a public company was called on a fixed day. After sending notice of the meeting, the government notified that day of meeting as a national holiday. Can the meeting proceed as scheduled? CS (Inter) - June 1999 (4 Marks)

Ans.: An AGM can be called during business hours, that is, between 9 a.m. and 6 p.m. on any day that is not a national holiday.

An AGM can be held at the registered office of the company or at some other place within the city, town or village in which the registered office of the company is situate.

If any day is declared by the Central Government to be a national holiday after the issue of the notice convening such meeting, it shall not be deemed to be a national holiday. Hence, there is no contravention and meeting can proceed as scheduled.

Que. No. 8] XYZ Ltd. wants to hold its annual general meeting on Sunday, the 30th June to facilitate the shareholder to attend. Advise the legal position.

CS (Inter) - June 1999 (4 Marks)

Ans.: An AGM can be called during business hours, that is, between 9 a.m. and 6 p.m. on any day that is not a National Holiday.

An AGM can be held at the registered office of the company or at some other place within the city, town or village in which the registered office of the company is situate.

As 30<sup>th</sup> June is not national, XYZ Ltd. can hold its AGM on 30<sup>th</sup> June even if it is Sunday.

Que. No. 9] An adjourned AGM falls on a holiday. Is there any contravention of the Companies Act, 2013? CS (Inter) - Dec 2004 (3 Marks)

Ans.: An AGM can be called during business hours, that is, between 9 a.m. and 6 p.m. on any day that is not a National Holiday. There is no contravention if an adjourned meeting accidentally comes to be held on a national holiday.

Que. No. 9A] There are seven shareholders in a private limited company having registered office in Chennai. Six shareholders are French nationals and belong to the same family holding an aggregate of 95% voting rights. These shareholders are unable to come down to Chennai and wish to hold the company's annual general meeting in Paris. Advise whether the meeting can be held in Paris. CS (Executive) - Dec 2016 (4 Marks)

Ans.: As per Section 96(2), an AGM can be held at the registered office of the company or at some other place within the city, town or village in which the registered office of the company is situate.

The Central Government is empowered to exempt any company from these provisions, subject to such conditions as it may impose.

Thus, private company can held AGM outside India if it applies to the Central Government for relaxation of provisions of Section 96 of the Companies Act, 2013.

Que. No. 10] What are the consequences if default is made in holding AGM?

Ans.: Consequences for making default in holding AGM are as follows:

- (1) **Power of Tribunal to call AGM [Section 97]:** If any default is made in holding the AGM of a company, any member of the company may make an application to the Tribunal to call or direct the calling of, an AGM of the company and give such ancillary or consequential directions as the Tribunal thinks expedient. Such directions may include a direction that one member of the company present in person or by proxy shall be deemed to constitute a meeting.

- (2) **Punishment for not holding AGM [Section 99]:** If any default is made in complying or holding AGM of the company, the company and every officer of the company who is in default shall be punishable with fine which may extend to ₹ 1 lakh and in case of continuing default, with a further fine which may extend to ₹ 5,000 for each day during which such default continues.

#### Judicial Views:

- ◆ Where the AGM has been stayed the orders of CLB/Tribunal, there is no default in holding AGM. [Ador-Samia Ltd. vs. Indocan Engineering Systems Ltd.]
- ◆ If at the time of holding the AGM there is only one shareholder (the other having died), no offence is committed when the AGM is not held. [State of Kerala vs. West Coast Planners Agencies Pvt. Ltd. (1958) 28 Com. Cas. 13]

**Que. No. 11] What do you understand by 'ordinary business' and 'special business'?**

State the matters of ordinary business to be transacted at an annual general meeting.

CS (Inter) – June 2001 (4 Marks)

**Ans.: Ordinary & Special Business [Section 102(2)]:** All businesses transacted at an AGM except the following are special business:

- (i) Consideration of financial statements & reports of the BOD and auditors
- (ii) Declaration of any dividend
- (iii) Appointment of directors in place of those retiring
- (iv) Appointment and the fixing remuneration of auditors.

In case of any other meeting all business shall be deemed to be special.

**Que. No. 12] Distinguish between: Ordinary Business & Special Business**

CS (Inter) – Dec 2006 (4 Marks)

**Ans.: Following are the main points of distinction between ordinary & special business:**

Points	Ordinary Business	Special Business
<b>Meaning</b>	Following four business are ordinary business: (1) The consideration of the accounts, balance sheet and the reports of the board of directors and auditors (2) The declaration of dividend (3) The appointment of directors in the place of those retiring (4) The appointment and fixing of remuneration of the auditors.	All business to be transacted at an AGM shall be deemed special business except which are ordinary businesses.
<b>Where transacted</b>	Ordinary businesses are transacted at AGM.	Special businesses can be transacted at AGM or EGM.
<b>Resolution</b>	Any matter to be dealt at AGM may be 'ordinary business' but it may require passing of 'special resolution'.	Any matter to be dealt at AGM or EGM may be 'Special business' but it may require passing of 'ordinary resolution'.

### EXTRAORDINARY GENERAL MEETINGS

**Que. No. 13] Write a short note on: Extraordinary General Meetings**

State the provision and conditions for holding extraordinary general meeting on requisition.

CS (Inter) – Dec 2001 (16 Marks)

**Ans.: All general meetings other than AGM are called EGM.**

EGM of the company, other than of the wholly owned subsidiary of a company incorporated outside India, shall be held at a place within India.

All businesses items can be transacted at the EGM are special business. Following are the key provisions, provided in Section 100, regarding calling and holding of an EGM:

(I) **By Board [Section 100(1)]:** The Board may, whenever it deems fit, call an EGM of the company.

(II) **By Board on Requisition [Section 100(2)]:** The Board must call an EGM on receipt of the requisition from the following number of members:

- (a) **In the case of a company having a share capital:** Members who hold, on the date of the receipt of the requisition, not less than 1/10<sup>th</sup> of the paid-up share capital of the company as on that date carries the right of voting.
- (b) **In the case of a company not having a share capital:** Members who have, on the date of receipt of the requisition, not less than 1/10<sup>th</sup> of the total voting power of all the members having on the said date a right to vote. The requisition should set out the matters to be considered at the proposed meeting and the same should be signed by the requisitionists and sent to the registered office of the company.

The Board must, within 21 days from the date of receipt of a valid requisition, proceed to call a meeting on a day not later than 45 days from the date of receipt of such requisition.

(III) **By Requisitionists [Section 100(4)]:** If the Board does not within 21 days from the date of receipt of a valid requisition in regard to any matter, proceed to call a meeting for the consideration of that matter on a day not later than 45 days from the date of receipt of such requisition, the meeting may be called and held by the requisitionists themselves. However, in such case, the meeting should be held within a period of 3 months from the date of the requisition.

Reasonable expenses incurred by the requisitionists in calling such a meeting shall be reimbursed by the company to the requisitionists. The company can in turn recover such expenses from any fee or other remuneration under section 197 payable to such of the directors who were in default in calling the meeting. [Section 100(6)]

In case, the quorum is not present within half-an-hour from the time appointed for holding a meeting called by requisitionists, the meeting shall stand cancelled. [Section 103 (2) (b)]

**Rules 17 of the Companies (Management & Administration) Rules, 2014** provides as under with regard to calling of EGM by requisitionists:

- ◆ The members may requisition convening of an EGM by providing such requisition in writing or through electronic mode at least clear 21 days prior to the proposed date of such EGM.
- ◆ The notice shall specify the place, date, day and hour of the meeting and shall contain the business to be transacted at the meeting. The requisitionists should convene meeting at Registered office or in the same city or town where Registered office is situated and such meeting should be convened on *any day except national holiday*.
- ◆ If the resolution is to be proposed as a special resolution, the notice shall be given as required by Section 114(2).
- ◆ The notice shall be signed by all the requisitionists or by a requisitionists duly authorized in writing by all other requisitionists on their behalf or by sending an electronic request attaching therewith a scanned copy of such duly signed requisition.

- ◆ No explanatory statement need be annexed to the notice of an EGM convened by the requisitionists and the requisitionists may disclose the reasons for the resolution which they propose to move at the meeting.
- ◆ The notice of the meeting shall be given to those members whose names appear in the Register of members of the company within 3 days on which the requisitionists deposit with the company a valid requisition for calling an EGM.
- ◆ Where the meeting is not convened, the requisitionists shall have a right to receive list of members together with their registered address and number of shares held and the company concerned is bound to give a list of members together with their registered address made as on 21 day from the date of receipt of valid requisition, before the expiry of the 45 days from the date of receipt of a valid requisition.
- ◆ The notice of the meeting shall be given by speed or registered post or through electronic mode. Any accidental omission to give notice to, or the non-receipt of such notice by, any member shall not invalidate the proceedings of the meeting.

(IV) By Tribunal [Section 98]: If for any reason it is impracticable to call a meeting of a company or to hold or conduct the meeting of the company, the Tribunal may, either *suo motu* or on the application of any *director or member* of the company who would be entitled to vote at the meeting order a meeting of the company to be called, held and conducted in such manner as the Tribunal thinks fit.

The Tribunal may give such ancillary or consequential directions as it thinks expedient, including directions modifying or supplementing in relation to the calling, holding and conducting of the meeting, the operation of the provisions of this Act or articles of the company. Such directions may include a direction that one member of the company present in person or by proxy shall be deemed to constitute a meeting.

Meeting held pursuant to such order shall be deemed to be a meeting of the company duly called, held and conducted.

The Supreme Court has in the case of *Life Insurance Corporation of India vs. Escorts Ltd.* (1986) 59 Com Cases 548 held that every shareholder of a company has a right to requisition an extraordinary general meeting. He cannot be restrained from requisitioning an extraordinary general meeting and he is not bound to disclose the reasons for the resolutions proposed to be moved at the meeting.

**Que. No. 14]** IFFCO Ltd. has a registered office in New Delhi. The company desires to hold extraordinary general meeting in Mumbai Comment.

CS (Final) – June 1995 (4 Marks), June 1997 (5 Marks)

**Ans.:** Extraordinary general meeting can be anywhere in India. EOGM need not be held in city where registered office is situated. [Re. *Metal Box India Ltd.* (2000) 24 SCL 144]

**Que. No. 15]** 40 out of 100 members of a company submitted a requisition for holding of an extraordinary general meeting in order to remove the managing director from the office. On the failure of the company to call the meeting, the requisitionists themselves called the meeting at the registered office of the company. On the appointed date, they could not hold the meeting at the registered office, as it was kept under lock and key by the managing director himself. The members held the meeting elsewhere and adopted a resolution removing the managing director from office. Is the resolution valid? Give reason.

CS (Inter) – June 2007 (6 Marks)

**Ans.:** Section 100 contains provisions regarding holding of EGM. It provides that if directors fail to call a properly requisitioned meeting, the requisitionists as represent not less than 1/10<sup>th</sup>

of the total voting rights may call a meeting to be held on a date fixed within 3 months of the date of the requisition.

Where a meeting is called by the requisitionists and the registered office is not made available to them, it was held that the meeting may be held anywhere else. Further, resolutions properly passed at such a meeting, are binding on the company. [R. *Chettiar vs. M. Chettiar*]

Thus, in the given case, since all the above mentioned provisions are duly complied with. Hence, the meeting with the resolution removing the managing director shall be valid.

**Que. No. 16]** Distinguish between: Extraordinary General Meeting & Annual General Meeting  
CS (Inter) – Dec 2006 (4 Marks), CS (Executive) – Dec 2016 (4 Marks)

**Ans.:** Following are the main points of distinction between extraordinary general meeting & annual general meeting:

Points	Extraordinary General Meeting	Annual General Meeting
<b>Meaning</b>	All the general meetings of a company, with the exception of the AGM, are called extraordinary general meetings (EGM).	Annual General Meeting is to be convened pursuant to Section 96 and once in calendar year.
<b>Place</b>	EGM can be held anywhere in India.	Every AGM called should be held at the registered office or at some other place within the city, town or village in which the registered office of the company is situated. However, AGM of an unlisted company may be held at place in India if consent is given in writing by all the members in advance.
<b>Day of holding</b>	EGM can be held on national holiday. However, EGM called by requisitionists has to be held on any day except national holiday. [Rule 17 of the Companies (Management & Administration) Rules, 2014]	Every AGM called should be held on working day during business hours.
<b>Business</b>	In the case of EGM, all business shall be deemed special.	In case of AGM ordinary as well as special business can be transacted.

## CLASS MEETINGS

**Que. No. 17]** Write a short note on: Class Meetings CS (Executive) – Dec 2012 (4 Marks)

What is 'class meeting'? What are the purposes, provisions and procedure for holding class meeting?  
CS (Executive) – Dec 2008 (8 Marks)

**Ans.:** Class meetings are those meetings which are held by holders of a particular class of shares, e.g. preference shares. Need for such meetings arise when it is proposed to vary the rights of a particular class of shares. The various class meetings are as follows:

- (1) **Meetings of Debenture holders** : When a company issues debentures it provides in the trust deed executed for securing the issue for the holding of meetings of debenture holders and also gives power to them to vary the terms of security or to alter their rights in certain circumstances. All matters connected with the holding, conduct and proceedings of the meetings of the debenture holders are given in the Debenture Trust Deed. The decisions arrived at such meetings with the requisite majority, are valid and binding upon the minority.
- (2) **Meeting of Creditors** : Sometimes, a company, either as running concern or in the event of winding up, has to make certain arrangements with its creditors, which has to be worked out in meetings of creditors. Strictly speaking, meetings of creditors are not company meetings.
- (3) **Meetings of Board of Directors** : Separately discussed in Chapter No. 16.

## PROVISIONS RELATING TO GENERAL MEETINGS

Que. No. 18] Write a short note on: Notice of Meeting

Can an annual general meeting be called at a shorter notice? Would your answer be different if it were an extraordinary general meeting? CS (Inter) – June 2003 (4 Marks)

Ans.: Notice of Meeting [Section 101(1)]: A general meeting of a company may be called by giving not less than 21 clear days notice either in writing or through electronic mode. Notice through electronic mode shall be given in prescribed manner.

Short Notice: A general meeting may be called after giving shorter notice if consent, in writing or by electronic mode, is accorded from the members as given below:

In case of AGM	Consent of 95% of the members entitled to vote thereat.
In case of other general meeting	If company has a share capital then consent of holders of 95% paid-up share capital of the company.
	If company has no share capital then consents of members having 95% voting right.

However, where any member of a company is entitled to vote only on some resolution or resolutions to be moved at a meeting and not on the others, those members shall be taken into account in respect of the former resolution(s) and not in respect of the latter.

Requirement of valid notice [Section 101(2)]: Every notice of a meeting shall specify the place, date, day and the hour of the meeting and shall contain a statement of the business to be transacted at such meeting.

Person entitled to receive notice of the meeting [Section 101(3)]: The notice of every meeting of the company shall be given to:

- Every member of the company, legal representative of any deceased member or the assignee of an insolvent member
- The auditor or auditors of the company and
- Every director of the company.

Accidental omission [Section 101(4)]: Any accidental omission to give notice to, or the non-receipt of such notice by, any member or other person who is entitled to such notice for any meeting shall not invalidate the proceedings of the meeting.

Where a secretary or other officer issued notice calling a general meeting but he had no power to do so under the AOA of the company, it was held that the notices were null & void and meeting held pursuant thereto was also null & void. But it will be valid if before the meeting is held the board ratifies the act.

21 clear days explained: The date of posting and the date of the meeting are excluded while calculating the period of 21 days. Intervening holidays are counted as period of notice. Further, if the notice is to be sent by post, another 48 hours are to be added. Hence, if notice is to be sent on 1<sup>st</sup> January, meeting should be held on 25<sup>th</sup> January to comply with the provisions of 21 clear days provision. (Thus, effectively meeting should be held after 24 days from the date of sending the notice as explained below)

1<sup>st</sup> January will be excluded

In the case of a notice of a meeting, if notice is sent by post, service of notice shall be deemed to have been effected at the expiration of 48 hours after the letter containing the same is posted. [Rule 35(6) of the Companies (Incorporation) Rules, 2014] Hence, notice effectively sent on 3<sup>rd</sup> January.

Another 21 days will expire on 24<sup>th</sup> January.

Thus, meeting can be held after 21 clear days on 25<sup>th</sup> January.

Que. No. 19] Mr. Monterio, a foreign shareholder of ABC Ltd., receives notice of the annual general meeting after it was held. Comment. CS (Final) – June 1995 (4 Marks)

Ans.: When notices are posted in time, the fact that some of the members received it late will not affect the validity of notice of the meeting. [Calcutta Chemical Co. Ltd. vs. Dhires Chandra Roy (1985) 58 Comp Cas 275]

Que. No. 20] The notice of a general meeting to be held on 5th May at 3.00 pm was posted on 13th April at 2.00 pm. Examine the validity of the notice.

CS (Inter) – June 1999 (4 Marks)

Ans.: According to Section 101, a general meeting may be called by giving 21 clear days notice in writing. The date of posting and the date of the meeting are excluded while calculating the period of 21 days. Intervening holidays are counted as period of notice. Further, if the notice is to be sent by post, another 48 hours are to be added.

If meeting is held on 5<sup>th</sup> May by giving notice on 13<sup>th</sup> April, it is not valid meeting as gap is only 21 days and not 21 clear days. 19 clear days notice is served. Notice falls short by 2 clear days.

Que. No. 21] Dev Ltd. issued a notice for holding of its AGM on 7th November, 2015. The notice was posted to the members on 16-10-2015. Some members of the company allege that the company had not complied with the provisions of the Companies Act, 2013 with regard to the period of notice and as such the meeting was not validly called. Decide whether the meeting has been validly called?

If there is a short fall in the number of days by which the notice falls short of the statutory requirement, state and explain by how many days does the notice fall short of the statutory requirement?

Ans.: According to Section 101, a general meeting of a company may be called by giving not less than 21 clear days notice either in writing or through electronic mode. Notice through electronic mode shall be given in such manner as may be prescribed.

As per the facts given in case, Dev Ltd. issued notice of holding AGM on 16-10-2015 and up to 7-11-2015 only 19 clear days notice is served. Thus, the meeting is, therefore, not validly convened. Notice falls short by 2 clear days.

Que. No. 22] Agile Ltd. called its AGM on 28th September, 2013. The notice of the meeting was posted on 6th September, 2013. With reference to the provisions of the Companies Act, 2013, examine whether the notice given by the company was valid.

CS (Executive) – Dec 2014 (4 Marks)

Ans.: According to Section 101, a general meeting of a company may be called by giving not less than 21 clear days notice either in writing or through electronic mode. Notice through electronic mode shall be given in such manner as may be prescribed.

As per the facts given in case, Agile Ltd. issued notice of holding AGM on 6-9-2013 and up to 28-9-2013 only 19 clear days notice is served. Thus, the meeting is, therefore, not validly convened. Notice falls short by 2 clear days.

Que. No. 23] Articles of association of a company reserved the powers for calling the annual general meeting. The Managing Director of the company, without reference to the Board, called an annual general meeting. Is the annual general meeting validly called? If not, what should be done to make it valid? Discuss with reference to case law, if any.

CS (Executive) – June 2009 (5 Marks)

Pioneers Ltd. convened a Board meeting on 1st September, 2013. During the course of meeting, the date of next AGM was discussed but no decision was taken. However, the Company Secretary issued the notice for AGM without any specific authorization from the Board of directors. Decide the validity of notice of AGM.

CS (Executive) – June 2013 (4 Marks), Dec 2014 (5 Marks)

**Ans.:** The annual general meeting of a company can be called by a proper authority i.e. board of directors in case of company. However, the board of director can delegate the authority to call general meeting to the company secretary. In such case meeting called by company secretary as per the direction of the board will be valid meeting.

However, it was held that, where a secretary or other officer issued notice calling a general meeting but he had no power to do so under the AOA of the company, the notices were null & void and meeting held pursuant thereto was also null & void. [*Al-Amin Seatrans Ltd. vs. Owners and Party Interested in Vessel M.V. 'Loyal Bird' (1996) 1 Comp. L.J. 258 (Cal.)*]

But, it will be valid if before the meeting is held the board ratifies the act. [*Hooper vs. Kevr Stuart & Co. (1900) 83 Law Times 729*]

**Que. No. 24] Write a short note on: Contents of the notice**

**Ans.:** **Place of meeting [Section 96]:** The notice should state the place where the general meeting is scheduled to be held. In case of an AGM, the place of the meeting has to be either the registered office of the company or some other place within the city, town or village in which the registered office of the company is situated. *For this purpose the twin cities of Delhi and New Delhi and Hyderabad and Secunderabad will be deemed to be a single city.*

The requisitionists should convene meeting at registered office or in the same city or town where the registered office is situated and such meeting should be convened on working day. [Rule 17]

**Day of meeting [Section 96]:** The day and date of the meeting should be clearly stated in the notice. In case of an annual general meeting, the day should be one that is not a National Holiday. An extraordinary general meeting can however be held on any day.

**Time of meeting [Section 96]:** Exact time of holding the meeting should be given in the notice. An annual general meeting can be called during business hours only, that is, between 9 a.m. and 6 p.m. There is no need to follow such timings in case of an extraordinary general meeting.

**Agenda [Section 102]:** A statement of the business to be transacted at the general meeting should be given in the notice. In case, the meeting is to transact a special business, an explanatory statement should be attached about such item.

**Proxy clause with reasonable prominence [Section 105(2)]:** Every notice calling a meeting of a company which has a share capital, or the articles of which provide for voting by proxy at the meeting, should carry with reasonable prominence, a statement that a member entitled to attend and vote is entitled to appoint a proxy, or, where that is allowed, one or more proxies, to attend and vote instead of himself, and that a proxy need not be a member.

**Que. No. 25] State the provisions relating to sending notice of the meeting through electronic mode.**

**Ans.:** **Notice of the meeting through electronic mode: [Rule 18]:** A company may give notice through electronic mode. Electronic mode means any communication sent by a company through its authorized and secured computer programme which is capable of producing confirmation and keeping record of such communication addressed to the person entitled to receive such communication at the last electronic mail address provided by the member.

**Conditions for notice send through e-mail are as under:**

A notice may be sent through e-mail as a text or as an attachment to e-mail or as a notification providing electronic link/Uniform Resource Locator (URL) for accessing such notice.

- ◆ The e-mail shall be addressed to the person entitled to receive such e-mail as per the records of the company. The company has to provide an advance opportunity at least once in a financial year, to the member to register his e-mail address and changes therein

and such request may be made by only those members who have not got their e-mail id recorded or to update a fresh email id and not from the members whose e-mail ids are already registered.

- ◆ The subject line in e-mail shall state the name of the company, notice of the type of meeting and the date on which meeting is scheduled.
- ◆ If notice is sent in the form of an attachment to e-mail, such attachment shall be in the Portable Document Format (PDF) or electronic documentation format together with a facility for recipient for downloading relevant version of the software for accessing such notice along with instructions for downloading such software and alternative contact details in case of inability of the recipient to open or read the attachment.
- ◆ There shall be no difference in the text of the physical version of the notice and electronic version except in respect of mode of dispatch of notice.
- ◆ Sending of notice *via* e-mail shall be subject to such option being confirmed by the member and e-mail address being updated in writing at least 30 days prior to dispatch of notice. In such cases, the company shall not be under obligation to deliver physical copy of the notice unless specifically requested by the member in writing before the date of the meeting.
- ◆ When notice or notifications of availability of notice are sent by e-mail, the company should ensure that it uses a system which produces confirmation of the total number of recipients e-mailed and a record of each recipient to whom the notice has been sent. A copy of such record and any notices of any failed transmissions and subsequent re-sending shall be retained by or on behalf of the company as 'proof of sending'.
- ◆ The company's obligation shall be satisfied when it transmits the e-mail and the company will not be held responsible for a failure in transmission beyond its control. However the company shall, where it is aware of the failure in delivery of the e-mail (and subsequent attempts do not rectify the situation), revert to sending physical copy of the notice at the member's registered address within 72 hours of the original attempt.
- ◆ If a member entitled to receive notice fails to provide or update relevant e-mail address to the company, company shall not be in default for not delivering notice *via* e-mail.
- ◆ Company may send e-mail through in-house facility or authorize any third party agency providing bulk e-mail facility.
- ◆ Notice made available on the electronic link/URL has to be readable, and the recipient should be able to obtain and retain copies. The company shall give the complete URL/ address of the website and full details of how to access the document/information.
- ◆ The notice is taken to be 'sent' on the date the notification is sent. The notice must be available on the electronic link/URL provided from the date of notification until the conclusion of the meeting.
- ◆ The failure to make notice available throughout the required period shall be disregarded if it is made available for part of that period and the failure is wholly attributable to circumstances that the company could not reasonably have prevented or avoided.

The notice of the general meeting of the company shall be simultaneously placed on the website of the company and on the website as may be notified by the Central Government.

**Que. No. 26] Who are entitled to the notices of meetings under the Companies Act, 2013?**

**Ans.:** **Person entitled to receive notice of the meeting [Section 101(3)]:** The notice of every meeting of the company shall be given to:

- (a) Every member of the company, legal representative of any deceased member or the assignee of an insolvent member
- (b) The auditor or auditors of the company and
- (c) Every director of the company.

**Accidental omission [Section 101(4)]:** Any accidental omission to give notice to, or the non-receipt of such notice by, any member or other person who is entitled to such notice for any meeting shall not invalidate the proceedings of the meeting.

**Que. No. 27]** A disabled shareholder, aged 70 years arrives at the venue of the AGM, escorted by his driver, who help him climbing the steps and occupying a seat. Shareholders granddaughter, who is also a joint holder, follows with her son aged 3 years and a baby in her arm. The company's security personnel try to stop her from entering the venue of the meeting and also ask the driver to go out of the venue of the AGM. Advice on the action of security personnel.  
CS (Inter) – June 2002 (4 Marks)

**Ans.:** Any meeting of the company can be attended by the persons who are entitled to receive the notice of the meeting. Other person can attend the meeting with the prior permission of the chairman. Thus, after making the disabled shareholder comfortable at his seat, his driver should be asked to leave the meeting. Granddaughter should be allowed to attend the meeting as she is joint holder. However, she may be requested to make arrangement to leave her son and baby outside the venue of the meeting.

**Que. No. 28]** State the provisions relating to "statement to be annexed to notices" of meetings under the Companies Act, 2013?

**Ans.:** Statement to be annexed to notice [Section 102]: In case of special business items to be transacted at a general meeting, a statement setting out the following material facts, shall be annexed to the notice calling the meeting:

- (I) The nature of concern or interest, financial or otherwise in respect of each item of:
  - Every director and the manager, if any
  - Every other key managerial personnel and
  - Relatives of the persons mentioned above.
- (II) Any other information and facts that may enable members to understand the meaning, scope and implications of the items of business and to take decision thereon.

Where any item of special business relates to any other company, the extent of shareholding of every promoter, director, manager and key managerial personnel in such other company shall also be set out in the statement. Such disclosure is necessary if shareholding is 20% or more.

Any benefit arising to the promoter, director, manager, if any, or other key managerial personnel due non-disclosure or insufficient disclosure, they should hold it in trust for the company and are liable to compensate the company to the extent of the benefit received by them.

## QUORUM

**Que. No. 29]** Write a short note on: Quorum for general meeting

The required quorum is not present within 30 minutes of the scheduled time for holding of annual general meeting. Advice with the help of relevant provisions of the Companies Act, 2013.  
CS (Executive) – June 2013 (4 Marks)

**Ans.:** Quorum refers to the minimum number of members required to constitute a valid meeting.

**Quorum for meetings [Section 103]:** Unless the articles of the company provide for a larger number, following shall be the quorum for a meeting of the company -

(a) In case of a public company:

- ◆ 5 members personally present if the number of members as on the date of meeting is not more than 1,000
- ◆ 15 members personally present if the number of members as on the date of meeting is more than 1,000 but up to 5,000
- ◆ 30 members personally present if the number of members as on the date of the meeting exceeds 5,000

(b) In the case of a private company: Two members personally present.

If the quorum is not present within 30 minutes from the time appointed for holding a meeting of the company-

- (a) The meeting shall stand adjourned to the same day in the next week at the same time and place, or to such other date and such other time and place as the Board may determine or
- (b) The meeting, if called by requisitionists shall stand cancelled.

However, in case of an adjourned meeting or of a change of day, time or place of meeting, the company shall give not less than 3 days notice to the members either individually or by publishing an advertisement 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.

If at the adjourned meeting also, a quorum is not present within 30 minutes from the time appointed for holding meeting, the members present shall be the quorum.

**Que. No. 30]** The required quorum is not present within 10 minutes of the scheduled time of holding of annual general meeting. Comment.

CS (Inter) – June 2000 (4 Marks)

**Ans.:** As per Section 103, quorum is required to be present within 30 minutes from the time appointed for holding a meeting of the company.

In given case, the people in meeting will have to wait for 20 minutes to ascertain whether requisite quorum is present or not before any decision regarding the conduct of the meeting can be taken.

**Que. No. 31]** The Board of Directors of a company decides to adjourn a requisitioned general meeting for want of quorum. Comment. CS (Final) – June 1996 (4 Marks)

**Ans.:** As per Section 103, if at the adjourned meeting, if the quorum is not present within 30 minutes from the time appointed for holding a meeting of the company, the meeting, if called by requisitionists shall stand cancelled.

Thus, Board of Directors cannot adjourn a requisitioned general meeting for want of quorum.

**Que. No. 32]** At an adjourned extraordinary general meeting of a public company only 3 members are personally present. Comment. CS (Inter) – June 1999 (4 Marks)

**Ans.:** As per Section 103, if at the adjourned meeting, a quorum is not present within 30 minutes from the time appointed for holding meeting, the members present shall be the quorum. Keeping in view above provision, if at an adjourned extraordinary general meeting of a public company only 3 members are personally present, then meeting is valid.

**Que. No. 33]** XYZ Ltd. a public company dealing in cosmetic products having 4,750 members has scheduled its 25th annual general meeting on 18th July 2015 at 11 a.m. On the appointed date at 11.35 a.m. only 17 persons are present out of which 3 persons are proxies. Comment.

**Ans.:** As per Section 103, quorum is required to be present within 30 minutes from the time appointed for holding a meeting of the company.

In case of public company, if number of members as on the date of meeting is more than 1,000 but up to 5,000, then 15 members personally present or higher number stated in Article will be the quorum.

As per facts stated in problem, only 14 members are personally present even after half-an-hour from the time appointed for holding a meeting, hence meeting will be adjourned.

In case of an adjournment of meeting, the company shall give not less than 3 days notice to the members either individually or by publishing an advertisement 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.

**Que. No. 34]** At the start of the general meeting of XYZ Ltd. (which has adopted Table F as its article and having 1,250 shareholders) there was quorum present. One of the directors, who was member of the company in his personal capacity. After the item of agenda was taken up for consideration, some members left the venue. There were only five members present in person including the director. One member objected the continuance of the meeting and declared that as there is no quorum, there is no meeting and, thus, the proceedings are invalid. Advise the chairman.

CS (Final) – Dec 2000 (3 Marks)

**Ans.:** As per Section 103, in case of public company, if number of members as on the date of meeting is more than 1,000 but up to 5,000, then 15 members personally present or higher number stated in Article will be the quorum.

Companies Act, 2013 is silent about the situation when quorum is available at the beginning of meeting but quorum is reduced in the middle of the meeting.

In *Hartely Baird In re* (1955) Ch 143, it was held that it is sufficient if the quorum is present at the beginning of the meeting and it not necessary that quorum should present throughout the meeting.

Thus, objection raised by the member is incorrect and proceeding at the meeting can be continued.

**Que. No. 35]** You are the Company Secretary of the Hardluck Pvt. Ltd. Its annual general meeting was fixed to be held at 10 AM on 30th September, 2015 in the Grand Hall. Due to unusual traffic congestion, only one shareholder Hari managed to arrive on time. He was only shareholder present for the first 10 minutes after the meeting was due to start. The chairman of the meeting arrived after 40 minutes and by that time the quorum for the meeting was also present. The chairman upon his arrival and finding that the quorum is present, called the meeting to order. Hari was not certain whether the belated holding of the meeting would be valid. He requests you to explain the legal position in this regard. Advise Hari.

CS (Final) – Dec 2002 (6 Marks)

**Ans.:** As per Section 103, quorum is required to be present within 30 minutes from the time appointed for holding a meeting of the company.

If the quorum is present but meeting could not start within half an hour as chairman was late, the meeting started after arrival of chairman is valid. [*Janaki Printing (P) Ltd. vs. Nadar Press Ltd.* (2000) 24 SCL 81]

In view of above, meeting continued by Hardluck Pvt. Ltd., upon his arrival of chairman 40 minutes after the meeting was due to start is valid.

**Que. No. 36]** The Articles of Association of X Ltd. require the personal presence of 7 members to constitute quorum of general meetings. The following persons were present in the extraordinary general meeting to consider the appointment of Managing Director:

- A, the representative of Governor of Madhya Pradesh.
- B & C, shareholders of preference shares
- D, representing Y Ltd. & Z Ltd.
- E, F, G & H as proxies of shareholders

Can it be said that the quorum was present in the meeting?

**Ans.:** For the purpose of quorum, only those members are counted who are entitled to vote on resolution proposed to be passed in the meeting.

Only members present in person and not by proxy are to be counted.

As per Sections 112 & 113, representative of President or Governor and representative of company are deemed to be a member present in person and counted for the purpose of quorum.

Where two or more companies which are members of another company, appoint a single person as their representative then each such company will be counted as quorum at a meeting of the latter company.

As per Section 47(2), preference shareholders have voting rights only in respect of resolutions which directly affect the rights attached to his preference shares.

In view of the above there are only three members are personally present.

'A' will be included for the purpose of quorum. B & C have to be excluded for the purpose of quorum because they represent the preference shares and since the agenda being the appointment of Managing Director, their rights cannot be said to be directly affected and therefore, they shall not have voting rights. D will have two votes for the purpose of quorum as he represents two companies Y Ltd. and Z Ltd. E, F, G and H are not to be included as they are not members but representing as proxies for the members.

**Que. No. 37]** A single member does not constitute quorum for a meeting. Comment.

CS (Inter) – Dec 1998 (4 Marks)

Under what circumstances can one person form a valid quorum?

CS (Inter) – Dec 2000 (4 Marks)

**Ans.:** Normally a single member cannot constitute a quorum. The MCA has also clarified that a single member present cannot by himself constitute quorum. Even at an adjourned meeting, one member present will not constitute quorum, for the section says that the members actually present shall be a quorum.

However, exceptions to this rule do exist.

- (1) Where all the preference shares in the company were held by one shareholder only it was held that a meeting of preference shareholders attended by only him was valid. [*East v. Bennet Bros. Ltd.*]

- (2) If there is one creditor or debenture holder, he constitute quorum for the creditor and debenture holders meeting.
- (3) As per Section 167, when default is made in holding an AGM, the Tribunal may direct that 1 member present in person or by proxy shall be deemed to constitute a meeting.

As per Section 186, the Tribunal may direct a meeting of a company to be called and held for any reason it is impracticable to call a meeting, and also direct that 1 member of the company present in person or by proxy shall be deemed to constitute a meeting.

## PROXY

Que. No. 38] Write a short note on: Proxy

Discuss briefly the voting rights of a proxy. CS (Executive) - June 2010 (4 Marks)

Ans.: Proxies [Section 105]: Any member of a company entitled to attend and vote at a meeting of the company shall be entitled to appoint another person as a proxy to attend and vote at the meeting on his behalf.

Various provisions relating to 'proxies' are discussed below:

- ◆ Every notice calling a meeting of a company which has a share capital, or the articles of which provide for voting by proxy at the meeting, should carry with reasonable prominence, a statement that *a member entitled to attend and vote is entitled to appoint a proxy, or, where that is allowed, one or more proxies, to attend and vote instead of himself, and that a proxy need not be a member.* Hence, a company not having a share capital can abstain from complying with this provision by incorporating necessary clause in its articles of association.
- ◆ A proxy shall not have the right to speak at the meeting.
- ◆ A proxy shall be entitled to vote only on a poll.
- ◆ A member of a company registered u/s 8 shall not be entitled to appoint any other person as his proxy unless such other person is also a member of such company.
- ◆ A person appointed as proxy shall not act as proxy on behalf of more than 50 members and members holding in the aggregate more than 10% of the total share capital of the company carrying voting rights. However, a member holding more than 10% of the total share capital of the company carrying voting rights may appoint a single person as proxy and such person shall not act as proxy for any other person or shareholder.
- ◆ The instrument appointing the proxy must be deposited with the company, 48 hours before the meeting. Any provision contained in the articles, requiring a longer period than 48 hours shall have effect as if a period of 48 hours had been specified.
- ◆ The instrument appointing a proxy must be in Form No. MGT. 11. It needs to be in writing and signed by the appointer or his attorney duly authorized in writing. If the appointer is a body corporate, the instrument should be under its seal or be signed by an officer or an attorney duly authorized by the body corporate. For execution of proxy, the AOA of a company cannot specify any special requirement to be complied with.
- ◆ Every member entitled to vote at a meeting of the company, or on any resolution to be moved thereat, is entitled to inspect the proxies lodged with the company, if at least 3 days notice is given to the company. Such inspection can be taken during the period beginning 24 hours before the time fixed for the commencement of the meeting, during the business hours of the company, and ending with the conclusion of the meeting.

Que. No. 39] A and B are joint holders of 1,000 equity shares in MNO Ltd. which adopted Table F as its article. For the general meeting of the company, A whose name stands first in the order of names in the register of members, execute a proxy authorizing X to attend the meeting. On the other hand B appoints Y as the proxy for the meeting.

- (i) Of the two proxies X and Y, who will have the right to attend and vote at the meeting?
- (ii) Would it make any difference to you answer if A's proxy is registered with the company and thereafter B's proxy is registered?
- (iii) What would be your answer if B personally attends the meeting.

CS (Final) - June 1997 (7 Marks)

Ans.:

- (i) As per Regulation 52 of the Table F, in the case of joint holders, the vote of the senior who tenders a vote, whether in person or by proxy, shall be accepted to the exclusion of the votes of the other joint holders. For this purpose, seniority shall be determined by the order in which the names stand in the register of members. Thus, of the two proxies X and Y, proxy X will have the right to attend and vote at the meeting.
- (ii) Normally, where two proxy instruments have been lodged in respect of same shares before the expiry of the time for lodging the proxies, the second in time will be entertained. However, in view of specific provision of Regulation 52 of Table F, answer will not change and still proxy X is valid and will have the right to attend and vote at the meeting.
- (iii) In *Cousins vs. International Bricks Co. Ltd.*, (1931) 2 Ch 90 (CA) at 101, it was held that there was nothing in the articles of a company to stop a shareholder to attend a meeting and vote in person, even though he had appointed a proxy to vote for him at the same meeting; the fact that the proxy was not revoked in the manner laid down in the articles did not prevent the member recording his vote in person to the exclusion of the proxy holder. But in *Narayanan Chettiar's case (supra)*, it was held that a shareholder's mere presence at the meeting will not have the effect of revocation. The revocation should be communicated before the meeting. Thus, if B revoke the authority of proxy and attends the meeting he will have right to vote at the meeting.

Que. No. 40] A was appointed as proxy by B to attend an AGM of XYZ Ltd. Later, B lodged another proxy appointing C to attend the same AGM. A & C both intend to attend the AGM. Decide.

CS (Inter) - June 1999 (4 Marks)

Abhijeet is a shareholder of Kutumb Ltd. on receipt of notice of an AGM to be held on 28th September 2014, Abhijeet issued a proxy in favour of Baljeet on 25th September 2014. Abhijeet again issued another proxy in favour of Charanjeet on 26th September 2014. Both Baljeet and Charanjeet attended the meeting on 28th September 2014. Decide who is entitled to vote on a poll.

CS (Inter) - Dec 2005 (4 Marks)

Ans.: Every member of a company having share capital has a right to appoint a proxy to attend and vote at a general meeting on his behalf. A member can appoint one or more proxies to vote in respect of the different shares held by him or he may appoint one or more proxies in the alternative, so that if the first named proxy fails to vote, the second one may do so, and so on.

When one person appoints two or more proxies, following rule will apply:

- ◆ Where two proxy instruments have been lodged in respect of same shares before the expiry of the time for lodging the proxies, the second in time will be entertained.

- ◆ Where one is lodged before and other after the expiry of the time for lodging proxy, the former will be accepted.

In present case, both the proxies were lodged in time, the second proxy i.e. C will be entertained.

**Que. No. 41]** The chairman of the meeting of a company received a proxy 54 hours before the time fixed for the start of the meeting. He refused to consider it although company's article required to a proxy to be filed before 60 hours of the start of the meeting. Can the holder of the proxy compel the chairman to admit it?

CS (Final) – Dec 2000 (4 Marks)

**Ans.:** According to Section 105, the instrument appointing the proxy must be deposited with the company, 48 hours before the meeting. Any provision contained in the articles, requiring a longer period than 48 hours shall have effect as if a period of 48 hours had been specified.

As per the facts given in case, since proxy form has been filed before 48 hours of the start of the meeting, proxy is valid and chairman must allow the proxy to attend the meeting.

**Que. No. 42]** X wants to appoint ABC Ltd. as its proxy to attend and vote for him at a general meeting of a listed company. Advise X. CS (Final) – June 2002 (4 Marks)

**Ans.:** Only natural person can be appointed as a proxy. Artificial legal person like body corporate cannot be appointed as proxy, as proxy has to be physically present at the meeting. [United Western Bank Ltd. In re. (2002) 38 SCL 24 (CLB)]

**Que. No. 43]** A proxy was appointed by a member on an instrument duly executed. Will the vote cast by the proxy be valid in the following cases:

- When the member himself attended and cast his vote at the meeting without revoking the authority of the proxy and
- When the member died in the meantime?

CS (Inter) – June 2007 (6 Marks)

**Ans.:** The relationship between the proxy and the person appointing him is that of an agent and principal, and the former must act in accordance with the instructions of the latter. As their relationship is governed by the law of agency, proxy can be revoked by the member at any time and is automatically revoked by the death or insolvency of the member.

A member may revoke the proxy's authority by attending and voting himself before the proxy has voted. However, a shareholder's mere presence at the meeting will not have the effect of revocation. [ICSI Guidance Note on General Meeting]

The revocation should be communicated before the meeting. Revocation will be too late if communicated after the meeting commenced. In such a case the votes cast by the proxy will be valid in a poll.

**Que. No. 44]** Yash, a member of Omar Ltd., appoints Jolly to attend a general meeting of the company. At the meeting, voting takes place by show of hands. However, Jolly does not know whether he (as a proxy) can vote by show of hands at the meeting. Advise.

CS (Executive) – June 2012 (4 Marks)

**Ans.:** As per Section 105, a proxy shall not have the right to speak at such meeting and shall not be entitled to vote except on a poll. A proxy can vote on show of hands only if there is specific provision in the article of the company.

In view of above provisions, the Jolly as a proxy can vote by show of hands at the meeting if the article of the company provides for the same.

**Que. No. 44A]** A member of a company has statutory right to appoint proxy for attending the general meeting of the company. Similarly, a director can also appoint his proxy for attending the meetings of Board of directors of the company.

CS (Executive) – Dec 2016 (5 Marks)

**Ans.:** As per Section 105, any member of a company entitled to attend and vote at a meeting of the company shall be entitled to appoint another person as a proxy to attend and vote at the meeting on his behalf.

However, same provision is not applicable for director and hence director cannot appoint proxy for attending board meeting.

## VOTING

**Que. No. 45]** In which circumstances voting rights of members can be restricted?

**Ans.:** Restriction on voting rights [Section 106]: A member shall not exercise any voting right in respect of any shares registered in his name on which any calls or other sums presently payable by him have not been paid or on which company has exercised any right of lien. No member can be prohibited from exercising his voting right on any other ground.

When a poll is taken a member or a proxy need not to use all his votes or cast in the same way.

**Que. No. 46]** C, a member of LS & Co. Ltd., holding some shares in his own name on which final call money has not been paid, is denied by the company voting right at a general meeting on the ground that the articles of association do not permit a member to vote if he has not paid the calls on the shares held by him. With reference to the provisions of the Companies Act, 2013, examine the validity of company's denial to C of his voting right.

**Ans.:** As per Section 106, a member shall not exercise any voting right in respect of any shares registered in his name on which any calls or other sums presently payable by him have not been paid or on which company has exercised any right of lien. No member can be prohibited from exercising his voting right on any other ground.

Since, the stipulation in the Articles relates to one of the grounds permitted u/s 106, the same is valid C's protest is not valid.

**Que. No. 47]** State the provisions relating to "voting by show of hand" of the Companies Act, 2013? CS (Executive) – Dec 2012 (4 Marks)

**Ans.:** Voting by show of hands [Section 107]: At any general meeting, a resolution put to the vote of the meeting shall in the first instance be decided on a show of hands.

A declaration by the Chairman of the meeting of the passing of a resolution by show of hands shall be conclusive evidence of the fact of passing of such resolution, unless a poll is demanded before or immediately on declaration by Chairman.

**Que. No. 48]** State the provisions relating to "voting through electronic means" of the Companies Act, 2013?

**Ans.:** Voting through electronic means [Section 108]: The Central Government may prescribe the class or classes of companies and manner in which a member may exercise his right to vote by the electronic means.

**Rule 20 of the Companies (Management & Administration) Rules, 2014** makes the following provisions in relation to voting through electronic means:

Every listed company or a company having not less than 1,000 members, shall provide to its members facility to vote on resolutions by electronic means.

A company which provides the facility to its members to exercise voting by electronic means shall comply with the following procedure:

- ◆ The notice of the meeting shall be sent to all the members, directors and auditors of the company either:
  - By registered post or speed post or
  - Through electronic means, namely, registered E-mail ID of the recipient or
  - By courier service
- ◆ The notice shall also be placed on the website of the company.
- ◆ The notice of the meeting shall clearly state -
  - That the company is providing facility for voting by electronic means and the business may be transacted through such voting.
  - That the facility for voting, either through electronic voting system or ballot or polling paper shall also be made available at the meeting and members attending the meeting who have not already cast their vote by remote e-voting shall be able to exercise their right at the meeting
  - That the members who have cast their vote by remote e-voting prior to the meeting may also attend the meeting but shall not be entitled to cast their vote again
- ◆ The notice shall-
  - Indicate the process and manner for voting by electronic means
  - Indicate the time schedule including the time period during which the votes may be cast by remote e-voting
  - Provide the details about the login ID
  - Specify the process and manner for generating or receiving the password and for casting of vote in a secure manner.
- ◆ The company shall cause a public notice by way of an advertisement to be published, immediately on completion of dispatch of notices for the meeting at least 21 days before the date of general meeting, at least once in a vernacular language newspaper and at least once in English language newspaper. Such new paper advertisement should contain the following matters:
  - Statement that the business may be transacted through voting by electronic means
  - The date and time of commencement of remote e-voting
  - The date and time of end of remote e-voting
  - Cut-off date
  - The manner in which persons who have acquired shares and become members of the company after the dispatch of notice may obtain the login ID and password
  - The statement that-
    - Remote e-voting shall not be allowed beyond the said date and time
    - The manner in which the company shall provide for voting by members present at the meeting and
    - A member may participate in the general meeting even after exercising his right to vote through remote e-voting but shall not be allowed to vote again in the meeting and
    - A person whose name is recorded in the register of members or in the register of beneficial owners maintained by the depositories as on the

cut-off date only shall be entitled to avail the facility of remote e-voting as well as voting in the general meeting

- Website address of the company, if any, and of the agency where notice of the meeting is displayed and
  - Name, designation, address, email id and phone number of the person responsible to address the grievances connected with facility for voting by electronic means
- ◆ The facility for remote e-voting shall remain open for not less than three days and shall close at 5.00 p.m. on the date preceding the date of the general meeting.
  - ◆ During the period when facility for remote e-voting is provided, the members of the company, holding shares either in physical form or in dematerialized form, as on the cut-off date, may opt for remote e-voting. However, once the vote on a resolution is cast by the member, he shall not be allowed to change it subsequently or cast the vote again. A member may participate in the general meeting even after exercising his right to vote through remote e-voting but shall not be allowed to vote again.
  - ◆ At the end of the remote e-voting period, the facility shall forthwith be blocked. If a company opts to provide the same electronic voting system as used during remote e-voting during the general meeting, the said facility shall be in operation till all the resolutions are considered and voted upon in the meeting and may be used for voting only by the members attending the meeting and who have not exercised their right to vote through remote e-voting.
  - ◆ The Board of Directors shall appoint one or more scrutinizer, who may be practicing CA, CWA, or CS or an Advocate, or any other person who is not in employment of the company and is a person of repute who, in the opinion of the Board can scrutinize the voting and remote e-voting process in a fair and transparent manner. The scrutinizer so appointed may take assistance of a person who is not in employment of the company and who is well-versed with the electronic voting system.
  - ◆ The scrutinizer shall be willing to be appointed and he available for the purpose of ascertaining the requisite majority.
  - ◆ The Chairman shall, at the general meeting, at the end of discussion on the resolutions on which voting is to be held, allow voting, with the assistance of scrutinizer, by use of ballot or polling paper or by using an electronic voting system for all those members who are present at the general meeting but have not cast their votes by availing the remote e-voting facility.
  - ◆ The scrutinizer shall, immediately after the conclusion of voting at the general meeting, first count the votes cast at the meeting, thereafter unblock the votes cast through remote e-voting in the presence of at least 2 witnesses not in the employment of the company and make, not later than 3 days of conclusion of the meeting, a consolidated scrutinizer's report of the total votes cast in favour or against, to the Chairman or a person authorized by him in writing who shall countersign the same. The Chairman or a person authorized by him in writing shall declare the result of the voting forthwith. The manner in which members have cast their votes, that is, affirming or negating the resolution, shall remain secret and not available to the Chairman, Scrutinizer or any other person till the votes are cast in the meeting.
  - ◆ For the purpose of ensuring that members who have cast their votes through remote e-voting do not vote again at the general meeting, the scrutinizer shall have access, after the closure of period for remote e-voting and before the start of general meeting, to details relating to members, such as their names, folios, number of shares held and such

other information that the scrutinizer may require, who have cast votes through remote e-voting but not the manner in which they have cast their votes.

- ◆ The scrutinizer shall maintain a register either manually or electronically to record the assent or dissent received, mentioning the particulars of name, address, folio number or client ID of the members, number of shares held by them, nominal value of such shares and whether the shares have differential voting rights.
- ◆ The register and all other papers relating to voting by electronic means shall remain in the safe custody of the scrutinizer until the Chairman considers, approves and signs the minutes and thereafter, the scrutinizer shall hand over the register and other related papers to the company.
- ◆ The results declared along with the report of the scrutinizer shall be placed on the website of the company, and on the website of the agency immediately after the result is declared by the Chairman. In case of companies whose equity shares are listed on a recognized stock exchange, the company shall, simultaneously, forward the results to the concerned stock exchange or exchanges where its equity shares are listed and such stock exchange or exchanges shall place the results on its or their website.
- ◆ Subject to receipt of requisite number of votes, the resolution shall be deemed to be passed on the date of the relevant general meeting.
- ◆ A resolution proposed to be considered through voting by electronic means shall not be withdrawn.

**Que. No. 49]** PQR Ltd. is an unlisted company and has 400 shareholders in all. The shareholders of the company propose voting by electronic mode. Chairman of the company rejected the shareholders' proposal. Explaining the provisions of the Companies Act, 2013, examine the validity of rejection of the shareholders' proposal by the Chairman.

CS (Executive) - June 2015 (4 Marks)

**Ans.:** As per Rule 20 of the Companies (Management & Administration) Rules, 2014, every listed company or a company having not less than 1,000 members, shall provide to its members facility to vote on resolutions by electronic means. In given case PQR Ltd. (an unlisted company) has only 400 shareholders. Thus, it is not mandatory for the PQR Ltd. to conduct voting by electronic voting system.

**Que. No. 50]** Write a short note on: Demand for Poll

**Ans.:** Demand for Poll [Section 109]: Before or on the declaration of the result of the voting on any resolution on show of hands, a poll may be ordered to be taken by the Chairman of the meeting on his own motion, and shall be ordered to be taken by him on a demand made in that behalf by the following persons:

- (a) **In the case a company having a share capital:** By the members present in person or by proxy, and having not less than 1/10<sup>th</sup> of the total voting power or holding shares on which an aggregate sum of not less than ₹ 5,00,000 or such higher amount as may be prescribed, has been paid-up and
- (b) **In the case of any other company:** By any member or members present in person or by proxy, where allowed, and having not less than 1/10<sup>th</sup> of the total voting power.

The demand for a poll may be withdrawn at any time by the persons who made the demand.

**Time for taking poll and declaring the result:** A poll shall be taken forthwith, if it is demanded for adjournment of the meeting or appointment of Chairman of the meeting.

A poll shall be taken at such time, not being later than 48 hours from the time when the demand was made on any other question.

Where a poll is to be taken, the Chairman of the meeting shall appoint such number of persons, as he deems necessary, to scrutinize the poll process and votes given on the poll and to report thereon to him in the manner as may be prescribed.

The result of the poll shall be deemed to be the decision of the meeting on the resolution on which the poll was taken.

**Que. No. 51]** Write a short note on: Voting rights of preference shareholders

Jolly is one of the preference shareholders of Jack & Jill Ltd., a company registered under the Companies Act, 2013. The annual general meeting of the said company is scheduled to be held on 8th January, 2015. In this context, Jolly wants to exercise his voting rights at the scheduled general meeting. Can he do so? If so, state whether he can vote on every resolution placed before the meeting.

CS (Executive) - Dec 2008 (8 Marks)

**Ans.:** Voting rights of preference shareholders [Section 47(2)]: Preference shareholders have voting rights only in respect of following:

- (a) Resolutions which directly affect the rights attached to his preference shares.
- (b) Any resolution for the winding up of the company or for the repayment or reduction of its equity or preference share capital.
- (c) Where the dividend in respect of a class of preference shares has not been paid for a period of 2 years or more years.

In a poll, the proportion of the voting rights of equity shareholders to the voting rights of the preference shareholders shall be in the same proportion as the paid-up capital in respect of the equity shares bears to the paid-up capital in respect of the preference shares.

Thus, Jolly cannot exercise voting rights on every resolution placed before the meeting. Jolly can exercise voting rights in respect of those resolution which directly affects the right of preference shareholders or if preference dividend is paid not for last 2 years.

## POSTAL BALLOT

**Que. No. 52]** Write a short note on: Passing of resolutions by postal ballot

CS (Executive) - June 2010 (4 Marks)

"A limited company will have to get certain resolutions passed only through postal ballot instead of transacting the business in the general meeting of the company." Discuss.

CS (Executive) - Dec 2009 (5 Marks)

**Ans.:** Postal Ballot [Section 2(65)]: Postal ballot means voting by post or through any electronic mode.

**Postal Ballot [Section 110]:** A company has to pass certain resolution notified by Central Government by the way of postal ballot. However, the company can also pass resolution by postal ballot of any other business except following:

- Ordinary business
- Any business in respect of which directors or auditors have a right to be heard at any meeting

If a resolution is assented to by the requisite majority of the shareholders by means of postal ballot, it shall be deemed to have been duly passed at a general meeting convened in that behalf.

**Resolution to be passed by postal ballot only [Rule 22(16)]:** The following items of business shall be transacted only by means of voting through a postal ballot:

- (a) Alteration of the *objects clause* of the MOA.
- (b) Alteration of AOA in relation to insertion or removal of provisions which, are required to be included in the articles of a company in order to constitute it a private company.
- (c) Change in place of registered office outside the local limits of any city, town or village.
- (d) Change in objects for which a company has raised money from public through prospectus and still has any unutilized amount out of the money so raised.
- (e) Issue of shares with differential rights as to voting or dividend or otherwise.
- (f) Variation in the rights attached to a class of shares or debentures or other securities.
- (g) Buy-back of shares by a company.
- (h) Election of a director.
- (i) Sale of the whole or substantially the whole of an undertaking of a company.
- (j) Giving loans or extending guarantee or providing security in excess of the limit prescribed under Section 186.

*Any item of business required to be transacted by means of postal ballot under clauses (a) to (j), may be transacted at a general meeting by a company which is required to provide the facility to members to vote by electronic means u/s 108.*

**Procedure for conducting business through postal ballot [Rule 22(1) to (15)]:**

- (1) Where a company is required or decides to pass any resolution by way of postal ballot, it shall send a notice to all the shareholders, along with a draft resolution explaining the reasons and requesting them to send their assent or dissent in writing on a postal ballot or by electronic means within a period of 30 days from the date of dispatch of the notice.
- (2) The notice shall be sent by Registered Post or speed post, or through electronic means or through courier service for facilitating the communication of the assent or dissent of the shareholder to the resolution within the said period of 30 days.
- (3) An advertisement shall be published at least once in a vernacular language newspaper and in English language newspaper, about having dispatched the ballot papers and specifying the following matters:
  - A statement to the effect that the business is to be transacted by postal ballot which includes voting by electronic means.
  - The date of completion of dispatch of notices.
  - The date of commencement of voting.
  - The date of end of voting.
  - The statement that any postal ballot received from the member beyond the said date will not be valid and voting whether by post or by electronic means shall not be allowed beyond the said date.
  - A statement to the effect that members, who have not received postal ballot forms may apply to the company and obtain a duplicate thereof.
  - Contact details of the person responsible to address the grievances connected with the voting by postal ballot including voting by electronic means.
- (4) The notice of the postal ballot shall also be placed on the website of the company forthwith after the notice is sent to the members and such notice shall remain on such website till the last date for receipt of the postal ballots from the members.
- (5) The Board of directors shall appoint one scrutinizer, who is not in employment of the company and who, in the opinion of the Board can conduct the postal ballot voting process in a fair and transparent manner. The scrutinizer shall be willing to be appointed and be available for the purpose of ascertaining the requisite majority.

- (6) If a resolution is assented to by the requisite majority of the shareholders by means of postal ballot including voting by electronic means, it shall be deemed to have been duly passed at a general meeting convened in that behalf.
- (7) Postal ballot received back from the shareholders shall be kept in the safe custody of the scrutinizer. After the receipt of assent or dissent of the shareholder in writing on a postal ballot, no person shall deface or destroy the ballot paper or declare the identity of the shareholder.
- (8) The scrutinizer shall submit his report as soon as possible after the last date of receipt of postal ballots but not later than seven days thereof.
- (9) **Register of postal ballot:** The scrutinizer shall maintain a register either manually or electronically to record their assent or dissent received, mentioning the particulars of name, address, folio number or client ID of the shareholder, number of shares held by them, nominal value of such shares, whether the shares have differential voting rights, if any, details of postal ballots which are received in defaced or mutilated form and postal ballot forms which are invalid.
- (10) The postal ballot and all other papers relating to postal ballot including voting by electronic means, shall be under the safe custody of the scrutinizer till the chairman considers, approves and signs the minutes. Thereafter, the scrutinizer shall return the ballot papers and other related papers/register to the company who shall preserve such ballot papers and other related papers/register safely.
- (11) The assent or dissent received after thirty days from the date of issue of notice shall be treated as if reply from the member has not been received.
- (12) The results shall be declared by placing it, along with the scrutinizer's report, on the website of the company.
- (13) The resolution shall be deemed to be passed on the date of declaration of its result.
- (14) The provisions regarding voting by electronic means shall apply, as far as applicable, *mutatis mutandis* in respect of the voting by electronic means.

If a resolution is assented to by the requisite majority of the shareholders by means of postal ballot, it shall be deemed to have been duly passed at a general meeting convened in that behalf. In case of OPC and other companies having members up to 50 are not required to transact any business through postal ballot.

**Que. No. 52A] Postal ballot mechanism improves shareholders' participation in corporate decision-making. CS (Executive) – Dec 2010 (5 Marks)**

**Ans.:** Postal ballot means voting by post or through any electronic mode.

A company has pass to certain resolution notified by Central Government by way of postal ballot. However, the company can also pass resolution by postal ballot of any other business except following:

- Ordinary business
- Any business in respect of which directors or auditors have a right to be heard at any meeting

If a resolution is assented to by the requisite majority of the shareholders by means of postal ballot, it shall be deemed to have been duly passed at a general meeting convened in that behalf.

The idea behind postal ballot is 'corporate democracy'. Presently, many listed companies have lakhs of shareholders spread all over India. It is not possible for most of them to attend general meeting and vote thereat. Thus, resolutions are passed at general meeting only by few members who attend the meetings. To remedy this situation, concept of postal ballot was first brought

into force on 15.6.2001 vide Section 192A of the Companies Act, 1956. These provisions are continued in Section 110 of the Companies Act, 2013.

Thus, through postal ballot process shareholder who cannot attend the meeting can also vote by sending postal ballot and large number of shareholders are involved in decision making; hence postal ballot mechanism improves shareholders' participation in corporate decision-making.

### REPRESENTATIVE MEMBERS

**Que. No. 53] Write a short note on: Representation of President & Governors in meetings**

**Ans.: Representation of President & Governors in meetings [Section 112]:** President of India or the Governor of a State, if he is a member of a company, may appoint such person as he thinks fit, to act as his representative at any meeting of the company. The person so appointed shall be deemed to be a member and have the same rights including the right to vote by proxy or postal ballot, as the President or Governor could exercise as a member of the company.

**Que. No. 54] Write a short note on: Representation of corporations at meeting of companies and of creditors**

Global India Ltd. holds 2,000 shares in Atlanta Co. Ltd. Prem, a director of Global India Ltd., has been appointed as its representative to attend the annual general meeting of the Atlanta Co. Ltd. Prem falls ill. Advise the company. CS (Final) - Dec 2000 (4 Marks)

**Ans.: Representation of corporations at meeting of companies and of creditors [Section 113]:** At the general meeting of the members, the body corporate will be represented by an authorized representative. Such representative should be appointed by resolution of a Board meeting or other governing body of that body corporate. Presence of representative is as good as presence of a company.

Such representative shall be entitled to exercise the same rights and powers, including the right to vote by proxy and by postal ballot, on behalf of the body corporate which he represents as that body could exercise if it were an individual member of the company. The representative at the meeting can do what an ordinary member can do at the meeting i.e. speak at the meeting, propose resolution, vote on show of hands, demand poll, appoint proxy etc.

Similarly, if company or body corporate is creditor or debenture holder of other company, it can appoint representative for the meetings of the creditors or debenture holders.

*Prem, a director of Global India Ltd. is advised to appoint a proxy if he is not able to attend the meeting of Atlanta Co. Ltd.*

### RESOLUTIONS

**Que. No. 55] Distinguish between: Motion & Resolution**

CS (Inter) - June 2007 (4 Marks)

CS (Executive) - Dec 2009 (4 Marks), June 2011 (4 Marks)

CS (Executive) - June 2012 (4 Marks)

**Ans.:** Following are the main points of distinction between motion & resolution:

Points	Motion	Resolution
Meaning	Motion is a proposal submitted for a discussion and a decision adopted by means of a resolution. A motion becomes a resolution only after the requisite majority of members have adopted it.	A resolution is the formal expression of the decision of the meeting when a motion has been duly voted and passed by the requisite majority.

<b>Official decision</b>	Every motion is not the official decision of the company.	A resolution once adopted and recorded in the minutes becomes the official decision of the company.
<b>Significance in meeting</b>	In case of company meetings, only such motions are proposed as are covered by the agenda. However, certain motions may arise out of the discussion and the standing orders of various bodies allow such motions to be discussed at the meeting without proper notice in writing.	A resolution relates to only such matters that are covered in notice of the meeting. No resolution can be passed in respect of matters which are not covered in notice of the meeting.

**Que. No. 56] Write a short note on: Ordinary Resolution and Special Resolution**

CS (Executive) - June 2013 (4 Marks)

**Ans.: Ordinary & Special Resolution [Section 114]:** A resolution shall be an ordinary resolution if the notice has been duly given and it is required to be passed by the votes cast, in favour of the resolution, including the casting vote, if any, of the Chairman, exceed the votes, if any, cast against the resolution.

A resolution shall be a special resolution when:

- The intention to propose the resolution as a special resolution has been duly specified in the notice calling the general meeting or other intimation given to the members of the resolution.
- The notice required under this Act has been duly given and
- The votes cast in favour of the resolution, are required to be not less than 3 times the number of the votes, if any, cast against the resolution.

**Que. No. 57] At a General meeting of a company, a matter was to be passed by a special resolution. Out of 40 members present, 20 voted in favour of the resolution, 5 voted against it and 5 votes were found invalid. The remaining 10 members abstained from voting. The Chairman of the meeting declared the resolution as passed.**

CS (Executive) - Dec 2016 (4 Marks)

**Ans.:** As per Section 114, while passing a special resolution, the votes cast in favour of the resolution should be at least 3 times of the vote cast against the resolution.

Thus, in terms of the requisite majority, votes cast in favour have to be compared with votes cast against the resolution. Accordingly, in the given problem, the votes cast in favour (20) being more than 3 times of the votes cast against (5), the decision of the Chairman is in order.

**Que. No. 58] For a special resolution in a company general meeting, 9 voted in favour, 2 against and 4 abstained. The chairman declared the resolution as passed. Is it a valid resolution?**

CS (Inter) - June 2001 (4 Marks), Dec 2007 (4 Marks)

**Ans.:** As per Section 114, while passing a special resolution, the votes cast in favour of the resolution should be at least 3 times of the vote cast against the resolution.

Thus, in terms of the requisite majority, votes cast in favour have to be compared with votes cast against the resolution. Accordingly, in the given problem, the votes cast in favour (9) being more than 3 times of the votes cast against (2), the resolution is validly passed as special resolution.

**Que. No. 59] Write a short note on: Resolutions requiring special notice**

**Ans.: Resolutions requiring special notice [Section 115]:** A special notice required to be given to the company shall be signed, either individually or collectively by such number of members

holding not less than 1% of total voting power or holding shares on which an aggregate sum of not less than ₹ 5,00,000 been paid up on the date of the notice.

Procedure for special notice [Rule 23]:

- ◆ A special notice shall be sent by members to the company not earlier than 3 months but at least 14 days before the date of the meeting at which the resolution is to be moved, exclusive of the day on which the notice is given and the day of the meeting.
- ◆ The company shall immediately after receipt of the notice, give its members notice of the resolution at least 7 days before the meeting in the same manner as it gives notice of any general meetings.
- ◆ Where it is not practicable to give the notice, the notice shall be published in English language newspaper and in vernacular language newspaper. Notice shall also be posted on the website of the Company. Such notice shall be published at least 7 days before the meeting.

Following resolution requires special notice under the Companies Act, 2013:

- (1) A resolution at an AGM appointing as auditor a person other than a retiring auditor, or providing expressly that a retiring auditor shall not be re-appointed. [Section 140]
- (2) A resolution to remove a director or to appoint somebody in place of a director so removed, at the meeting at which he is removed. [Section 169]

Que. No. 60] Distinguish between: Special resolution & Resolutions requiring special notice

CS (Inter) - Dec 2004 (4 Marks)

CS (Executive) - June 2012 (4 Marks)

Ans.: Following are the main points of distinction between special resolution & resolutions requiring special notice:

Points	Special Resolution	Resolutions requiring special notice
Meaning	A special resolution is one passed at a general meeting of a company when: <ul style="list-style-type: none"> <li>- Notice of the meeting specifying the intention to propose the resolution as a special resolution has been duly given and</li> <li>- The votes cast in favour are 3 times of the vote cast against it.</li> </ul>	According to Section 115, where by any provision of the Act or in the articles, special notice is required of any resolution, notice of the intention to move the resolution shall be given to the company not earlier than 3 months but at least 14 days before the date of the meeting.
From No.	Every special resolution is required to be filed in Form No. MGT.14 to the ROC.	Every resolution requiring special notice is also required to be filed with ROC, but no Form has been prescribed.
Dependence	Every special resolution does not require special notice.	Resolutions requiring special notice may be passed as ordinary resolution.
Examples	Following are some of the transactions which requires special resolution: <ul style="list-style-type: none"> <li>◆ Alteration of the name of the company with the approval of the Central Government</li> <li>◆ Shifting of registered office from one city, town or village to another city, town or village within the same State.</li> <li>◆ Change of registered office from one State to another State</li> <li>◆ Change in object clause</li> </ul>	Following are some of the transactions which requires special notice: <ul style="list-style-type: none"> <li>◆ A resolution at an AGM appointing as auditor a person other than a retiring auditor, or providing expressly that a retiring auditor shall not be re-appointed.</li> <li>◆ A resolution to remove a director or to appoint somebody in place of a director so removed, at the meeting at which he is removed.</li> </ul>

Que. No. 61] Write a short note on: Adjournment of meeting

A new business cannot be dealt within an adjourned meeting without permission of chair. Do you agree with the statement? Give reasons.

CS (Executive) - June 2011 (4 Marks)

Ans.: When meeting is called and started but suspended to resume at later time on the same date or some another date it is known as adjournment of meeting.

Adjournment of meeting [Regulation 49 of Table F]:

- (1) The Chairperson may, with the consent of any meeting at which a quorum is present, and shall, if so directed by the meeting, adjourn the meeting from time to time and from place to place.
- (2) No business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.
- (3) When a meeting is adjourned for 30 days or more, notice of the adjourned meeting shall be given as in the case of an original meeting.
- (4) It shall not be necessary to give any notice of an adjournment or of the business to be transacted at an adjourned meeting.

Resolutions passed at adjourned meeting [Section 116]: Where a resolution is passed at an adjourned meeting of a company; or the holders of any class of shares in a company; or the Board of Directors, the resolution shall be treated as passed on the day it was actually passed and not on any earlier date.

Que. No. 62] Zolta Ltd., whose year ended on 31st March, held its annual general meeting on 30th September. However, as the accounts were not ready, the meeting transacted all other business except accounts and adjourned the meeting to 24th December for consideration of accounts. The Registrar of Companies issued a show cause notice for violation of Section 129 of the Companies Act, 2013. Advise.

CS (Final) - June 2001 (5 Marks)

Ans.: It was held that even adjourned meeting must be held within the time allowed under the Companies Act. Since adjourned meeting is continuance of the original meeting, even adjourned meeting must be completed within time specified under the Companies Act. [MD Mundra vs. Assistance ROC (1986) 59 Comp Cas 822 (Cal)]

In AGM one point on agenda is adoption of audited accounts. Department has clarified that if audited accounts are not ready, AGM can be adjourned. However, even adjourned meeting should be held within the stipulated time or, within the extension allowed, if any.

One of the condition for the AGM is that, it must be held within 6 months from the end of the accounting year. Since, Zolta Ltd. had not completed its adjourned meeting within 6 months from the end of the accounting period it has committed the default of not holding the AGM within statutory time period.

Que. No. 63] Distinguish between: Postponement of meeting & Adjournment of meeting

CS (Executive) - Dec 2012 (4 Marks)

Ans.: Following are the main points of distinction postponement & adjournment of meeting:

Points	Postponement of Meeting	Adjournment of Meeting
Meaning	When it is decided by the directors to cancel the duly called meeting and to take it on some other day it is known as postponement of meeting.	When meeting is called and started but suspended to resume at later time on the same date or some another date it is known as adjournment of meeting.

Effect	Postponement means cancelling the meeting itself and hold fresh meeting on some other date.	Adjourned meeting mere continuance of original meeting.
Power	Directors who have issued notice of general meeting for a particular date have the power to postpone the date for valid, <i>bona fide</i> and proper reasons.	The chairman may, with the consent of any meeting at which a quorum is present and shall, if so directed by the meeting, adjourn the meeting from time to time and from place to place.
Notice	Fresh notice will be required in case meeting is postponed.	For an adjourned meeting fresh notice is not necessary, if time, date and place are decided and declared at the time of adjourning. The rules may provide for notice to be given for adjourned meeting if the interval exceeds a fixed time, e.g., 30 days. If the meeting is adjourned <i>sine die</i> , fresh notice of the adjourned meeting is necessary.

**Que. No. 64] Whether the chairman of meeting has a power to dissolve the meeting before the business of the meeting is over?** CS (Inter) – Dec 2004 (4 Marks)

**Ans.:** The chairman may, with the consent of any meeting at which a quorum is present and shall, if so directed by the meeting, adjourn the meeting from time to time and from place to place. The chairman has no power to stop the meeting and dissolve it before the business of the meeting is over. (*Vakil vs. Bombay Residency*)

**Que. No. 65] Write a short note on: Circulation of Members Resolution**

**Ans.:** Some members may themselves want to put certain resolution for consideration at the AGM. Sometimes, in respect of certain resolution, members may like to issue a statement to all members. Such members have to submit a requisition to the company. This facility is provided in Section 111 which is also known as 'Circulation of Members Resolution'.

#### **Circulation of Members Resolution [Section 111]:**

- (1) A company shall, on requisition in writing from members, as required in Section 100:
  - (a) Give notice to members of any resolution which may properly be moved and is intended to be moved at a meeting and
  - (b) Circulate to members any statement with respect to the matters referred to in proposed resolution or business to be dealt with at that meeting.
- (2) A company shall be bound to give notice of any resolution or to circulate any statement only if-
  - (a) A two or more copies of the requisition signed by the requisitionists is deposited at the registered office of the company
    - In the case of a requisition requiring notice of a resolution, not less than 6 weeks before the meeting
    - In the case of any other requisition, not less than 2 weeks before the meeting and
  - (b) There is deposited or tendered with the requisition, a sum reasonably sufficient to meet the company's expenses in giving effect thereto:

However, if an annual general meeting is organized by the company after the receipt of requisition, the proposed resolution at the general meeting must be circulated even if notice falls short by 6 weeks.

- (3) The company shall not be bound to circulate any statement, if on the application either of the company or of any other person who claims to be aggrieved, the Central Govern-

ment, by order, declares that the rights conferred by this section are being abused to secure needless publicity for defamatory matter.

- (4) An order made by the Central Government may also direct that the cost incurred by the company by virtue of this section shall be paid to the company by the requisitionists, notwithstanding that they are not parties to the application.

#### **MINUTES**

**Que. No. 66] Discuss the requirements for keeping the minutes book of general meetings.**

CS (Inter) – June 2001 (4 Marks), Dec 1998 (4 Marks)

CS (Executive) – June 2010 (4 Marks), Dec 2010 (5 Marks)

CS (Executive) – Dec 2014 (4 Marks)

**Ans.:** Minutes of proceedings of general meeting, meeting of Board of Directors and other meeting and resolutions passed by postal ballot [Section 118]: Every company shall prepare, sign and keep minutes of proceedings of every general meeting, including the meeting called by the requisitionists and all proceedings of meeting of any class of share holders or creditors or Board of Directors or committee of the Board and also resolution passed by postal ballot within 30 days of the conclusion of every such meeting concerned.

In case of meeting of Board of Directors or of a committee of Board, the minutes shall contain name of the directors present and also name of dissenting director or a director who has not concurred the resolution.

The chairman shall exercise his absolute discretion in respect of inclusion or non-inclusion of the matters which is regarded as defamatory of any person, irrelevant or detrimental to company's interest in the minutes.

Minutes kept shall be evidence of the proceedings recorded in a meeting.

Every company shall observe **Secretarial Standards** with respect to General and Board Meetings specified by the ICSI and approved as such by the Central Government.

**Rule 25 of the Companies (Administration & Management) Rules, 2014** contains the following provisions with regards to minutes of meetings.

- ◆ A distinct minute book shall be maintained for each type of meeting.
- ◆ It may be noted that resolutions passed by postal ballot shall be recorded in the minute book of general meetings as if it has been deemed to be passed in the general meeting. In no case the minutes of proceedings of a meeting or a resolution passed by postal ballot shall be pasted to any such book.
- ◆ In case of every resolution passed by postal ballot, a brief report on the postal ballot conducted including the resolution proposed, the result of the voting thereon and the summary of the scrutinizer's report shall be entered in the minutes book of general meetings along with the date of such entry within 30 days from the date of passing of resolution.
- ◆ Minutes of proceedings of each meeting shall be entered in the books maintained for that purpose along with the date of such entry within thirty days of the conclusion of the meeting.
- ◆ Each page of every such book shall be initialled or signed and the last page of the record of proceedings of each meeting or each report in such books shall be dated and signed by:

- In the case of minutes of proceedings of a meeting of the Board or of a committee thereof, by the chairman of the said meeting or the chairman of the next succeeding meeting;
  - In the case of minutes of proceedings of a general meeting, by the chairman of the same meeting within the aforesaid period of 30 days or in the event of the death or inability of that chairman within that period, by a director duly authorized by the Board for the purpose;
  - In case of every resolution passed by postal ballot, by the chairman of the Board within the aforesaid period of 30 days or in the event of there being no chairman of the Board or the death or inability of that chairman within that period, by a director duly authorized by the Board for the purpose.
- ◆ Minute books of general meetings shall be kept at the *registered office* of the company. Minutes of the Board and committee meetings shall be kept at the registered office or at such other place as may be approved by the Board.
  - ◆ Minutes books shall be preserved *permanently* and kept in the custody of the Company Secretary or any director duly authorized by the Board and shall be kept at the registered office or such place as the members may decide by passing special resolution pursuant to requirement of Section 88 read with Section 94.

**Que. No. 66A] 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.**  
CS (Executive) – Dec 2016 (5 Marks)

**Ans.:** As per Section 118, in case of meeting of Board of Directors or of a committee of Board, the minutes shall contain name of the directors present and also name of dissenting director or a director who has not concurred the resolution.

Thus, contention of director is correct and his note of dissent must be recorded in minutes of the board meeting.

**Que. No. 67] Can the Chairman direct exclusion of any matter from the minutes? Some of the shareholders insist on inclusion of certain matters which are regarded as defamatory of a Director of the company. The Chairman declines to do so. State how the matter can be resolved.**

**Ans.:** As per Section 118, the chairman shall exercise his absolute discretion in respect of inclusion or non-inclusion of the matters which is regarded as defamatory of any person, irrelevant or detrimental to company's interest in the minutes.

**Que. No. 67A] Minutes of the company can be maintained in loose leaf form.**  
CS (Executive) – Dec 2014 (5 Marks)

**Ans.:** Minutes are required to be recorded in minute book. A distinct minute book shall be maintained for each type of meeting.

The Tribunal may not object if the minutes are maintained in the loose leaf form provided all other procedural requirements are complied with and all possible safeguards against manipulation or interpolation of the minutes are ensured. The loose leaves can be got bound at reasonable interval say, 6 months. Entering the minutes in the bound minute book by a chemical process which does not amount to attachment to any book by pasting or otherwise is permissible; provided the original signatures of the Chairman are given on each page.

**Que. No. 68] Write short note on: Inspection of minute book of general meeting**

**Ans.:** **Inspection of minute-books of general meeting [Section 119]:** The minute's book of general meetings shall be kept at the registered office and shall be open for inspection to members during business hours without any charge subject to such restrictions as the company may impose.

A member shall be entitled for a copy of any minutes subject to payment of fees as may be specified in the AOA of the company, but not exceeding a sum of ₹ 10 for each page or part of any page. The copy should be made available to him within 7 days of his making request.

A member who has made a request for provision of soft copy in respect of minutes of any previous general meetings held during a period of immediately preceding 3 financial years shall be entitled to be furnished, with the same free of cost.

**Remedy for refusal to inspection or give copies of minute book:** Where the company refuses inspection or fails to furnish a copy of minutes within specified time, the Tribunal is empowered to direct immediate inspection or sending a copy of minutes in the matter and the company and every officer of the company shall be punishable with fine.

**Que. No. 69] Write a short note on: Maintenance and inspection of document in electronic form**

**Ans.:** **Maintenance and inspection of documents in electronic form [Section 120]:** The documents, records, registers, minutes may be kept and inspected in electronic form.

According to Rule 27, every listed company or a company having not less than 1,000 share holders, debenture holders and other security holders, shall maintain its records, as required to be maintained under the Act or rules made thereunder, in electronic form.

The records in electronic form shall be maintained in such manner as the Board of directors of the company may think fit, provided that-

- ◆ The records are maintained in the same formats and in accordance with all other requirements as provided in the Act or the rules made thereunder.
- ◆ The information as required under the provisions of the Act or the rules made thereunder should be adequately recorded for future reference.
- ◆ The records must be capable of being readable, retrievable and reproducible in printed form;
- ◆ The records are capable of being dated and signed digitally wherever it is required under the provisions of the Act or the rules made thereunder.
- ◆ The records, once dated and signed digitally, shall not be capable of being edited or altered;
- ◆ The records shall be capable of being updated, according to the provisions of the Act or the rules made thereunder, and the date of updation shall be capable of being recorded on every updation.

It may be noted that the term "records" means any register, index, agreement, memorandum, minutes or any other document required by the Act or the rules made thereunder to be kept by a company.

**Security of records maintained in electronic form:** The Managing Director, Company Secretary or any other director or officer of the company as the Board may decide shall be responsible for the maintenance and security of electronic records.

**Inspection and copies of records maintained in electronic form:** Where a company maintains its records in electronic form, any duty imposed by the Act or rules made thereunder to make those records available for inspection or to provide copies of the whole or a part of those records, shall be construed as a duty to make the records available for inspection in electronic form or to provide copies of those records containing a clear reproduction of the whole or part thereof, as the case may be.

**Que. No. 70] Write a short note on: Report on annual general meeting**

**Ans.: Report on AGM [Section 121]:** Every listed public company required to prepare a report on each AGM including the confirmation to the effect that the meeting was convened, held and conducted as per the provisions of the Act and the rules made thereunder. A copy of the report is to be filed with the Registrar in **Form No. MGT. 15** within **30 days** of the conclusion of AGM along with the prescribed fee.

The report shall be prepared in the following manner **[Rule 31]**:

- (a) A report under section 121 shall be prepared in addition to the minutes of the general meeting.
- (b) The report shall be signed and dated by the Chairman of the meeting or in case of his inability to sign, by any two directors of the company, one of whom shall be the managing director, if there is one.
- (c) Such report shall contain the details in respect of the following:
  - The day, date, hour and venue of the annual general meeting.
  - Confirmation with respect to appointment of Chairman of the meeting.
  - Number of members attending the meeting.
  - Confirmation of quorum.
  - Confirmation with respect to compliance of the Act and the Rules, secretarial standards made thereunder with respect to calling, convening and conducting the meeting.
  - Business transacted at the meeting and result thereof.
  - Particulars with respect to any adjournment, postponement of meeting, change in venue.
  - Any other points relevant for inclusion in the Report.
- (d) Such report shall contain fair and correct summary of the proceedings of the meeting. If the company fails to file the report on annual general meeting before the expiry of the period specified-
  - The company shall be punishable with fine which shall not be less than ₹ 1 lakh but which may extend to ₹ 5 lakhs and
  - Every officer of the company who is in default shall be punishable with fine which shall not be less than ₹ 20,000 but which may extend to ₹ 1 lakh.

**Que. No. 71] DEF Ltd., a company listed at Bombay Stock Exchange, failed to file its report on the AGM for the financial year ended 31st March, 2013 with the ROC, Mumbai. The company further abstained from filing the said report for another 2 years, viz. financial years ended 31st March, 2014 and 2015 respectively.**

**Examining the provisions of the Companies Act, 2013, state whether the default committed by the company amounts to an offence. If so, to what extent it is possible to get the offences compounded.**

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

**Ans.: As per Section 121,** if the company fails to file the report on annual general meeting before the expiry of the period specified-

- The company shall be punishable with fine which shall not be less than ₹ 1 lakh but which may extend to ₹ 5 lakhs and

- Every officer of the company who is in default shall be punishable with fine which shall not be less than ₹ 20,000 but which may extend to ₹ 1 lakh.

**Section 441** deals with 'compounding of offences'. As per this section only offence punishable with fine can be compounded.

If an offence is compounded in favour of a person and if that person commits the same offence once again within a span of 3 years from the previous compounding, then the subsequent offence shall not be eligible for compounding.

Thus, if offence of not filing of report on annual general meeting is compounded for the year ended 31<sup>st</sup> March, 2013, same offence for the year ending 31<sup>st</sup> March, 2014 & 2015 cannot be compounded.

**CHAIRMAN****Que. No. 72] Write a short note on: Chairman**

**Explain the provision relating to appointment of chairman of general meeting.**

**CS (Inter) - June 2001 (4 Marks)**

**Ans.: The Chairman** plays a crucial role in a company meeting and is usually appointed by the articles. Following are some of the important provisions relating to 'Chairman':

- (1) Unless the articles of the company otherwise provide, the members personally present at the meeting shall elect one of themselves to be the Chairman thereof on a show of hands. **[Section 104(1)]**
- (2) If a poll is demanded on the election of the Chairman, it shall be taken forthwith in accordance with the provisions of this Act and the Chairman elected on a show of hands shall continue to be the Chairman of the meeting until some other person is elected as Chairman as a result of the poll, and such other person shall be the Chairman for the rest of the meeting. **[Section 104(2)]**
- (3) A declaration by the Chairman of the meeting of the passing of a resolution or otherwise by show of hands and an entry to that effect in the books containing the minutes of the meeting of the company shall be conclusive evidence of the fact of passing of such resolution or otherwise. **[Section 107(2)]**
- (4) Before or on the declaration of the result of the voting on any resolution on show of hands, a poll may be ordered to be taken by the Chairman of the meeting on his own motion, and shall be ordered to be taken by him on a demand made in that behalf by the following persons:
  - *In the case of a company having a share capital:* By the members present in person or by proxy, and having not less than 1/10<sup>th</sup> of the total voting power or holding shares on which an aggregate sum of not less than ₹ 5,00,000 or such higher amount as may be prescribed, has been paid-up and
  - *In the case of any other company:* By any member or members present in person or by proxy, where allowed, and having not less than 1/10<sup>th</sup> of the total voting power.
- (5) A poll demanded for adjournment of the meeting or appointment of Chairman of the meeting shall be taken forthwith. **[Section 109(3)]**
- (6) A poll demanded on any question other than adjournment of the meeting or appointment of Chairman shall be taken at such time, not being later than 48 hours from the time when the demand was made, as the Chairman of the meeting may direct. **[Section 109(4)]**

- (7) The Chairman of the meeting shall have power to regulate the manner in which the poll shall be taken. [Section 109(5)]
- (8) Where a poll is to be taken, the Chairman of the meeting shall appoint such number of persons, to scrutinize the poll process and votes given on the poll and to report thereon to him in the manner as may be prescribed. [Section 109(5)]
- (9) In case of ordinary resolution, chairman has casting vote. [Section 114(1)]
- (10) 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 proceedings or
  - (c) Is detrimental to the interests of the company. [Section 118(5)]
- (11) The Chairman shall exercise absolute discretion in regard to the inclusion or non-inclusion of any matter in the minutes on the grounds specified Section 118(5). [Section 118(6)]
- (12) Questions arising at any meeting of a committee shall be determined by a majority of votes of the members present, and in case of an equality of votes, the chairman shall have a second or casting vote. [Regulation 25 of the Table F]
- (13) The chairperson, if any, of the Board shall preside as Chairperson at every general meeting of the company. [Regulation 45 of the Table F]
- (14) If there is no Chairperson, or if he is not present within 15 minutes after the time appointed for holding the meeting, or is unwilling to act as chairperson of the meeting, the directors present shall elect one of their members to be Chairperson of the meeting. [Regulation 46 of the Table F]
- (15) If at any meeting no director is willing to act as Chairperson or if no director is present within 15 minutes after the time appointed for holding the meeting, the members present shall choose one of their members to be Chairperson of the meeting. [Regulation 47 of the Table F]
- (16) The Chairperson may, with the consent of any meeting at which a quorum is present, and shall, if so directed by the meeting, adjourn the meeting from time to time and from place to place. [Regulation 49 of the Table F]
- (17) In case of an equality of votes at the Board meeting, the Chairperson of the Board, shall have a second or casting vote. [Regulation 68 of the Table F]
- (18) The Board may elect a Chairperson of its meetings and determine the period for which he is to hold office. If no such Chairperson is elected, or if at any meeting the Chairperson is not present within 5 minutes after the time appointed for holding the meeting, the directors present may choose one of their number to be Chairperson of the meeting. [Regulation 70 of the Table F]
- (19) A committee may elect a Chairperson of its meetings. If no such Chairperson is elected, or if at any meeting the Chairperson is not present within 5 minutes after the time appointed for holding the meeting, the members present may choose one of their members to be Chairperson of the meeting. [Regulation 72 of the Table F]

**Que. No. 73]** The chairman at a Board meeting counts 6 votes in favour and 7 votes against the resolution. Can the chairman cast his own vote, which he had not exercised earlier, in favour of the resolution and also the casting vote which the articles of association authorize, and declare the resolution as passed?

CS (Inter) - Dec 2007 (4 Marks)

**Ans.:** As per **Regulation 68 of the Table F**, questions arising at any meeting of the Board shall be decided by a majority of votes. In case of an equality of votes, the Chairperson of the Board, if any, shall have a second or casting vote.

A casting vote is a second vote exercised by a chairman of a meeting in addition to his own vote as a member. Casting vote can be given by chairman in case of equality of votes. In given case there is no equality of vote hence, there is no case for exercising casting vote. If Chairman does not vote at the time voting, then subsequently he cannot give his vote after the result of voting.

**Some important points relating to casting vote:**

- ◆ Casting vote is additional vote in case of equality of vote. Chairperson has full discretion in using his casting vote. He can vote in different way than in which he exercised first vote. He may even decide not to use his casting vote.
- ◆ In case of ordinary resolution the chairperson has a casting vote. [Section 114(1)]
- ◆ In case of general meeting, chairperson has casting vote even if he is not member of the company.
- ◆ Casting vote can be exercised by the chairperson at the show of hands or by electronic mode or on a poll.

**Que. No. 74]** Amol, a non-member of Shristhi Ltd., has been appointed as a director of the company. Later on, he has become the chairman of the company. In an annual general meeting of Shristhi Ltd., Amol presided over the meeting. Zahir, a member of the company, objected to his chairmanship on the ground that Amol is not a member of the company. Discuss the validity of the objection. CS (Inter) - Dec 2007 (4 Marks)

**Ans.:** As per **Section 104**, unless the articles of the company otherwise provide, the members personally present at the meeting shall elect one of themselves to be the Chairman thereof on a show of hands.

As per **Regulation 45 of the Table F**, The chairperson, if any, of the Board shall preside as Chairperson at every general meeting of the company.

Considering both above provision answer to given case can be given as follows:

- If Shristhi Ltd. has adopted Table F or its articles contains similar provision like that of Table F, then Amol can be appointed as chairperson if he is also chairperson of the Board.
- If Shristhi Ltd. has not adopted Table F or its articles do not contains similar provision like that of Table F, then Amol, being non-member cannot be appointed as chairperson as provided in Section 104.

# CHAPTER 15

## INSTITUTION OF DIRECTORS

### This Chapter Covers:

- Definition of Director
- Legal position of Directors
- Qualifications & disqualification of director
- Number of Directors
- Appointment of Directors
- Directors Identification Number
- Removal of Directors
- Retirement of Directors
- Resignation of Directors
- Penalty for Wrongful Withholding of Company's Property
- Vacation of office of Directors
- Remuneration of Directors
- Board of directors and its Committees
- Office or place of profit

Note: In this chapter, unless otherwise stated, Rule means the Companies (Appointment & Qualification of Directors) Rule, 2014.

### MEANING & LEGAL POSITION OF DIRECTOR

Que. No. 1] Define the term 'Director'. State the legal position of directors.

Examine the position of directors as its trustee, agent and employee. According to you, what is the true relationship between the company and directors.

CS (Inter) – June 2001 (10 Marks)

Directors ought not to misuse the trust entrusted on them.

CS (Executive) – Dec 2010 (5 Marks)

Ans.: Director [Section 2 (36)]: Director means a director appointed to the Board of a company.

The directors of a company are its eyes, ears, brain, hands, nerves and other essential limbs, upon whose efficient functioning depend the success of the company. The directors formulate policies and establish organizational set up for implementing those policies and to achieve the objectives as contained in the memorandum.

The position of director in relation to company is given below:

- (1) **Director as employee:** Directors are not the employees of the company. However, in addition to his directorship, he may hold a salaried employment in the company and in such case he will enjoy all the rights available to an employee of the company.
- (2) **Director as agent:** The position of company directors is to some extent is that of agent and apart from the provisions of the various corporate laws which bind them, they have certain rights and obligations which make them liable for defaults for violations on behalf of company.
- (3) **Director as trustee:** To some extent, directors are also trustees for the properties of the company. Directors are accountable for their proper use and are required to refund or restore the same if improperly used.

Directors stand in fiduciary position towards the company in regard to the powers conferred on them by the Companies Act, 2013 and by the articles of the company and also with regard to the funds of the company, which are under their control.

Que. No. 1A] Directors ought not to misuse the trust entrusted on them. Comment.

CS (Executive) – Dec 2010 (5 Marks)

Ans.: Directors stand in fiduciary position towards the company in regard to the powers conferred on them by the Companies Act, 2013 and by the articles of the company and also with regard to the funds of the company, which are under their control.

**Director as trustee:** To some extent, directors are also trustees for the properties of the company. Directors are accountable for their proper use and are required to refund or restore the same if improperly used.

A trustee is a person who is the owner of the property, deals with it as principal, as owner and a master, subject only to an equitable obligation to account to some person to whom he stands in relation of trustee.

Directors are always considered and treated as trustees of money which comes to their hands or which is actually under their control; and ever since joint stock companies were invented directors have been held liable to make good, moneys which they have misapplied upon the same footing as if they were trustees.

As regards the position of directors as trustees, the directors are persons selected to manage the affairs of the company for the benefit of the shareholders. It is an office of trust which if they undertake, it is their duty to perform fully and entirely. A resolution by the shareholders that shares or any other property of the company shall be at the disposal of the director, binds them and they must deal with it within the scope of the functions delegated to them and in the manner that suited to benefit the shareholders.

To sum up, directors are trustees of the moneys of the company, but not of the debts due to the company. They are trustees also in respect of powers of the company that are conferred upon them, e.g. powers of: (a) issuing and allotting shares, (b) approving transfers of shares, (c) making calls on shares and (d) forfeiting shares for non-payment of calls. They must exercise these powers solely for the benefit of the company.

Thus, directors ought not to misuse the trust entrusted on them.

**Que. No. 2] Write a note on: Types of Directors**

Write a short note on: Independent Directors

CS (Executive) – June 2010 (4 Marks), Dec 2011 (4 Marks)

Distinguish between: Executive Director &amp; Independent Director

CS (Inter) – June 2005 (4 Marks)

Ans.: Various types of directors are follows:

- (1) **Executive Director:** Executive director is a common post in many organizations, but the Companies Act, 2013 does not define the phrase.

Directors who are in whole time employment or those who are entrusted with day to day operations of a company are termed as 'executive director'. He is a person responsible for the administration of a business. Executive directors perform operational and strategic business functions such as managing people, looking after assets, entering into contracts. Executive directors are usually employed by the company and paid a salary, so are protected by employment law. Managing Director, Whole Time Directors are executive directors.

- (2) **Managing Director [Section 2(54)]:** 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.

- (3) **Whole Time Director [Section 2(94)]:** Whole time director includes a director in the whole-time employment of the company. Thus, a whole-time director means a director who devotes all his time and attention to the management of the company. Where a director is appointed to act as Technical Director, Legal Director, Work Director and Sales Director on full time basis he is a whole-time director of the company. A whole-time director is also a managerial person.

- (4) **Non-executive Director:** Non-executive directors do not get involved in the day-to-day running of the business. Non-executive directors participate and execute work through board meetings.

- (5) **Nominee Directors:** Nominee directors are appointed by financial institutions or banks, which extend term loans or working capital assistance or any other type of financial assistance to companies. Nominee directors are a powerful tool of project supervision, monitoring and control, particularly, following the issue of Government guidelines enjoining financial institutions to nominate directors on the boards of companies enjoying substantial assistance.

- (6) **Independent Directors [Section 149 (5)]:** Discussed separately.

- (7) **Interested Director [Section 2 (49)]:** Interested director means a director who is in any way, whether by himself or through any of his relatives or firm, body corporate or other association of individuals in which he or any of his relatives is a partner, director or a member, interested in a contract or arrangement, or proposed contract or arrangement, entered into or to be entered into by or on behalf of a company.

Interested director's presence cannot be counted for the purpose of forming a quorum at a meeting of the Board, at the time of the discussion or vote on any matter.

**Que. No. 3] Can a company or body corporate be appointed as director of the company?**

Ans.: As per Section 149 (1), only an individual can be a director of a company.

Only an individual should be a director, as the office of a director is to some extent an office of trust and there should be somebody available on whom responsibility could be fixed. Fixing such responsibility might be difficult if the director is a corporation or an association or firm. [Oriental Metal Pressing Works Pvt. Ltd. vs. Bhaskar Kashinath Thakore (AIR 1961 SC 573)]

**QUALIFICATION & DISQUALIFICATION FOR DIRECTOR****Que. No. 4] What is the qualification for a person to be appointed as director of any company?**

Ans.: The Companies Act, 2013 does not lay down any qualifications for a person to be appointed as a director of a company.

**Que. No. 5] Enumerate the disqualifications of a director mentioned in Section 164.**

CS (Inter) – June 2002 (10 Marks), June 2006 (6 Marks)

CS (Executive) – Dec 2010 (8 Marks)

Ans.: **Disqualifications for appointment of director [Section 164 (1)]:** A person shall not be eligible for appointment as a director of a company, if -

- (i) He is of unsound mind and stands so declared by a competent Court.
- (ii) He is an undischarged insolvent.
- (iii) He has applied to be adjudicated as an insolvent and his application is pending.
- (iv) 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 6 months and a period of 5 years has not elapsed from the date of expiry of the sentence. If a person has been convicted of any offence and sentenced to imprisonment for a period of 7 years or more, he shall not be eligible to be appointed as a director in any company.
- (v) An order disqualifying him for appointment as a director has been passed by a Court or Tribunal and the order is in force.
- (vi) He has not paid any calls in respect of any shares of the company held by him, whether alone or jointly with others, and 6 months have elapsed from the last day fixed for the payment of the call.
- (vii) He has been convicted of the offence dealing with related party transactions u/s 188 at any time during the last preceding 5 years.
- (viii) He has not complied Section 152 (3) (i.e. he not allotted DIN)

**Disqualification by reason of default made by a company [Section 164 (2)]:** A person who is or has been a director of a company shall not be eligible to be re-appointed as a director of that company or appointed in other company for a period of 5 years which-

- (a) has not filed financial statements or annual returns for any continuous period of 3 financial years; or
- (b) has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for 1 year or more.

However, where a person is appointed as a director of a company in default of clause (a) or (b), he shall not incur the disqualification for a period of six months from the date of his appointment.

**Additional grounds for disqualification by private company [Section 164 (3)]:** A private company may by its articles provide additional grounds for disqualifications for appointment of a director in addition to those specified above.

**Disqualification continue to apply even if appeal is filed [section 164(3)]:** The disqualification referred to in clauses (d), (e) and (g) of section 164(1) shall continue to apply even if the appeal or petition has been filed against the order of conviction or disqualification.

**Provisions contained in Rule 14:**

- (1) Every director shall inform to the company concerned about his disqualification under Section 164 (2) in **Form DIR-8** before he is appointed or re-appointed.
- (2) 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, the company shall immediately file **Form DIR-9**, to the ROC furnishing therein the names and addresses of all the directors of the company during the relevant financial years.
- (3) Upon receipt of the Form DIR-9, the ROC shall immediately register the document and place it in the document file for public inspection.
- (4) Any application for removal of disqualification of directors shall be made in **Form DIR-10**.

**Vacation of office of director due to disqualification [Section 167 (1) (a)]:** The office of director become vacant, where he incurs any of the disqualification specified in Section 164.

**Que. No. 6] State with reference to the relevant provisions of the Companies Act, 2013 whether the following persons can be appointed as a director of a public company:**

- (i) Mr. A, who has huge personal liabilities far in excess of his assets and properties, has applied to the Court for adjudicating him as an insolvent and such application is pending.
- (ii) Mr. B, who was caught red-handed in a shop lifting case 2 years ago, was convicted by a Court and sentenced to imprisonment for a period of 8 weeks.
- (iii) Mr. C, former bank executive, was convicted by a Court 8 years ago for embezzlement of funds and sentenced to imprisonment for a period of 1 year.
- (iv) Mr. D is a director of DLT Ltd., which has not filed its annual returns pertaining to the annual general meetings held in the calendar years 2014, 2015 and 2016.

CA (Final) - May 2004 (8 Marks)

**Ans.:** The given problem is discussed as under:

- (i) As per **Section 164 (1) (iii)**, if any person has applied to be adjudicated as an insolvent and his application is pending, he is disqualified to be appointed as director. Since, Mr. A has himself applied to the Court for adjudicating himself as an insolvent, he is disqualified to be appointed as director, even if his application is pending.
- (ii) As per **Section 164 (1) (iv)**, if any person has been convicted by a Court of any offence, whether involving moral turpitude or otherwise, and sentenced to imprisonment for 6 months or more, he is disqualified to be appointed as director. In the present case Mr. B

was caught red-handed in a shop lifting case and was sentenced to imprisonment for a period of 8 weeks i.e. less than 6 months, he is not disqualified and can be appointed as director.

- (iii) As per **Section 164(1)(iv)**, if any person has been convicted by a Court of any offence, whether involving moral turpitude or otherwise, and sentenced to imprisonment for 6 months or more, he is disqualified to be appointed as director for next 5 years from the date of expiry of the sentence. Since, more than 5 years has been elapsed from the date of expiry of the sentence, Mr. C can be appointed as a director.
- (iv) As per **Section 164(2)**, a person who is or has been a director of a company shall not be eligible to be re-appointed as a director of that company or appointed in other company for a period of 5 years which has not filed financial statements or annual returns for any continuous period of 3 financial years. Since, Mr. D has not filed annual returns for continuous period of 3 financial years; he is disqualified to be appointed as director for next 5 years.

**Que. No. 7] Nalin is a director of ABC Ltd. which has failed to repay matured deposit from 1st April, 2014 onwards and the default continues. But ABC Ltd. is regular in filing annual accounts and annual returns. Nalin is also director of PQR Ltd. and XYZ Ltd.**

**Answer the following question with reference to the relevant provisions of the Companies Act, 2013:**

- (i) Whether Nalin is disqualified and if so, whether he is required to vacate his office of director in PQR Ltd. and XYZ Ltd.?
- (ii) Is it possible for the board of director of DEF Ltd. to appoint Nalin as an additional director at the board meeting to be held on 15th May 2015? Would your answer be different if Nalin ceased to be director of ABC Ltd. by resignation on 1st March 2015?

CA (Final) - May 2002 (6 Marks)

**Ans.:** As per **Section 164(2)**, a person who is or has been a director of a company shall not be eligible to be re-appointed as a director of that company or appointed in other company for a period of 5 years which 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 1 year or more.

In the given case ABC Ltd. has failed to repay its deposits on the due date i.e. 1.4.2014 and such default continues for more than 1 year i.e. beyond 31.3.2015. Therefore -

- Nalin shall not be eligible to be appointed as director in any other company after 31.3.2015 for a period of 5 years. Thus, DEF Ltd. cannot appoint Nalin as an additional director on 15.5.2015.
- As per **Section 167(1)(a)**, due disqualification under Section 164, Nalin's office of director in ABC Ltd, PQR Ltd. & XYZ Ltd. shall become vacant on the expiry of 31.3.2015.

If Nalin had ceased to be director of ABC Ltd. by resignation on 1.3.2015, he would have escaped the disqualification specified in Section 164 (2) and thus, DEF Ltd. could appoint Nalin as an additional director on 15.5.2015.

Que. No. 8] Mr. Ramanathan is a Director of Fraudulent Ltd., Honest Ltd. and Regular Ltd. For the financial year ended on 31.3.2014 two irregularities were discovered against Fraudulent Ltd. For the financial year ended on 31.3.2014 Fraudulent Ltd. did not file its annual accounts for the year ended 31.3.2014 and failed to pay interest on loans taken from a financial institution for the last 3 years.

On 1.6.2015 Mr. Ramanathan is proposed to be appointed as additional director of Goodwill Ltd., which company has sought a declaration from Mr. Ramanathan and he also submitted the declaration stating that the disqualification specified in Section 164 of the Companies Act, 2013 is not attracted in his case. Decide under the provisions of the Companies Act, 2013:

- Whether the declaration submitted by Mr. Ramanathan to Goodwill Ltd. is in order?
- Whether Mr. Ramanathan can continue as a Director in Honest Ltd. and Regular Ltd.?

CA (Final) – June 2009 (7 Marks)

Ans.: The given problem is discussed as under:

- As per Section 164(2), a person who is or has been a director of a company shall not be eligible to be re-appointed as a director of that company or appointed in other company for a period of 5 years which has not filed financial statements or annual returns for any continuous period of 3 financial years. As per the facts given in case, failure to file annual accounts has not been for 3 continuous years and therefore Mr. Ramanathan is not disqualified for his directorship and can be appointed as director in Goodwill Ltd.

The declaration submitted by Mr. Ramanathan to Goodwill Ltd. is in order and valid.

Failure to pay interest on loans taken from a financial institution is not covered in Section 164, since defaults specified in 164 covers default of repayment of 'public deposit', 'interest on public deposit' and 'non-filing of annual accounts or annual returns' and not non-payment of 'loan' or 'interest on loan' obtained from financial institution.

- Since Mr. Ramanathan is not disqualified under Section 164, he is not required to vacate his office of directorship in any company as per Section 167 (1)(a).

Que. No. 9] A private company may by its articles provide additional disqualification in respect of directorship of the company. Comment. CS (Inter) – June 2004 (4 Marks)

Ans.: A private company may by its articles provide additional grounds for disqualifications for appointment of a director in addition to those specified in Section 164 (1) & (2).

However, public companies cannot provide additional grounds for disqualification for appointment of a director other than those specified in Section 164 (1) & (2).

Que. No. 9A] Is it mandatory for all directors to obtain DIN? Discuss.

CS (Executive) – Dec 2008 (4 Marks)

Ans.: Director Identification Number (DIN) to be obtained by all existing directors and every other person, intending to become a director.

MCA-21 has introduced the concept of Director Identification Number (DIN) which is mandatory, unique and life time identification for all existing and prospective directors. In the scenario of e-filing, DIN is a pre-requisite for filing of certain company related documents. Any individual who is a director or intends to be a director of a company should apply for DIN first. DIN has to be obtained by the directors of the company before commencing the procedure for incorporation of a company.

Que. No. 9B] A foreign national was intended to be appointed to the Board of 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 correct?

CS (Executive) – Dec 2013 (4 Marks)

Ans.: Director Identification Number (DIN) is a unique Identification Number allotted to an individual who is an existing director of a company or intends to be appointed as director of a company.

All existing and any person intending to be appointed as a director are required to obtain the Director Identification Number (DIN). DIN 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 branch offices in India.*

Thus, if foreign national is to be appointed to the Board of MNC in India, DIN will be necessary.

### VACATION OF OFFICE OF DIRECTORS

Que. No. 10] When is the office of a director deemed to be vacated?

CS (Inter) – Dec 1999 (4 Marks)

Ans.: Vacation of office of director [Section 167]: The office of a director shall become vacant in case-

- He incurs any of the disqualifications specified in Section 164. However, where he incurs disqualification under section 164(2), the office of the director shall become vacant in all the companies, other than the company which is in default under Section 164(2).
- 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.
- He acts in contravention of the provisions of Section 184 relating to entering into contracts or arrangements in which he is directly or indirectly interested.
- He fails to disclose his interest in any contract or arrangement in which he is directly or indirectly interested, in contravention of the provisions of Section 184.
- He becomes disqualified by an order of a Court or the Tribunal.
- He is convicted by a Court of any offence, whether involving moral turpitude or otherwise and sentenced in respect thereof to imprisonment for not less than 6 months.

However, the office shall not be vacated by the director in case of orders referred to in clauses (e) and (f) –

- For 30 days from the date of conviction or order of disqualification
  - Where an appeal or petition is preferred within 30 days until expiry of 7 days from the date on which such appeal or petition is disposed of or
  - Where any further appeal or petition is preferred against order or sentence within 7 days, until such further appeal or petition is disposed of.
- He is removed in pursuance of the provisions of the Act.
  - He, having been appointed a director by virtue of his holding any office or other employment in the holding, subsidiary or associate company, ceases to hold such office or other employment in that company.

Penalty [Section 167(2)]: If a person, functions as a director even when he knows that the office of director held by him has become vacant on account of any of the disqualifications specified Section 167(1), he shall be punishable:

- with imprisonment for a term which may extend to 1 year or
- with fine which shall not be less than ₹ 1 lakh but which may extend to ₹ 5 lakh or
- with both.

**Consequences of vacation of office of all the directors [Section 167(3)]:** Where all the directors of a company vacate their offices under any of the disqualifications specified in Section 167(1), the promoter or, in his absence, the Central Government shall appoint the required number of directors who shall hold office till the directors are appointed by the company in the general meeting.

**Judicial Views:**

- It was held that when the law provides that a director shall vacate office on the happening of some event the director automatically vacates his office on the happening of that event, the board has no power to waive that event. [*Entel Chand Kad vs. Hindsons (Patiala) Ltd. (1986) 3 Comp L J 234 (MP)*]
- A private company which is not a subsidiary of a public company may by its articles provide additional grounds for vacation of office of director. A public company cannot, however, add to the disqualifications mentioned in Section 167. [*Cricket Club of India Ltd. vs. Madhau L. Apte. (1975) 45 Comp Cases 574*]

**Que. No. 11] Iqbal Sons Ltd. issued shares of the nominal value of ₹ 10 per share, out of which ₹ 5 was payable on application and balance ₹ 5 was payable on call. The call money was invited by the Board of Directors but some shareholders, including a non-executive director, failed to pay the same within the prescribed period. Explain the status of director who defaulted in paying call money.**

CA (Final) - May 2005 (3 Marks)

**Ans.:** As per Section 164 (1)(vi), person shall not be eligible for appointment as a director of a company, if he has not paid any calls in respect of any shares of the company held by him, whether alone or jointly with others, and 6 months have elapsed from the last day fixed for the payment of the call.

As per Section 167 (1)(a), the office of a director shall become vacant in case he incurs any of the disqualifications specified in Section 164.

Thus, due to disqualification under Section 164, non-executive director's office shall become vacant on the expiry of the last day fixed for the payment of the call. Further, he shall also be disqualified to be appointed as director in Iqbal Sons Ltd.

**Que. No. 12] Azad, the managing director of a company, fails to attend three board meetings in a year. Should he vacate his office?** CS (Inter) - Dec 2001 (2 Marks)

**Ans.:** As per Section 167(1)(b), the office of a director shall become vacant, 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. Azad, need not vacate office as did not absent from all the meetings of the Board of Directors held during a period of 12 months.

**Que. No. 12A] Five Board meetings were held in Asha Ltd. during the period from January to June in the calendar year 2017. 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.**

CS (Executive) - Dec 2016 (4 Marks)

**Ans.:** As per Section 161, the additional director shall hold office up to the date of the next AGM or the last date on which the AGM should have been held, whichever is earlier.

As per Section 167, the office of a director shall become vacant 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.

Thus, office of Rajeev, Director of Asha Ltd. will be vacated if he remains absent for all board meeting in calendar year 2017. If he attends any board meeting during the period July 2017 to Dec 2017 his office will not be vacated.

However, he is not disqualified to become director as per section 164

**NUMBER OF DIRECTORS & INCREASE IN NUMBER OF DIRECTORS**

**Que. No. 13] State the provision relating to 'number of directors' under the Companies Act, 2013.**

Write a short note on : Resident Director CS (Executive) - June 2016 (4 Marks)

**Ans.:** Company to have Board of Directors [Section 149(1) to (5)]: Every company shall have a Board of Directors consisting of individuals as directors and shall have-

- Minimum 3 directors in the case of a public company, 2 directors in the case of a private company, and 1 director in the case of OPC and
- Maximum of 15 directors

A company may appoint more than 15 directors after passing a special resolution. Prescribed classes of companies shall have at least 1 woman director.

Every company shall have at least 1 director who has stayed in India for a total period of not less than 182 days during the financial year. However, in case of newly incorporated company proportionate stay of 182 days is required.

Every listed public company shall have at least 1/3<sup>rd</sup> of the total number of directors as independent directors and the Central Government may prescribe the minimum number of independent directors in case of any class or classes of public companies. Any fraction contained while computing 1/3<sup>rd</sup> shall be rounded off as one.

**Que. No. 14] LKG Ltd. was incorporated on 5th May, 2014 under the Companies Act, 2013. Mr. Ramanujam was appointed as the first resident director of the company in the board meeting held on 30th September, 2014. Examine the validity owing appointments with reference to the provisions of the Companies Act, 2013.**

CA (Final) - May 2015 (3 Marks)

**Ans.:** As per Section 149(3), every company shall have at least one director who has stayed in India for a total period of not less than 182 days during the financial year.

The MCA vide General Circular No. 25/2014 has given a clarification on applicability of requirement for resident director in the current calendar/financial year. Regarding newly incorporated companies, it is clarified that companies incorporated between 1<sup>st</sup> April, 2014 to 30<sup>th</sup> September, 2014 should have a resident director either at the incorporation stage itself or within 6 months of their incorporation.

Since, LKG Ltd., was incorporated on 5<sup>th</sup> May 2014, it should have a resident director either at the incorporation stage itself or within 6 months of their incorporation. Thus accordingly, the appointment of Mr. Ramanujam as a first resident director of the company in the board meeting held on 30<sup>th</sup> September, 2014 is valid.

**Que. No. 14A] Three Singapore nationals who have been to India have decided to be shareholders holding 100% equity shares and the only directors of a private company in India in the year 2015 which is not subsidiary of a public company. Comment.**

CS (Executive) - June 2016 (4 Marks)

Ans.: As per **Section 149**, every company shall have a Board of Directors consisting of individuals as directors and shall have minimum 3 directors in the case of a public company, 2 directors in the case of a private company, and 1 director in the case of OPC.

Every company shall have at least 1 director who has stayed in India for a total period of not less than 182 days in the previous calendar year.

As per facts given in case all the three Singapore national who are also shareholder of the company are directors also and all the three never been India. Thus, they should appoint at least one director who should be present in India for at least 182 days in the year.

**Que. No. 15] Write a short note on: Woman directors**

Ans.: **Woman director on the Board [Rule 3]:** The following class of companies shall appoint at least 1 woman director-

- (i) Every listed company
- (ii) Every other public company having -
  - (a) Paid-up share capital of ₹ 100 Crore or more or
  - (b) Turnover of ₹ 300 Crore or more.

It is clarified that the paid up share capital or turnover, as on the last date of latest audited financial statements shall be taken into account.

**Vacancy of a woman director:** Any intermittent vacancy of a woman director shall be filled-up by the Board at the earliest but not later than immediate next Board meeting or 3 months from the date of such vacancy whichever is later.

**Que. No. 16] The Board of Directors of MNP Ltd. appointed Neha as a woman 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 Sheela on 30th June, 2014. Will your answer differ if the board meeting of the company was held on 8th November, 2014?**  
CA (Final) - May 2015 (4 Marks)

Ans.: As per **Rule 3 of the Companies (Appointment & Qualification of Directors) Rules, 2014** any intermittent vacancy of a woman director shall be filled up by the Board at the earliest but not later than immediate next Board meeting or three months from the date of such vacancy, whichever is later.

As per the above provisions, the appointment of Neha is valid. The vacancy of a woman director of MNP Ltd. which arose on 30<sup>th</sup> June 2014, due to the resignation of Ms. Sheela, should be filled up latest by 29<sup>th</sup> September 2014 or the day of the next board meeting, whichever is later. Since, Neha was appointed in the next board meeting after the vacancy arose, i.e. on 10<sup>th</sup> September 2014, her appointment is valid.

The answer will remain the same, even if MNP Ltd. appoints Neha in the board meeting held on 8<sup>th</sup> November 2014, provided the said meeting is the first meeting of the Board after 30<sup>th</sup> June 2014 i.e. after the resignation of Sheela.

**Que. No. 16A] Divine Industries (Pvt.) Ltd. has a turnover of ₹ 350 Crore during the financial year 2016-2017. The bankers of the company have advised the company to compulsorily appoint a woman 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?**

CS (Executive) - Dec 2016 (4 Marks)

Ans.: As per **Rule 3 of the Companies (Appointment & Qualification of Directors) Rule, 2014**, the following class of companies shall appoint at least 1 woman director -

- (i) Every listed company
- (ii) Every other public company having -
  - (a) Paid-up share capital of ₹ 100 Crore or more or
  - (b) Turnover of ₹ 300 Crore or more.

It is clarified that the paid-up share capital or turnover, as on the last date of latest audited financial statements shall be taken into account.

Considering above provisions private limited companies are not required to appoint woman director irrespective of its turnover. Thus, advice given by bankers to Divine Industries (Pvt.) Ltd. is not as per law.

If Divine Industries is public company then it has to appoint woman director.

**Que. No. 17] Write a short note on: Number of independent directors**

Ans.: **Number of independent directors [Rule 4(1)]:** The following class or classes of companies shall have at least 2 directors as independent directors -

- (i) Public companies having paid up share capital of ₹ 10 Crore or more or
- (ii) Public companies having turnover of ₹ 100 Core or more or
- (iii) Public companies having outstanding loans, debentures and deposits, exceeding ₹ 50 Crores

However, if a company is required to appoint a higher number of independent directors due to composition of its audit committee, such higher number of independent directors shall be applicable to it.

Where a company ceases to fulfil any of the 3 conditions laid down Rule 4(1) for 3 consecutive years, it shall not be required to comply with these provisions until such time as it meets any of such conditions.

**Vacancy of an independent director:** Any intermittent vacancy of an independent director shall be filled-up by the Board at the earliest but not later than immediate next Board meeting or 3 months from the date of such vacancy, whichever is later.

**Explanation:** The paid up share capital or turnover or outstanding loans, debentures and deposits, as existing on the last date of latest audited financial statements shall be taken into account.

A company belonging to any class of companies for which a higher number of independent directors has been specified in the law for the time being in force shall comply with the requirements specified in such law.

Companies not required to appoint independent director [Rule 4(2)]: The Following classes of unlisted public company shall not be covered under Rule 4(1) -

- (a) Joint venture
- (b) Wholly owned subsidiary
- (c) Dormant company.

## INDEPENDENT DIRECTORS

**Que. No. 18] Write a short note on: Independent Directors**

CS (Executive) - June 2010 (4 Marks), Dec 2011 (4 Marks)

**Distinguish between: Executive Director & Independent Director**

CS (Inter) - June 2005 (4 Marks)

**Ans.: Independent Directors [Section 149(5)]:** An independent director in relation to a company, means a director other than a managing director or a whole time director or a nominee director-

- (a) who, in the opinion of the Board, is a person of integrity and possesses relevant expertise and experience;
- (b) who is or was not a promoter of the company or its holding, subsidiary or associate company or who is not related to promoters or directors in the company, its holding, subsidiary or associate company;
- (c) who has or had no pecuniary relationship, other than remuneration as such director or having transaction not exceeding 10% of his total income or such amount as may be prescribed with the company, its holding, subsidiary or associate company, or their promoters, or directors, during the 2 immediately preceding financial years or during the current financial year;
- (d) none of whose relatives -
  - (i) is holding any security of or interest in the company, its holding, subsidiary or associate company during the two immediately preceding financial years or during the current financial year. However, the relative may hold security or interest in the company of face value not exceeding ₹ 50 lakh or 2% of the paid-up capital of the company, its holding, subsidiary or associate company or such higher sum as may be prescribed;
  - (ii) is indebted to the company, its holding, subsidiary or associate company or their promoters, or directors, in excess of such amount as may be prescribed during the two immediately preceding financial years or during the current financial year;
  - (iii) has given a guarantee or provided any security in connection with the indebtedness of any third person to the company, its holding, subsidiary or associate company or their promoters, or directors of such holding company, for such amount as may be prescribed during the two immediately preceding financial years or during the current financial year; or
  - (iv) has any other pecuniary transaction or relationship with the company, or its subsidiary, or its holding or associate company amounting to 2% or more of its gross turnover or total income singly or in combination with the transactions referred to in clause (i), (ii) or (iii);
- (e) who, neither himself nor any of his relatives-
  - (i) holds or has held the position of a key managerial personnel or is or has been employee of the company or its holding, subsidiary or associate company in any of the three financial years immediately preceding the financial year in which he is proposed to be appointed; however, in case of a relative who is an employee, the restriction under this clause shall not apply for his employment during preceding three financial years.
  - (ii) is or has been an employee or proprietor or a partner, in any of the 3 financial years immediately preceding the financial year in which he is proposed to be appointed, of-
    - (A) a firm of auditors or company secretaries in practice or cost auditors of the company or its holding, subsidiary or associate company; or
    - (B) any legal or a consulting firm that has or had any transaction with the company, its holding, subsidiary or associate company amounting to 10% or more of the gross turnover of such firm;

- (iii) holds together with his relatives 2% or more of the total voting power of the company;
- (iv) is a Chief Executive or director, by whatever name called, of any non-profit organization that receives 25% or more of its receipts from the company, any of its promoters, directors or its holding, subsidiary or associate company or that holds 2% or more of the total voting power of the company; or
- (f) who possesses such other qualifications as may be prescribed.

The company and independent directors shall abide by the provisions specified in Schedule IV. The provisions of section 152 in respect of retirement of directors by rotation shall not be applicable to appointment of independent directors.

**Que. No. 19] What kind of declaration is required to be given by independent director each year to the Board of directors as per the Companies Act, 2013?**

**Ans.: Declaration by Independent Director [Section 149(7)]:** Every independent 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 circumstances which may affect his status as an independent director, give a declaration that he meets the criteria of independence as provided Section 149(5).

**Que. No. 20] Write a short note on: Stock option and other remuneration to an independent director.**

**Ans.:** An independent director shall not be entitled to any stock options. However, he may receive remuneration by way of sitting fees.

The company may reimburse to the independent director the expenses for participation in the Board and other meetings.

An independent director may be paid profit related commission as may be approved by the members.

**Que. No. 21] Write a short note on: Term of office of independent director**

**Ans.: Term of office of independent director [Section 149(10) & (11)]:** An independent director shall hold office for a term up to 5 consecutive years on the Board of a company. He shall be eligible for reappointment on passing of a special resolution by the company and disclosure of such appointment in the Board's report.

No independent director shall hold office for more than 2 consecutive terms. An independent director shall be eligible for appointment after the expiration of 3 years of ceasing to become an independent director.

An independent director shall not be appointed in or be associated with the company in any other capacity, either directly or indirectly during the said period of 3 years.

**Que. No. 21A] In terms of the provisions of the Companies Act, 2013, answer the following:**

- (i) Which companies are required to have independent directors?
- (ii) What is the tenure of independent directors and the number of terms for which such a director can be appointed? Are independent directors required to hold meetings of their own without the presence of non-independent directors?

CS (Executive) - Dec 2015 (4 Marks)

**Ans.:** As per Section 149, every listed public company shall have at least 1/3rd of the total number of directors as independent directors and the Central Government may prescribe the

minimum number of independent directors in case of any class or classes of public companies. Any fraction contained while computing  $1/3^{\text{rd}}$  shall be rounded off as one.

**Number of independent directors [Rule 4]:** The following class or classes of companies shall have at least 2 directors as independent directors -

- (i) Public companies having paid up share capital of ₹ 10 Crore or more or
- (ii) Public companies having turnover of ₹ 100 Crore or more or
- (iii) Public companies having outstanding loans, debentures and deposits, exceeding ₹ 50 Crore

However, if a company is required to appoint a higher number of independent directors due to composition of its audit committee, such higher number of independent directors shall be applicable to it.

Where a company ceases to fulfil any of the 3 conditions laid down Rule 4(1) for 3 consecutive years, it shall not be required to comply with these provisions until such time as it meets any of such conditions.

**Vacancy of an independent director:** Any intermittent vacancy of an independent director shall be filled up by the Board at the earliest but not later than immediate next Board meeting or 3 months from the date of such vacancy, whichever is later.

**Term of office of independent director [Section 149(10) & (11)]:** An independent director shall hold office for a term up to 5 consecutive years on the Board of a company. He shall be eligible for reappointment on passing of a special resolution by the company and disclosure of such appointment in the Board's report.

**Que. No. 22] Write a short note on: Exemption from liability to an independent director**

**Ans.:** An independent director or a non-executive director (*not being promoter or key managerial personnel*) shall be held liable, only in respect of such acts of omission or commission by a company which had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently.

**Que. No. 23] Explain the provisions of the Companies Act, 2013 relating to maintenance of data bank of independent directors.**

**Ans.:** Manner of selection of independent directors and maintenance of databank of independent directors [Section 150 & Rule 6]:

- ◆ An independent director may be selected from a data bank containing names, addresses and qualifications of persons who are eligible and willing to act as independent directors.
- ◆ The data bank may be maintained by any body, institute or association, as may be notified by the Central Government, having expertise in creation and maintenance of data bank.
- ◆ Such data bank will be put on the website for the use by the companies making the appointment of independent directors.
- ◆ The responsibility of exercising due diligence before selecting a person from the data bank, as an independent director shall lie with the company making such appointment.
- ◆ The appointment of independent director shall be approved by the company in general meeting and the explanatory statement annexed to the notice of the general meeting called to consider the said appointment shall indicate the justification for choosing the appointee for appointment as independent director.

- ◆ The data bank agency shall create and maintain data of persons willing to act as independent director in accordance with rules as may be prescribed.
- ◆ The Central Government may prescribe the manner and procedure of selection of independent directors who fulfil the qualifications and requirements specified under section 149.
- ◆ Any person who desires to get his name included in the data bank of independent directors shall make an application to "the agency" in Form DIR-1.
- ◆ The agency may charge a reasonable fee from the applicant for inclusion of his name in the data bank of independent directors.
- ◆ Any person who has applied for inclusion of his name in the data bank of independent directors or any person whose name appears in the data bank, shall intimate to the agency about any changes in his particulars within fifteen days of such change.

### SMALL SHAREHOLDER DIRECTOR

**Que. No. 24] Define 'small shareholder'. Which types of companies are required to appoint small shareholder?**

**Can a person hold office as small shareholder director in three companies at the same time?**  
CS (Inter) - Dec 2003 (4 Marks)

**Ans.:** Small Shareholder [Section 151]: Small Shareholder means a shareholder holding shares of nominal value of ₹ 20,000 or less or such other sum as may be prescribed.

A listed company may have one director elected by small shareholders in prescribed manner and with prescribed terms and conditions.

Rule 7 of the Companies (Appointment & Qualification) Rules, 2014 makes the following provisions with regard to small shareholder director:

- (1) A listed company, may upon notice of not less than 1,000 small shareholders or  $1/10^{\text{th}}$  of the total number of small shareholders, whichever is lower, have a small shareholders director elected by the small shareholders.
- (2) A listed company may appoint small shareholders director voluntary.
- (3) 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 signatures 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.
- (4) 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 and
  - (c) His consent to act as a director of the company
- (5) Small shareholders director shall be considered as an independent director, if eligible for appointment as an independent director as per Section 149(6) and he gives a declaration of his independence in as per Section 149(7).
- (6) The appointment of small shareholders director shall be subject to the provisions of section 152 except that -

- (a) He shall not be liable to retire by rotation
  - (b) His tenure shall not exceed a period of 3 consecutive years
  - (c) On the expiry of the tenure, small shareholder director shall not be eligible for re-appointment.
- (7) A person shall not be appointed as small shareholders director, if the person is not eligible for appointment in terms of Section 164. (Section 164 deals with disqualification for appointment of directors)
- (8) A person appointed as small shareholders director shall vacate the office if -
- (a) He incurs any of the disqualifications specified in Section 164
  - (b) He vacates the office of director as per Section 167
  - (c) He ceases to meet the criteria of independence as provided in Section 149(6).
- (9) No person shall hold the position of small shareholders' director in more than 2 companies at the same time. However, the second company in which he has been appointed shall not be in a business which is competing or is in conflict with the business of the first company.
- (10) A small shareholders director when ceases to hold office as a small shareholders director in a company, he shall not be appointed in that company or associated company in any other capacity, either directly or indirectly for next 3 years.

**Voting by postal ballot:** In case of listed companies, the resolution to appoint small shareholder director is required to be passed through postal ballot. [Section 110(1)(a) read with Rule 22(16)(h) of the Companies (Management & Administration) Rules, 2014]

**Que. No. 25]** The Board of Directors of ABC Ltd., an unlisted company having a paid-up capital of ₹ 6 Crores consisting of equity share capital of ₹ 5 Crores and preference share capital of ₹ 1 Crore and also 1,100 small shareholders holding equity shares seeks your advice on the following:

- (i) It is necessary for the company to appoint a director to represent the 'Small Shareholders'?
- (ii) In case the company decides to appoint such a director. The procedure to be followed by the company for such appointment and the period for which such appointment can be made.

Advise explaining the relevant provisions of the Companies Act, 2013 and the Rules.

CA (Final) – May 2004 (6 Marks)

**Ans.:**

- (i) The provisions of Section 151 read with Rule 7 of the Companies (Appointment & Qualification) Rules, 2014 relating to appointment of small shareholder director is applicable only to listed company. Thus, ABC Ltd. being an unlisted company need not appoint small shareholder director.
- (ii) However, even unlisted company by making provision in its article can appoint small shareholder director. (As there is no prohibition under the Companies Act, 2013 that unlisted company should not appoint small shareholder director)

The small shareholder director will be appointed by the small shareholder in accordance with the provisions of the Article of such unlisted company.

**Que. No. 26]** State the provisions relating to increase in number of directors of public company.  
CS (Inter) – June 1999 (3 Marks)

**Ans.:** As per Section 149(1), a company shall have maximum 15 directors. A company may appoint more than 15 directors after passing a special resolution. The provisions of Section 149 apply to both private and public company.

**Que. No. 27]** Write a short note on: Restrictions on number of directorships

CS (Inter) – June 2003 (6 Marks)

**Ans.:** Number of directorships [Section 165]: A person shall not hold office as a director, including any alternate directorship, in more than 20 companies at the same time. However, the maximum number of public companies in which a person can be appointed as a director shall not exceed 10.

**Explanation:** For reckoning the limit of public companies in which a person can be appointed as director, directorship in private companies that are either holding or subsidiary company of a public company shall be included.

For reckoning the limit of directorship of 20 companies, the directorship of dormant company shall not be included.

The members of a company may specify lesser number of companies in which a director of the company may act as directors by passing special resolution.

**Penalty:** If a person accepts an appointment as a director in contravention of Section 165(1), he shall be punishable with fine which shall not be less than ₹ 5,000 but which may extend to ₹ 25,000 for every day after the first during which the contravention continues.

**Restriction on number of small shareholder directorships [Rule 7]:** No person shall hold the position of small shareholders director in more than 2 companies at the same time.

**Que. No. 28]** Mr. Naksh is already a director of 19 companies. Out of which, 10 are public companies and 5 are private companies. He is being appointed as director of another company named XYZ Ltd. Advise Mr. Naksh.  
CA (Final) – Nov 2001 (3 Marks)

**Ans.:** As per Section 165, a person shall not hold office as a director, including any alternate directorship, in more than 20 companies at the same time. Further, a person can be appointed a director in maximum 10 companies.

Mr. Naksh is already a director of 10 public companies and if he is appointed a director in XYZ Ltd. (public company) there will be contravention of provisions of the Section 165. Thus, he cannot be appointed as director in XYZ Ltd.

## APPOINTMENT & RE-APPOINTMENT OF DIRECTORS

**Que. No. 29]** What are the modes in which a director of a company can be appointed?

CS (Executive) – June 2009 (8 Marks)

**Ans.:** Directors may be appointed in the following ways:

- Subscribers of the Memorandum [Deemed as first directors; Section 152]
- By members in general meeting
- By Board of directors
  - Additional Director [Section 161]
  - Director appointed to fill up the casual vacancy [Section 161]

- Alternate Director [Section 161]

• By third-parties if the articles provide (i.e. Nominee Director) [Section 161]

• By small shareholders [Section 151]

**Que. No. 30] Write a short note on: Appointment of first directors**

**Ans.: First Directors [Section 151(1)]:** Where no provision is made in the articles of a company for the appointment of the first director, the subscribers to the memorandum who are individuals shall be deemed to be the first directors of the company until the directors are duly appointed. In case of OPC an individual being member shall be deemed to be its first director until the director or directors are duly appointed by the member as per provisions of this section.

**Que. No. 31] Explain the law relating to appointment of directors at the general meeting. The annual general meeting of a company was adjourned *sine die* and retiring director, who was otherwise eligible for reappointment, could not be appointed before adjournment. State the legal position and suggested action.**

CS (Inter) - Dec 2000 (4 Marks)

**Ans.: Appointment of directors at the general meeting [Section 152(2) to (7)]:**

- (1) Every director shall be appointed by the company in general meeting.
- (2) No person shall be appointed as a director of a company unless he has been allotted the Director Identification Number.
- (3) Every person proposed to be appointed as a director by the company in general meeting or otherwise, shall furnish his Director Identification Number and a declaration that he is not disqualified to become a director under the Act.
- (4) Every person who has been appointed to hold the office of a director shall on or before the appointment furnish to the company a consent in writing to act as such in Form DIR-2. The company shall, within 30 days of the appointment of a director, file such consent with the Registrar in Form DIR-12 along with prescribed fee.
- (5) In the case of appointment of an independent director in the general meeting, an explanatory statement annexed to the notice for the general meeting, shall include a statement that in the opinion of the Board, he fulfils the conditions specified for an appointment of independent director.
- (6) Unless the articles provide for the retirement of all directors at every AGM, not less than  $2/3^{\text{rd}}$  of the total number of directors of a public company shall be persons whose period of office is liable to determination by retirement of directors by rotation. Directors retired by rotation can be reappointed in general meeting. (such  $2/3^{\text{rd}}$  directors are rotational directors)
- (7) At every subsequent AGM,  $1/3^{\text{rd}}$  of rotational directors shall retire at every AGM. 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.
- (8) At the AGM at which a director retires, the company may fill up the vacancy by appointing the retiring director or some other person. However, independent directors are not liable to retire by rotation.
- (9) If the vacancy of the retiring director 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.

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-

- (i) At that meeting or at the previous meeting a resolution for the re-appointment of such director has been put to the meeting and lost;
- (ii) The retiring director has, by a notice in writing addressed to the company or its Board of directors, expressed his unwillingness to be so re-appointed;
- (iii) He is not qualified or is disqualified for appointment;
- (iv) A resolution, whether special or ordinary, is required for his appointment or re-appointment by virtue of any provisions of this Act; or
- (v) Section 162 is applicable to the case.

**Example on computation of 'Rotational Directors', 'Non-Rotational Directors' & 'Directors that retire at AGM':**

Total Directors	3	4	5	6	7	8	9	10	11	12	13	14
Rotational Directors	2	3	4	4	5	6	6	7	8	8	9	10
Total Directors $\times 2/3$ (rounded up to next)												
Non-Rotational Directors	1	1	1	2	2	2	3	3	3	4	4	4
Total Director - Rotational directors												
Director that retire at AGM	1	1	1	1	2	2	2	2	3	3	3	3
Rotational Directors $\times 1/3$ (rounded to nearest)												

**Que. No. 32] A Public limited company has 10 directors as under.**

Non-retiring director 2

Directors liable to retire by rotation 4

Additional directors 4

**State the number of directors retiring by rotation at the next annual general meeting and the number of directors vacating office.**  
CS (Inter) - June 2001 (4 Marks)

**Ans.: As per Section 152(6) (a),** unless the articles provide for the retirement of all directors at every AGM, not less than  $2/3^{\text{rd}}$  of the total number of directors of a public company, shall retire by rotation. While calculating  $2/3^{\text{rd}}$  any fraction is to be rounded off to next higher number.

As per Section 152(6)(c), at every subsequent AGM,  $1/3^{\text{rd}}$  of rotational directors shall retire at every AGM. While calculating  $1/3^{\text{rd}}$  it has to be rounded up to nearest to  $1/3^{\text{rd}}$ .

Of the 10 directors mentioned in problem 2 directors are non-retiring directors and are not liable to retire by rotation. The position in regard to remaining director is as under:

- (1) Four directors appointed as additional directors shall vacate the office at the AGM because additional directors hold office till the next AGM or the last date on which the annual general meeting should have been held, whichever is earlier. [Section 161]
- (2) Of the 4 rotational directors  $1/3^{\text{rd}}$  i.e.  $4 \times 1/3 = 1.33$  i.e. 1 (rounded up to nearest) director will retire. Director who was longest in office will retire. If all the four directors were appointed on same date then the decision shall be made by mutual consent or by draw of lots.

Hence, total number of directors vacating the office is 5.

**Que. No. 33]** Write a short note on: Appointment of person other than retiring director X, who is not shareholder of company, sent a notice to the company of his candidature for the office of director in the place of a retiring director at the ensuing annual general meeting of the company. The same company received another notice from Y, a member, holding only one share signifying his intention to propose the candidature of Z for the office of director in the place of retiring director. As a secretary of the company, how will you deal with these notices? Can any member present at the meeting propose the aforesaid proposals for the consideration of the meeting?

CS (Inter) - June 2000 (16 Marks)

**Ans.:** Right of persons other than retiring directors to stand for directorship [Section 160]: A person who is not a retiring director shall be eligible for appointment to the office of a director at any general meeting.

Such person or some member intending to propose him as a director has to give a notice in writing at least 14 days before the meeting. A sum of ₹ 1 lakh shall be deposited along with notice. However, requirement of deposit of amount shall not apply in case of appointment of an independent director or a director recommended by the Nomination & Remuneration committee. Amount deposited will be refunded to such person or to the member, if the person proposed gets elected as a director or gets *more than 25% of total valid votes* cast either on show of hands or on poll on such resolution.

**Duty of the company to inform members:** On receipt of notice as stated above, the company shall inform its members about the candidature of the person proposed as a director in prescribed manner.

**Que. No. 34]** Whether it is possible to appoint two or more directors by single resolution in public company?

The appointment of several directors cannot be clubbed together. Comment.

CS (Inter) - June 2004 (4 Marks)

**Ans.:** Appointment of directors to be voted individually [Section 162]: At a general meeting of a company, only one director can be appointed by a single resolution. If resolution appointing more than one director is passed, the appointment is void, even if no objection was raised.

A single resolution for appointment of two or more director can be moved only if a proposal to move such a motion has first been agreed to at the meeting without any vote being cast against it.

**Example 1:** In general meeting, 100 members were present. All the 100 members passed a single resolution appointing 2 directors Gopal & Suresh. The single resolution appointing 2 directors is void since a resolution was not first been agreed to by the meeting that appointment of 2 directors shall be made by single resolution.

**Example 2:** In general meeting, 20 members were present. A resolution to the effect that Ram & Shyam shall be appointed was passed with the consent of 16 members, but 4 members abstained from voting. At the time of voting on single resolution for the appointment of Ram & Shyam, 14 members voted in favour of resolution and 6 members voted against the resolution. The single resolution appointing the 2 directors is valid.

This section is not applicable to private company. [MCA Notification dated 5.6.2015]

Thus, in case of private company, more than one director can be appointed by single resolution.

## ■■■■ ADDITIONAL DIRECTOR

**Que. No. 35]** Write a short note on: Additional Directors

**Ans.:** Appointment of additional director [Section 161(1)]: 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 who shall hold office up to the date of the next AGM or the last date on which the AGM should have been held, whichever is earlier.

However, a person who fails to get appointed as a director in a general meeting cannot be appointed as additional director.

Some important points relating to 'Additional Director':

- ◆ An additional director can be appointed by passing a resolution by circulation.
- ◆ Section 161(1) applies to all companies, whether public or private.
- ◆ An additional director has same rights, powers, duties and liabilities as any other director. The provisions relating to disqualification, vacation of office, disclosure of interest etc. are also applicable to additional director as they apply to any other director.

**Que. No. 36]** Mohan, who was appointed as additional director at the board meeting held on 15th June 2014 continues to be in his office on the ground that the AGM for the financial year 2013-2014 was not held as required under the Act. Whether continuance of Mohan in the office is valid? Will your answer be different if Mohan was also managing director for a period of five years with effect from 1st June 2014 at the same board meeting?

CA (Final) - May 1996 (5 Marks)

**Ans.:** As per Section 161(1), an additional director holds office up to the date of the next AGM or the last date on which the AGM should have been held, whichever is earlier. Thus, Mohan would vacate the office of director on the last day on which AGM ought to have been held.

Only director can be appointed as managing director. Since, Mohan vacates the office of director, the office of managing director is also vacated irrespective of the fact that he was appointed as managing director for a period of 5 years.

**Que. No. 37]** Suresh, an additional director appointed by the board of directors of a public company, is proposed to be appointed as a regular director in the AGM. Explain the requirement under the Companies Act, 2013 to give effect to the proposed appointment.

CA (Final) - Nov 2008 (5 Marks)

**Ans.:** As per Section 161(1), an additional director holds office up to the date of the next AGM or the last date on which the AGM should have been held, whichever is earlier. If an additional director seeks appointment as a regular director, he must comply with requirements of Section 160.

- Suresh or some member intending to propose him as a director has to give a notice in writing under his hand signifying his candidature as a director or, as the case may be, the intention of member to propose him as a candidate for that office at least 14 days before the meeting.
- A sum of ₹ 1 lakh or such higher amount as may be prescribed shall be deposited along with notice.
- Amount deposited will be refunded to Suresh or to the member, if he gets elected as a director or gets more than 25% of total valid votes cast either on show of hands or on poll on such resolution.
- On receipt of notice as stated above, the company shall inform its members about the candidature of the person proposed as a director in prescribed manner.
- On the appointed date meeting will be held and resolution to appoint him will be passed at the general meeting.

**Que. No. 38]** The Board of directors of Zest Ltd. appoints Pavan as a director under section 161 by passing a resolution by circulation. The appointee now seeks your advice about the tenure of his appointment. Advise him.

CS (Executive) – June 2012 (4 Marks)

**Ans.:** According to Section 161(1), 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 who shall hold office up to the date of the next AGM or the last date on which the AGM should have been held, whichever is earlier. The appointment of additional director may be made either at a meeting of the Board or by circular resolution.

**Que. No. 39]** Vinay was appointed as an additional director by the Board of directors of Prudent Ltd. in its meeting held on 20th July, 2015. Further, Vinay was appointed as a director by members of the company in its annual general meeting held on 2nd September, 2015. Comment whether Vinay is again required to file consent to act as a director.

CS (Inter) – June 2006 (4 Marks)

**Ans.:** MCA has clarified that where an additional director is appointed as director of the company in the AGM, the nature of his appointment changes radically. It would, therefore, be in the interest of such directors that such changes are notified to the Registrar in Form No. DIR -12.

**Que. No. 40]** X was appointed as an additional director in the board meeting held on 15th January, 2015 of ABC Ltd. and was to hold office until the next annual general meeting of the said company. The next annual general meeting which should have been held by 30th September, 2015 could not be held due to circumstances beyond control. The board declares that X should continue on the board after 30th September, 2015. Advise the board.

CS (Inter) – Dec 2000 (4 Marks), June 2001 (4 Marks)

**Ans.:** As per Section 161(1), an additional director holds office up to the date of the next AGM or the last date on which the AGM should have been held, whichever is earlier. Thus, X would vacate the office of director on the last day on which AGM ought to have been held.

In view of above X cease to be director on 30<sup>th</sup> September, 2015 and declaration by the board is not valid.

**Que. No. 40A]** 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.

CS (Executive) – June 2016 (4 Marks)

**Ans.:** As per Section 2(36), director means a director appointed to the Board of a company. Mere giving designation as director is not relevant. If company wants to appoint any person as director then it can appoint him in AGM or if during two AGM director has to be appointed then such person can be appointed as additional director as per Section 161(1).

As per Section 161(1), 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 who shall hold office up to the date of the next AGM or the last date on which the AGM should have been held, whichever is earlier.

Thus, it is advised to the Krugen Holdings (P) Ltd. to appoint Ms. Bhavna as additional director in Board meeting and she will hold the office till the next AGM. In next AGM she can be appointed as regular director.

As far as designation of "Director (Administration)" is concerned, the company can use any suitable designation to identify the work of director.

## ALTERNATE DIRECTOR

**Que. No. 41]** Explain the law relating to alternate director.

CS (Inter) – Dec 2005 (4 Marks)

CS (Executive) – June 2009 (4 Marks)

ABC Ltd. wishes to appoint an alternate director in place of B, who has gone to USA for one year. Advise the procedure to be followed by the company.

CS (Inter) – Dec 1999 (4 Marks)

**Ans.:** Appointment of alternate director [Section 161(2)]: The Board of Directors of a company may, if so authorized by its articles or by a resolution passed by the company in general meeting, appoint an alternate director for a director during his absence for a period of not less than 3 months from India. A person can be appointed as alternate director only for one director and not for more than one director.

However, following person cannot be appointed as alternate director:

- A person already appointed as alternate director in place of any other director.
- A person who is director in the same company.

**Alternate director for an independent director:** A person can be appointed as an alternate director for an independent director only if he is qualified to be appointed as an independent director as per Section 149(6).

**Term of office of alternate director:** An alternate director shall not hold office for a period longer than that permissible to the director in whose place he has been appointed and shall vacate the office if and when the director in whose place he has been appointed returns to India.

**Automatic reappointment applies to original director:** If the term of office of the original director is determined before he so returns to India, any provision for the automatic re-appointment of retiring directors shall apply to the original, and not to the alternate director.

### Some important points relating to 'Alternate Director'

- An alternate director cannot be appointed by passing a resolution by circulation.
- Section 161(2) applies to all companies, whether public or private.

**Que. No. 42]** X, an employee of the ABC Ltd. was appointed as an alternate director. In the meantime, the original director returned and wanted to attend the board meeting. Advise.

CS (Final) – June 1996 & Dec 1999 (3 Marks)

**Ans.:** As per Section 161(2), an alternate director shall not hold office of director for a longer period than that are permissible to the original director. The alternate director shall vacate his office when original director return back to India, irrespective of the fact that as to whether the original director attends the Board meetings or not. Thus, after an original director comes to India, only he can attend the Board meetings. The alternate director would automatically cease to be director.

**Que. No. 43]** Mr. Q a director of PQR Ltd. proceeding to a long foreign tour, appointed Mr. Y as an alternate director to act for him during his absence. The article of the company contains the provision for appointment of alternate director by the board of director. Mr. Q claims that he has right to appoint alternate director. Examine the given case in the light of the provisions of the Companies Act, 2013.

CA (Final) – May 2002 (4 Marks)

**Ans.:** The appointment of Mr. Y as alternate director by Mr. Q would amount to assignment of office which is prohibited under Section 166(6) and therefore, the appointment of Mr. Y as

an alternate director by Mr. Q is void. Further, as per Section 161 (2), the alternate director is appointed by the Board of Directors and not by the director in whose place he is appointed.

**Que. No. 44]** 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. Comment.  
CA (Final) – Nov 2014 (2 Marks)

**Ans.:** As per Section 162, a person can be appointed as an alternate director for an independent director only if he is qualified to be appointed as an independent director as per Section 149 (6). Thus, appointment of Mr. P as alternate director for an independent director is void.

**Que. No. 44A]** 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?  
CS (Executive) – Dec 2015 (4 Marks)

**Ans.:** As per Section 161(2), the Board of Directors of a company may, if so authorized by its articles or by a resolution passed by the company in general meeting, appoint an alternate director for a director during his absence for a period of not less than 3 months from India. A person can be appointed as alternate director only for one director and not for more than one director. A person can be appointed as an alternate director for an independent director only if he is qualified to be appointed as an independent director as per Section 149(6).

In view of above provisions, answer to given case is as follows:

Even though article of the Disha Ltd. not confer power to appoint alternate director, Disha Ltd. can appoint alternate director in place of Mr. Johnson by passing a resolution in general meeting. However, even in such case alternate director can be appointed for 3 months and not for 8 months.

**Que. No. 45]** Distinguish between: Additional Director & Alternate Director

CS (Inter) – June 2006 (5 Marks)

**Ans.:** Following are the main points of distinction between additional & alternate director:

Points	Additional Director	Alternate Director
<b>Appointment</b>	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 who shall hold office up to the date of the next AGM or the last date on which the AGM should have been held, whichever is earlier.	The board of directors of a company may, if so authorized by its articles or by a resolution passed by the company in general meeting, appoint an alternate director for a director during his absence for a period of not less than 3 months from India.
<b>Period of office</b>	Additional director holds the position of director from the date of appointment to next AGM.	An alternate director shall hold office as such for a period during absence of original director.
<b>Section</b>	Appointment of additional director is governed by Section 161(1).	Appointment of alternate director is governed by Section 161(2).
<b>Who appoints</b>	Additional director can be appointed at board meeting or by passing a resolution by circulation.	Alternate director can be appointed at board meeting or general meeting.

## NOMINEE DIRECTOR

**Que. No. 46]** Write a short note on: Nominee Director

**Ans.:** Nominee director means a director appointed by a third parties e.g. a director appointed by a financial institutions or a bank which has provided financial assistance to the company.

**Nominee Director [Section 161(3)]:** Subject to the articles of a company, the Board may appoint following types of nominee director:

- Person nominated by any institution in pursuance of any law for the time being in force.
- Person nominated by any institution in pursuance of any agreement.
- Person nominated by the Central or State Government by virtue of its shareholding in a Government company

Sometimes financial institutions or banks or other lenders, etc., nominate a director to represent their interest on the Board. Such Financial Institutions have to safeguard their interests. They have to ensure that the money is only used for the purposes for which it was borrowed. The right and the terms of nominating the directors on the boards of companies are usually contained in the agreement itself.

Nominee Directors are of two types:

- (1) Nominee Directors appointed by the Public Financial Institutions and companies established under the Acts of Parliament having *non obstante provisions* over the Companies Act, like IDBI, LIC, UTI, IIBI etc., in their respective statutes. Such directors can be appointed by the companies even if there is no provision in their article. They are governed by respective Acts under which they are appointed. After appointment the company has to take note of such appointment in the board meeting.
- (2) Nominee Directors appointed on the boards of assisted concerns or other public companies by public financial institutions, Central or State Government and banking companies. Such directors can be appointed as nominee director only if there is provision in article of association otherwise article is required to amended.

**Que. No. 47]** On the request of bank providing financial assistance the board of directors of PQR Ltd. 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.  
CA (Final) – Nov 2014 (2 Marks)

**Ans.:** According to Section 161 (3), 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, subject to the articles of a company.

In the present case, on the request of bank providing financial assistance the board of directors of PQR Ltd. decides to appoint on its Board Mr. Peter, as nominee director. Articles 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. Thus, the appointment of Mr. Peter as nominee director is not valid as Articles do not confer upon the board of directors any such power.

**Que. No. 48]** Humlog Ltd. received a letter from IDBI on 1st March, 2015 which has financed the project requesting the company to appoint Madhavan, General Manager (Operations), IDBI, as a director on its Board with immediate effect, as per the terms of sanction. Does his appointment require any other approval? Is he liable for retirement by rotation?  
CS (Inter) – Dec 2003 (4 Marks)

**Ans.:** Nominee Directors appointed by the Public Financial Institutions and Companies established under the Acts of Parliament having *non obstante provisions* over the Companies Act, 2013, like IDBI, LIC, UTI, IIBI etc., in their respective statutes. Such directors can be appointed

by the companies even if there is no provision in their article. They are governed by respective Acts under which they are appointed. After appointment the company has to take note of such appointment in the board meeting.

In view of above appointment of Madhavan as nominee director is effective from the date of letter viz. 1.3.2015 is received in the office of the company.

### CASUAL VACANCIES

Que. No. 49] Write a short note on: Filling up casual vacancies

CS (Inter) - Dec 2004 (4 Marks)

Ans.: Casual vacancy means any vacancy, which occurs by reason of death, resignation, disqualification, failure of an elected director to accept the office or for any reason other than retirement by rotation.

**Filling up casual vacancies [Section 161(4)]:** If the office of any director appointed by the company in general meeting is vacated before his term of office expires in the normal course, the resulting casual vacancy may, in default of and subject to any regulations in the articles of the company, be filled by the board of directors at a meeting of the Board, which shall be subsequently approved by members in the next general meeting.\*

**Term of office of director filling casual vacancy:** Any person so appointed to fill the casual vacancy shall hold office only up to the date up to which the director in whose place he is appointed would have held office if it had not been vacated.

#### Some important points:

- ◆ Casual vacancy cannot be filled up by circular resolution.
- ◆ It is not obligatory for the company to fill a casual vacancy and the Board may resolve to keep vacancy unfilled.
- ◆ A director filling a casual vacancy is not a retiring director and he is to be regular director only on compliance of Section 160.
- ◆ Where a casual vacancy is filled by the Board and the person appointed to such casual vacancy also vacates, then the resulting vacancy is not a casual vacancy and cannot be filled by the Board. It may be noted that the Section 161(4) applies only to a casual vacancy in the office of a director appointed by the company in general meeting. The Board in such a case can only appoint an additional director, if the Article has any provision in this regard.

Que. No. 50] X, a director of a company, was appointed at the AGM. X resigned and casual vacancy was filled by the appointment of Y at a meeting of the Board. Later on, Y resigned and the directors again invited X to fill the vacancy created by the resignation of Y. Is the action of the Board in appointing X, in the second instance, in accordance with the provisions of the Companies Act, 2013?

Ans.: As per Section 164(4), 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 be filled by the board of directors at a meeting of the Board.

Thus, casual vacancy created by the resignation of Y cannot be filled by the board of director. In such case X can be appointed as additional director and in next AGM he can be appointed as regular director by complying provisions of Section 160.

Que. No. 51] Mohan, a director of XYZ Ltd. died in air crash. It has been decided to appoint Murari in his place. Will the company be required to call extraordinary general meeting to approve the latter's appointment as a director? When appointed, how long Murari would be in office?

CS (Inter) - June 2001 (4 Marks)

Ans.: As per Section 164(4), 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 be filled by the board of directors at a meeting of the Board. Any person so appointed to fill the causal vacancy shall hold office only up to the date up to which the director in whose place he is appointed would have held office if it had not been vacated.

Thus, vacancy caused to death of Mohan can be filled up by board of directors at board meeting there is no need to call extraordinary general meeting and Murari will continue in office up to the date up to which Mohan in whose place he is appointed would have held office if it had not been vacated.

★ However, the appointment of Murari must be approved by members in immediate next general meeting.

Que. No. 51A] 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.

CS (Executive) - Dec 2015 (4 Marks)

Ans.: Casual vacancy means any vacancy, which occurs by reason of death, resignation, disqualification, failure of an elected director to accept the office or for any reason other than retirement by rotation.

As per Section 161(4), 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.

Any person so appointed to fill the casual vacancy shall hold office only up to the date up to which the director in whose place he is appointed would have held office if it had not been vacated.

In view of above provisions, vacancy caused by the death of Mohan, a director of Bright Ltd. can be filled by the board of directors at a meeting of the Board and approval in general meeting is not required. ?

Que. No. 51B] Distinguish between: 'Appointment of director by nomination' & 'appointment of director against casual vacancy'

CS (Executive) - June 2016 (4 Marks)

Ans.:

Points	Appointment of director by nomination	Appointment of director against casual vacancy
Meaning	Appointment of director by nomination means appointing a director by a third parties like financial institutions or a bank which has provided financial assistance to the company. nominated by FI but appointed by BOD	Appointment of director against casual vacancy means appointing a director due vacancy caused by reason of death, resignation, disqualification or failure of an elected director to accept the office or for any reason other than retirement by rotation.
Appointment	In certain cases i.e. pursuant to loan agreement appointment of nominee director becomes necessary.	It is not obligatory for the company to fill a casual vacancy and the Board may resolve to keep vacancy unfilled.
Provision in article	Director nominated under statutory powers can be appointed even if there is no provision in Articles of the Company.	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

Points	Appointment of director by nomination	Appointment of director against casual vacancy
		and subject to any regulations in the articles of the company, be filled by the board of directors at a meeting of the Board.
Term of office	Term of office of nominee director depends upon his appointment. For example, nominee director appointed by financial institution continues to be director until loan is fully repaid.	Any person appointed to fill the casual vacancy shall hold office only up to the date up to which the director in whose place he is appointed would have held office if it had not been vacated.

## REMOVAL, RETIREMENT & RESIGNATION OF DIRECTORS

### Que. No. 52] Removal of directors by shareholders

A company may remove director before expiry of his term, but there are certain exceptions. Comment. CS (Inter) - Dec 1998 (4 Marks)

Clover Ltd. has received a notice from its shareholders holding in all 8% of the paid-up capital for the removal of one of the directors. Advise the company.

CS (Inter) - Dec 2005 (4 Marks)

Ans.: Removal of directors [Section 169]:

- (1) A company may remove a director by passing ordinary resolution before the expiry of the period of his office after giving him a reasonable opportunity of being heard. However, the company cannot remove director who is appointed by the Tribunal under Section 242 or director appointed by way of proportional representation under Section 163.
- (2) A special notice shall be required of any resolution, to remove a director or to appoint somebody in place of a director so removed, at the meeting at which he is removed.
- (3) On receipt of notice of a resolution to remove a director, the company shall forthwith send a copy to the director concerned, and the director shall be entitled to be heard on the resolution at the meeting.
- (4) Where notice has been given of a resolution to remove a director, the director concerned can make representation in writing to the company.

If he makes such requests, the company shall, if the time permits it to do so,-

- (a) In any notice of the resolution given to members of the company, state the fact of the representation having been made and
- (b) Send a copy of the representation to every member of the company to whom notice of the meeting is sent (whether before or after receipt of the representation by the company)

If a copy of the representation is not sent as aforesaid due to insufficient time or for the company's default, the director may without prejudice to his right to be heard orally require that the representation shall be read out at the meeting.

Copies of the representation need not be sent out and the representation need not be read out at the meeting if, on the application either of the company or of any other person who claims to be aggrieved, the Tribunal is satisfied that the rights of making representation are being abused to secure needless publicity for defamatory matter. In addition, Tribunal may order the company's costs on the application to be paid in whole or in part by the director notwithstanding that he is not a party to it.

- (5) A vacancy created by the removal of a director appointed by the company in general meeting or by the Board, be filled by the appointment of another director in his place at

the meeting at which he is removed. However, special notice of the intended appointment has to be given.

- (6) A director so appointed shall hold office till the date up to which his predecessor would have held office if he had not been removed.
- (7) If the vacancy is not filled, it may be filled as a casual vacancy in accordance with the provisions of this Act. However, the director who was removed from office shall not be re-appointed as a director by the Board of Directors.
- (8) Director removed can claim compensation or damages if the terms of contract or terms of his appointment as director.
- (9) This section shall not be taken as derogating from any power to remove a director under other provisions of the Act.
- (10) On removal of director Form No. DIR. 12 is required to be filed with ROC.

Directors that cannot be removed under Section 169:

- (a) A director appointed by the Tribunal under Section 242.
- (b) A director appointed according to the principle of proportional representation u/s 163.
- (c) A nominee director appointed by a Financial Institution/Bank constituted under Special Act of parliament.

### Judicial Views:

- ◆ A company has full power u/s 169 to remove a permanent director even if articles of association put restrictions on removal of permanent directors. The shareholders cannot be restrained from calling a general meeting to remove existing directors and appoint new directors. [*LIC vs. Escorts Ltd.* (1986) 59 Com Cases 548 (SC)]
- ◆ The provisions of explanatory statement are not applicable in respect of the resolution for the removal, because the company is merely acting in pursuance of a special notice received by it to move the resolution, it is not a resolution proposed by the company [*LIC vs. Escorts Ltd.* (1986) 59 Com Cases 548 (SC)].
- ◆ The Civil Court has no jurisdiction to entertain the suit for removal of directors of a limited company as it relates to the internal management of the company which is governed by the Act. [*Khetan Industries Private Ltd. vs. Manju Ravindra Prasad Khetan* AIR 1995 Bom 43]
- ◆ Where articles of association confer power on the board of directors to remove a director, such power is not affected by the provisions of section 169. The articles of association are in the nature of an agreement between the shareholders who are the joint owners of the company. If some specific methodology is devised by consent, nothing precludes the members/shareholders from doing so. [*Ravi Prakash Singh vs. Venus Sugar Ltd.* [(2008) 84 SCL 75 (Del)]
- ◆ If the appointment of a managing or other director was revoked by the Board of directors, Section 169 would not be attracted. Hence, there is no scope of applying Section 169 when the director was not to be disturbed from his office as a director and the business proposed to be transacted related only to the removal from his managerial position. He could not question the meeting on that ground, nor could any other person do so on that cause. [*Major General Shanti Shamsher vs. Kamant Brothers*, AIR 1959 Bom 201. (1959) 29 Com Cases 501]
- ◆ Articles may empower the Board to remove a director. [*Bersel Manufacturing Co. Ltd. vs. Berry* (1968) 2 All ER 522 (HL)]

### Que. No. 53] Write a short note on: Resignation of Directors

Ans.: Resignation of director [Section 168]: A director may resign from his office by giving a notice in writing to the company. The Board shall on receipt of such notice take note of the same and shall also place the fact of such resignation in the report of directors laid in the immediately following general meeting by the company.

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.

However, the director who has resigned shall be liable even after his resignation for the offences which occurred during his tenure.

Where all the directors of a company resign from their offices, or vacate their offices u/s 167, the promoter or, in his absence, the Central Government shall appoint the required number of directors who shall hold office till the directors are appointed by the company in general meeting.

**Notice of resignation of director [Rule 15]:** 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.

**Copy of resignation of director to be forwarded by him [Rule 16]:** Where a director resigns from his office, he shall within a period of 30 days from the date of resignation, forward to the Registrar a copy of his resignation along with reasons for the resignation in Form No. DIR.11 along with the prescribed fees.

**Que. No. 54] Smart, a director, verbally resigned from his office at the board meeting. His resignation was accepted although the article provided for resignation in writing. Is the resignation valid?**

CS (Inter) – June 2001 (4 Marks)

**Ans.:** As per Section 168, a director may resign from his office by giving a notice in writing to the company. Thus, verbal resignation given by Smart, a director at the board meeting is not valid even if it was accepted by meeting.

For valid resignation, the Smart is advised to give the resignation in writing to the company. He should also forward a copy of his resignation giving reasons for the resignation in Form No. DIR. 11 along with the prescribed fees to the ROC.

**Que. No. 55] A director, aged 71 years, due to retire by rotation in the AGM, declares at the AGM that he is resigning due to old age and ill health when the resolution for his appointment is taken up. In spite of persuasion by many shareholder, he does not agree to continue as director. However, he send his resignation in writing to the board subsequently, till the next board meeting. Advise the chairman.**

CS (Inter) – June 2002 (4 Marks)

**Ans.:** As per Section 168, a director may resign from his office by giving a notice in writing to the company. A declaration at the AGM by the director that he is resigning is not valid.

However, written resignation sent subsequently before the next Board meeting is valid. He should also forward a copy of his resignation along with reasons for the resignation in Form No. DIR. 11 along with the prescribed fees to the ROC.

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.

**Que. No. 56] The Managing Director of Progressive Ltd. resigned on 6th May, 2015 as such, but the company filed Form No. DIR. 12 with the ROC stating the date of resignation as 15th March 2016. The company issued various cheques to its investors in repayment of their deposits after 6th May, 2015 which were bounced. The investors filed a complaint against the former managing director. Will the managing director be liable in the instant case?**

CS (Executive) – Dec 2011 (4 Marks), June 2014 (8 Marks)

**Ans.:** As per Section 168, the director who has resigned shall be liable even after his resignation for the offences which occurred during his tenure. Thus, director is not liable for the transaction entered by the company after his resignation.

As managing director of Progressive Ltd. has resigned on 6<sup>th</sup> May, 2015 he is not liable for the transaction entered by the company after 6<sup>th</sup> May 2015.

**Que. No. 56A] 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.**

CS (Executive) – Dec 2014 (4 Marks)

**Ans.:** In *Bank of Baroda vs. Official Liquidator*, (1992) 73 Comp Cases 688 (MP), it was held that where certain directors who had guaranteed the company's debts retired and new directors were appointed in their place who also signed the guarantee bond and there was no agreement to show that the earlier guarantee had ceased to be operative it was held that all the directors including retired directors were liable jointly and severally under guarantee.

Thus, contention of retired directors is not correct and they are liable to the bank.

**Que. No. 56B] 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.**

CS (Executive) – June 2016 (4 Marks)

**Ans.:** As per Section 168, a director may resign from his office by giving a notice in writing to the company. The Board shall on receipt of such notice take note of the same and shall also place the fact of such resignation in the report of directors laid in the immediately following general meeting by the company.

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.

However, the director who has resigned shall be liable even after his resignation for the offences which occurred during his tenure.

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.

Where a director resigns from his office, he shall within a period of 30 days from the date of resignation, forward to the Registrar a copy of his resignation along with reasons for the resignation in Form No. DIR. 11 along with the prescribed fees.

As per facts given in case, Paras a director of Spike (Pvt.) Ltd. has forwarded copy of resignation to the company and ROC in time and hence his resignation is valid and effective. It doesn't make any difference whether company file the form with ROC or not.



## REGISTER OF DIRECTORS & KMP

Que. No. 57] Write a short note on: Register of directors and key managerial personnel and their shareholding

Ans.: Register of directors and key managerial personnel and their shareholding [Section 170]: Every company shall keep at its registered office a register containing prescribed particulars of its directors and key managerial personnel, which shall include the details of securities held by them in the company or its holding, subsidiary, subsidiary of company's holding company or associate companies.

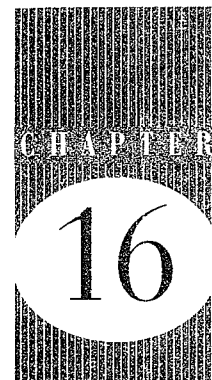
A return in **Form No. DIR 12** and prescribed documents of the directors and the KMP shall be filed with the Registrar within 30 days from the appointment of every director and KMP and within 30 days of any change taking place.

As per **Rule 17 of the Companies (Appointment and Qualification of Directors) Rules, 2014**, every company shall keep at its registered office a register of its directors and key managerial personnel containing the following particulars, namely:

- (a) DIN (optional for KMP)
- (b) Present name and surname in full
- (c) Any former name or surname in full
- (d) Father's name, mother's name and spouse's name (if married) and surnames in full
- (e) Date of birth
- (f) Residential address (present as well as permanent)
- (g) Nationality (including the nationality of origin, if different)
- (h) Occupation
- (i) Date of the board resolution in which the appointment was made
- (j) Date of appointment and reappointment in the company
- (k) Date of cessation of office and reasons
- (l) Office of director or key managerial personnel held or relinquished in any other body corporate
- (m) Membership number of the ICSI in case of Company Secretary
- (n) PAN (mandatory for KMP if not having DIN)

In addition to the details of the directors or KMP, the company shall also include the details of securities held by them in the company, its holding company, subsidiaries, subsidiaries of the company's holding company and associate companies relating to-

- (a) The number, description and nominal value of securities
- (b) The date of acquisition and the price or other consideration paid
- (c) Date of disposal and price and other consideration received
- (d) Cumulative balance and number of securities held after each transaction
- (e) Mode of acquisition of securities
- (f) Mode of holding - physical or in dematerialized form and
- (g) Whether securities have been pledged or any encumbrance has been created on the securities.



## POWERS & DUTIES OF DIRECTORS

### This Chapter Covers:

- > Distribution of powers of a Company
- > Exercise of Powers
- > Power of shareholders to intervene on matters delegated
- > Board's sanction for contracts in which Directors are interested
- > Disclosure of Interest by Directors
- > Loans to Directors
- > Provisions relating to board meetings



## POWERS OF BOARD OF DIRECTORS

Que. No. 1] Can shareholders interfere in the exercise of powers delegated to the board of directors? Can decision of the board of directors be changed by the shareholders?

CS (Inter) - Dec 1999 (4 Marks), Dec 2006 (4 Marks)

Powers of the directors of a company are co-extensive with those of the company. Comment.

CS (Executive) - June 2015 (5 Marks)

Ans.: **Power of Board [Section 179]:** The Board of Directors of a company shall be entitled to exercise all such powers, and to do all such acts and things, as the company is authorized to exercise and do. However, in exercising such power or doing such act or thing, the Board shall be subject to the provisions contained in Companies Act, 2013, or in the memorandum or articles or in any regulations made by the company in general meeting.

Thus, the Board shall not exercise any power or do any act or thing which is to be exercised or done by the company in general meeting.

It is also provided that the company by making regulation in general meeting cannot invalidate any prior act of the Board.

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 supercede the director's powers, or instruct them how they shall exercise their powers.

The directors passed a resolution for rights issue which was questioned by certain shareholders. The Calcutta HC held that the question whether the company needed additional capital was a question which should primarily be decided by the directors of the company and if they were of the view that further capital in the form of rights issue was required, the Court would not be allowed to disturb the same unless there were extreme circumstances of mala fides or breach of trust. [*Milan Sen vs. Guardian Plastic Ltd.*, (1998) 2 Comp L J 320]

**Exceptions:** In the following exceptional cases, the general body of shareholders is competent to act even in matters delegated to the board:

- (1) **Directors acting mala fide:** The general body of shareholders can intervene when it is proved that the directors have acted for improper motive or arbitrarily. Ordinarily the directors of a company are persons who can conduct litigation in the name of company, but when they are themselves the wrong doers the majority of the shareholders may take steps for redressal of the wrong.
- (2) **Incompetent Board:** The general body of shareholders may exercise the powers vested in the board when the board is incompetent to act, for instance, where all the directors are interested in the transaction or the board is unwilling to act, or when there are no validly appointed directors functioning.

A clause in the articles of the company authorized the directors to fill casual vacancies and also to increase the number of directors within the maximum number fixed in the articles. Some casual vacancies occurred, and they were promptly filled at a general meeting of the shareholders. This was challenged on the ground that once the power to appoint was delegated to the Board, it could not have been exercised at a general meeting. The Court upheld the appointments by the company in the general meeting, as it found that at the time of the general meeting there was no director in office and, therefore, the members had the right to elect. [*Vishwanathan v. Tiffins B.A. & P. Ltd.*, AIR 1953 Mad. 520]

- (3) **Deadlock in the board:** If the directors are unable or unwilling to act, on account of deadlock, the shareholders have the inherent power to act.

There were only 2 directors on the board of the company and one refused to act with the other. There was no provision in the articles enabling the general meeting of the shareholders to increase or reduce the number of directors. Held: that as there was a deadlock in the administration resulting from the fact that the power to take necessary steps to ensure the working of the company and to appoint additional director for the purpose. [*Barron v. Potter*, (1914) 1 Ch. 895]

From the above, it is clear that the residuary powers can be pressed into service by the shareholders in general meeting.

**Que. No. 2]** Discuss the powers of the company which can be exercised by the board only by means of resolution passed at the board meetings and not otherwise.

CS (Inter) - Dec 1999 (4 Marks), Dec 2005 (6 Marks)

Can the board of directors of a company delegate any of its powers to others? Discuss.

CS (Executive) - June 2013 (4 Marks)

**Ans.: Powers exercisable by passing resolution at a board meeting only [Section 179(3)]:** The Board of Directors of a company shall exercise the following powers on behalf of the company by means of resolutions passed at meetings of the Board, namely:

- (a) To make calls on in respect of money unpaid on shares
- (b) To authorize buy-back of securities u/s 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) Any other matter which may be prescribed.

The powers specified in clauses (d), (e) and (f) to the extent specified conditions by the board may be delegated to:

- (i) Committee of directors,
- (ii) Managing director,
- (iii) Manager or
- (iv) Principal officer of the company or
- (v) Principal officer of the branch office.

Every resolution of the board delegating the powers must specify:

- ◆ The total amount to be borrowed
- ◆ The total amount that may be invested and the nature of the investment
- ◆ The total amount up to which loans may be made

**Rule 8 of the Companies (Meeting of Board and its Powers) Rules, 2014** prescribes that the following powers shall be exercised by the board by passing a resolution at a board meeting only:

- (1) Power to make political contributions.
- (2) Power to appoint or remove KMP.
- (3) Power to appoint internal auditors and secretarial auditor.

**Que. No. 2A]** The Board of directors of Nav Avtar Ltd. passed a resolution for issue of rights shares. However, certain shareholders of the company raised an objection as to whether the company needed additional capital. Discuss the validity of the counter-move taken by the shareholders and resolution passed by the Board.

CS (Executive) - June 2012 (4 Marks)

**Ans.:** As per Section 179, the Board of Directors of a company shall be entitled to exercise all such powers, and to do all such acts and things, as the company is authorized to exercise and do. However, in exercising such power or doing such act or thing, the Board shall be subject to the provisions contained in Companies Act, 2013, or in the memorandum or articles or in any regulations made by the company in general meeting.

Thus, the Board shall not exercise any power or do any act or thing which is to be exercised or done by the company in general meeting.

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.

In *Milan Sen vs. Guardian Plastic Ltd.* (1998) 2 Comp L J 320, the directors passed a resolution for rights issue which was questioned by certain shareholders. The Calcutta High Court held that the question whether the company needed additional capital was a question which should

primarily be decided by the directors of the company and if they were of the view that further capital in the form of rights issue was required, the Court would not be allowed to disturb the same unless there were extreme circumstances of *mala fide* or breach of trust.

Thus, shareholder of the company will succeed only if they are able to show that directors are exercising their power to mala fide or in breach of trust.

**Que. No. 3] A Board of director desires to buy back its equity share capital up to 10% by passing resolution at Board meeting. Advise them keeping in view the provisions of the Companies Act, 2013. CA - Final May 2003 & May 2010 (4 Marks)**

**Ans.:** As per Section 68(2) the board of director are authorized to buy back up to 10% of the total paid-up equity capital and free reserves of the company by passing resolution at its meeting.

Under Section 179(3)(b) the Board of Directors of a company has given power to buy-back of securities as per Section 68 by passing resolution at meetings of the Board.

Therefore, in the present case, the Board of Directors are authorized to buy back the shares of the company up to 10% of the paid up capital, provided the resolution authorizing the buy back is passed at the Board meeting and not by circular resolution.

**Que. No. 4] Ram is the director of M & Co. Ltd. Ram has borrowed ₹ 50 Lakhs on reasonable terms from Shyam for Company's benefit and business. Ram has no power to borrow. What will be the legal position? Explain. CA (Final) - Nov 2010 (2 Marks)**

**Ans.:** As per Section 179(3) power to borrow monies shall be exercised by the board at the board meeting. However, this power may be delegated to:

- (i) Committee of directors,
- (ii) Managing director,
- (iii) Manager or
- (iv) Principal officer of the company or
- (v) Principal officer of the branch office.

Borrowing of money falls within the implied or ostensible authority of a director and so outsider dealing with the company are entitled to assume that every director is authorized to borrow money on behalf of company. Thus, the company shall be liable to repay the amount, if it shown that money has gone into the hands of the company.

**Que. No. 5] 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.**

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

**Ans.:** In *Maharashtra State Mining Corpn. vs. Sunil* (2006) 5 SCC 96, the appellant corporation's Managing Director terminated respondent's services for various misconducts. The respondent filed a writ petition challenging the said dismissal order on the ground that the Managing Director had no authority to do so since the same was vested in the appellant's board of directors. While the said petition was pending, the Board of Directors passed a resolution ratifying the managing director's impugned action.

The High Court, while setting aside the impugned termination order, allowed respondent's writ petition. Appellant appealed to the Supreme Court. Appeal was allowed. According to the Supreme Court, the High Court was right when it held that an act by a legally incompetent authority was invalid. But it was entirely wrong in holding that such an invalid act cannot be subsequently rectified by ratification of the competent authority. Ratification, by definition, means making valid an act already done.

Therefore, ratification assumed an invalid act, which was retrospectively validated. In the instant case, the managing director's order dismissing the respondent from the service was admittedly ratified by the board of directors and the board of directors unquestionably had the power to terminate the services of the respondent. Since the order of the Managing Director had been ratified by the board of directors, such ratification related back to the date of the order and validated it. Therefore, the instant appeal was allowed, the impugned judgment and order of the High Court was quashed, and the dismissal order was upheld.

**Que. No. 6] State the powers of director which must be exercised by unanimous vote.**

**Ans.:** The following powers of the board must be exercised by resolutions passed at meeting with the consent of *all the directors present* at the meeting:

- (1) The power to appoint or employ a person as its managing director or manager u/s 203 if he is managing director or manager of one and not more than one other company.
- (2) The power to invest in shares or debentures of any other body corporate u/s 186.

**Que. No. 7] What are the powers of the board which are exercisable with the approval of the company in general meeting?**

**Ans.:** **Restrictions on powers of Board [Section 180(1)]:** The board of directors of a public company shall exercise the following powers only with the consent of company by a special resolution:

**(a) Sell, lease or dispose of the whole of the undertaking of the company.**

*Undertaking* shall mean an undertaking in which the investment of the company exceeds 20% of its net worth as per the audited balance sheet of the preceding financial year or an undertaking which generates 20% of the total income of the company during the previous financial year.

*Substantially the whole of the undertaking* in any financial year shall mean 20% or more of the value of the undertaking as per the audited balance sheet of the preceding financial year.

*Net worth* means the aggregate value of the paid-up share capital and all reserves created out of the profits and securities premium account, after deducting the aggregate value of the accumulated losses, deferred expenditure and miscellaneous expenditure not written off, as per the audited balance sheet, but does not include reserves created out of revaluation of assets, write-back of depreciation and amalgamation. [Section 2(57)]

Nothing contained Section 180(1)(a) shall affect -

- (a) the title of a buyer or other person who buys or takes on lease any property, investment or undertaking as is referred to in that clause, in good faith; or
- (b) the sale or lease of any property of the company where the ordinary business of the company consists of, or comprises, such selling or leasing.

Any special resolution passed by the company consenting to the transaction referred to Section 180(1)(c) may stipulate conditions as may be specified in such resolution, including conditions regarding the use, disposal or investment of the sale proceeds which may result from the transactions.

- (b) Invest the amount of compensation received by it as a result of any merger or amalgamation (if amount invested in trust securities this clause is not applicable hence members consent by way of special resolution is not required)
- (c) 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 and securities premium (if amount borrowed is temporary loan from the company's bankers in the ordinary course of business then this clause is not applicable, hence members consent by way of special resolution is not required)

Free Reserves means such reserves which, as per the latest audited balance sheet of a company, are available for distribution as dividend:

Provided that -

- (i) any amount representing unrealised gains, notional gains or revaluation of assets, whether shown as a reserve or otherwise, or
- (ii) 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

Every special resolution passed by the company in general meeting in relation to the exercise of the powers referred to in Section 180(1)(c) shall specify the total amount up to which monies may be borrowed by the Board of Directors.

No debt incurred by the company in excess of the limit imposed by Section 180(1)(c) shall be valid or effectual, unless the lender proves that he advanced the loan in good faith and without knowledge that the limit imposed by that clause had been exceeded.

- (d) Remit, or give time for the repayment of, any debt due from a director.

**Department's view:** If a company mortgages the whole or substantially the whole of its undertaking for obtaining loans or other financial assistance, it need not comply with the provisions of Section 180(1)(a), but if it is an usufructuary mortgage the said section would be attracted.

**Usufructuary Mortgage:** Where the mortgagor delivers possession, or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee and authorizes him to retain such possession until payment of the mortgage money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest or partly in payment of the mortgage money, partly in lieu of interest and partly in payment of the mortgage money, the transaction is called a usufructuary mortgage and the mortgagee a usufructuary mortgagee.

**Hire purchase & leasing transactions:** Hire purchase and leasing transactions are not covered by Section 180(1)(d), as they do not amount to borrowing.

**Judicial Views:**

- ◆ A closed unit of a company is not an undertaking within the meaning of this sub-section and the provisions of Section 180 (1) do not apply to a proposed sale of the unit. [Pranod Kumar Mittal vs. Andhra Steel Corporation Ltd., (1982) 2 Comp LJ 629]
- ◆ Leasing of the right to use the facilities of a company, was held to be not a lease or disposal of the Company's undertaking, because undertaking means substantial part of the assets. An agreement of sale etc. means a complete and exclusive transfer whereby the transferee gets the right to hold, possess and control the undertaking in question. [Allana Cold Storage Ltd. v. Goa Meat Complex Ltd. (1997) 90 Comp. Cases 50 at 64]

**Que. No.8]** One of the objects clause of the Memorandum of Association of Info Company Ltd. 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 EOGM 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 member's 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?

CA (Final) - Nov 2015 (4 Marks)

**Ans.:** Except where express provisions are made that the powers of a company in respect of any matter are to be exercised by the company in general meeting, in all other cases the Board is entitled to exercise all its powers.

The directors acting together are the authority for conducting the affairs of the company. They are authorized to do what the company is authorized to do, unless barred by restrictions on their powers by the provisions of the Companies Act, 2013, the MOA or AOA of the company [Section 179].

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 supercede the director's powers, or instruct them how they shall exercise their powers. This sovereignty of the directors within the limits of the powers conferred on them by the articles, and within limit laid down by the Act.

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. The only way in which the general body of the shareholders can control the exercise of the powers vested by the articles, in the directors, is by altering the articles, or if opportunity arises under the articles, by refusing to re-elect the directors whose action they disapprove. They cannot themselves usurp the powers which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders.

In view of above answer to given problem is as follows:

- (i) The contention of members against the non-compliance of member's decision by the directors is not tenable.
- (ii) It not 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

Further as per Section 180, the board of directors of a public company shall exercise certain powers only with the consent of company by a special resolution. Sell, lease or dispose of the whole of the undertaking of the company is covered by Section 180.

Thus, correct procedure is to be followed for board is to approve the sale of undertaking clearly specifying the terms and conditions and then convene general meeting for the approval of shareholder.

**Que. No. 9] Power to borrow money includes the power to give security. Comment.**

CS (Executive) – Dec 2010 (5 Marks)

**Ans.:** The power to borrow includes the power to give security, which may take the form of a mortgage, a charge, hypothecation, lien, guarantee, pledge etc. The creditor's position becomes safer when security is given.

A company, like a natural person, can give security. Normally, the debentures and other borrowings of the company are secured by a charge on the assets of the company.

Every company may necessarily possess certain powers which are implied, such as, a power to appoint and act by agents, and where it is a trading company, a power to borrow and give security for the purposes of its business, and also a power to sell. Such powers are incidental and can be inferred from the powers expressed in the memorandum. [*Oakbank Oil Co. v. Crum* (1882) 8 App Cas 65] The principle underlying the exercise of such powers is that a company, in carrying on the business for which it is constituted, must be able to pursue those things which may be regarded as incidental to or consequential upon that business. [*Egyptian Salt and Soda Co. vs. Port Said Salt Association*]

**Que. No. 9A] Bright Products Ltd. wishes to sell one of its undertakings for which it decides to call an extra-ordinary general meeting (EGM) and to pass a resolution thereat. State the material facts to be set out in the explanatory statement to be annexed to the notice of the EGM on this special business to be transacted at the meeting.**

CS (Executive) – June 2016 (4 Marks)

**Ans.:** As per Section 180(1)(a), the board of directors of a public company can sell, lease or dispose of the whole of the undertaking of the company only with the consent of company by a special resolution.

As per Section 102, in case of special business items to be transacted at a general meeting, a statement setting out the following material facts, shall be annexed to the notice calling the meeting:

- (I) The nature of concern or interest, financial or otherwise in respect of each item of:
  - Every director and the manager, if any
  - Every other key managerial personnel and
  - Relatives of the persons mentioned above.
- (II) Any other information and facts that may enable members to understand the meaning, scope and implications of the items of business and to take decision thereon.

Thus, keeping in view above provisions, for selling one of the undertakings of the company explanatory statement annexed to the notice must specify the following material facts:

- (1) General nature of business of the company.
- (2) Role of undertaking in the business of the company.
- (3) Nature of assets and liabilities of the undertaking.
- (4) Reasons for the sale of undertaking.
- (5) Financial effect after sales on the balance sheet and income of the company.
- (6) Major terms and conditions relating to sale of undertaking.
- (7) The fact that sale of undertaking requires approval of shareholder in terms of Section 180.
- (8) The nature of interest, if any of the director, manager and KMP.

**Que. No. 10] The last three years Balance Sheet of RBS Ltd., contains the following information and figures:**

Particulars	As at 31.3.2013 ₹	As at 31.3.2014 ₹	As at 31.3.2015 ₹
Paid up Capital	50,00,000	50,00,000	75,00,000
General Reserve	45,00,000	50,00,000	60,00,000
Debenture Redemption Reserve	15,00,000	20,00,000	25,00,000
Secured Loans	10,00,000	15,00,000	30,00,000
Net Profit for the year	12,50,000	19,00,000	34,50,000

In the ensuring Board Meeting scheduled to be held on 5th November, 2015, among other items of agenda, following item is also appearing:

"To decide about borrowing from financial institutions on long-term basis."

Based on above information, you are required to find out as per the provisions of the Companies Act, 2013, the amount up to which the Board can borrow from financial institutions without seeking the approval in general meeting.

**Ans.:** As per Section 180(1)(c), the board of directors of a public company shall not borrow money without the consent of company by a special resolution, where the money to be borrowed, together with the money already borrowed by the company exceeds aggregate of its paid-up share capital and free reserves. However, temporary loan obtained from company's banker in the ordinary course of business shall not be considered as borrowings.

For the purpose of calculation of limit, paid up capital and free reserve of latest audited balance sheet of a company has to be taken. Debenture Redemption Reserve is not for free distribution of dividend and is therefore not considered as free reserve.

As per the data given in problem, the paid up capital and free reserve is ₹ 1,35,00,000. The company has already borrowed ₹ 30,00,000. Thus, company can borrow further ₹ 1,05,00,000 without requiring any consent from shareholder. However, if fresh borrowing exceeds ₹ 1,05,00,000 the consent of shareholders of the company by a special resolution will be required.

**Que. No. 11] State the power of board of director to contribute amounts to charitable and other funds as given in Section 181 of the Companies Act, 2013?**

**Ans.:** Company to contribute to charitable funds [Section 181]: The Board of Directors of a company may contribute to *bona fide* charitable and other funds. However, if contribution to charitable and other funds exceeds 5% of its average net profits for the 3 immediately preceding financial years, prior permission of the company in general meeting shall be required.

**Que. No. 12] The board of directors of public company having made an average profit of ₹ 1 Crore during last 3 years proposes to donate during the current year ₹ 1 lakh to school run exclusively for the benefit of employee. Advise the board of directors in this regard.**  
CA (Final) – May 1995 (4 Marks)

**Ans.:** As per Section 181, the Board of Directors of a company may contribute to *bona fide* charitable and other funds. However, if contribution to charitable and other funds exceeds 5% of its average net profits for the 3 immediately preceding financial years, prior permission of the company in general meeting shall be required.

Donating the amount to the school run exclusively for the benefit of employee does not amount to charitable contribution. It will be treated as 'welfare expenses', which will induce the employee to increase their efforts.

As the donation is outside the purview of charitable donation, provisions of the Section 182 are not attracted. Therefore, donation of ₹ 1,00,000 to the school run exclusively for the benefit of

employee is within the powers of the board and prior permission of the company in general meeting shall not be required.

**Que. No. 13] Advice the management on the prohibitions and restrictions regarding political contributions.**  
CS (Inter) – Dec 2000 (8 Marks)

CS (Executive) – June 2014 (4 Marks), June 2015 (5 Marks)

**Ans.: Prohibitions and restrictions regarding political contributions [Section 182]:** Following companies are prohibited from making political contribution:

- (1) Government companies
- (2) Other companies which has been in existence for less than 3 financial years

The aggregate of the political contributions in any financial year shall not exceed 7.5% of its average net profits during the 3 immediately preceding financial years.

The power to make political contribution shall be exercised only by passing a resolution at the board meeting.

Every company shall disclose in its profit and loss account any amount contributed to any political party during the financial year, giving particulars of the total amount contributed and the name of the party to which amount has been contributed.

**Penalty:** If a company makes any contribution in contravention of the above provisions, the company shall be punishable with fine which may extend to 5 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 6 months and
- with fine which may extend to 5 times the amount so contributed.

A donation or subscription or payment caused to be given by a company on its behalf or on its account to a person who, to its knowledge, is carrying on any activity which, at the time at which such donation or subscription or payment was given or made, can reasonably be regarded as likely to affect public support for a political party shall be deemed to be contribution for a political purpose.

The amount of expenditure incurred, directly or indirectly, by a company on an advertisement in any publication, being a publication in the nature of a souvenir, brochure, tract, pamphlet or the like, shall also be deemed, –

- (i) Where such publication is by or on behalf of a political party, to be a contribution of such amount to such political party, and
- (ii) Where such publication is not by or on behalf of, but for the advantage of a political party, to be a contribution for a political purpose.

**Que. No. 14] State with reference to the provisions of the Companies Act, 2013 whether following companies can make donations (as on 1.6.2016) to the political parties and if so conditions to be complied in this regard:**

- (i) ABC Ltd., a government company registered in 2009 wants to donate a sum of ₹ 10,00,000.
- (ii) EFG Ltd. a public company registered in 2011 wishes to contribute a sum of ₹ 5,00,000.
- (iii) RST Ltd., a company incorporated in year 2014, decides to contribute a sum of ₹ 3 lakhs.

CA (Final) – Nov 1999 (6 Marks)

**Ans.:** Keeping in view of provisions of Section 182 of the Companies Act, 2013 answers to given problem is as follows:

- (i) ABC Ltd. is a government company and it is prohibited from making any political contribution.
- (ii) EFG Ltd. is a public company registered in 2011 and has been in existence for more than 3 years; hence it can make political contribution only if the company has made average net profit of ₹ 66,66,667 or more ( $5,00,000 \times 100/7.5$ ) during last 3 financial year. EFG Ltd. shall make political contribution only by passing a resolution at the board meeting. EFG Ltd. shall disclose in its profit and loss account any amount contributed to political party during the financial year, giving particulars of the total amount contributed and the name of the party to which amount has been contributed.
- (iii) RST Ltd. is incorporated in year 2014 and has not been existence for a period of 3 financial years. Thus, it cannot make any political contribution.

**Que. No. 15] The Board of Directors of LM Ltd. propose to donate ₹ 3,00,000 to a school established exclusively for the benefit of children of employees and also donate ₹ 50,000 to a political party during the financial year ending 31st March, 2015. The average net profits determined in accordance with the provisions of Section 198 during the 3 immediately preceding financial years is ₹ 40,00,000. Examine with reference to the provisions of the Companies Act, 2013 whether the proposed donations are within the power of the board of directors of company.**  
CA (Final) – Nov 2009 (4 Marks)

**Ans.:** As per Section 181, the Board of Directors of a company may contribute to *bona fide* charitable and other funds. However, if contribution to charitable and other funds exceeds 5% of its average net profits for the 3 immediately preceding financial years, prior permission of the company in general meeting shall be required. Donating the amount to the school run exclusively for the benefit of employee does not amount to charitable contribution. It will be treated as 'welfare expenses', which will induce the employee to increase their efforts.

In the given case, the school is established exclusively for the benefit of the children of the employees of the company and hence the restriction u/s 181 is not applicable and the board is empowered to make the proposed donation.

**Donation to political parties:** It is presumed that LM Ltd. is not a government company and it has been in existence for more than 3 years. The proposed donation to a political party is only ₹ 50,000 which is less than 7.5% of the average net profit for 3 immediately preceding financial years. Hence, the board of directors is empowered to make a donation by passing a resolution at a board meeting. The company is also required to make proper disclosure in the profit and loss account. [Section 182]

**Que. No. 15A] 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 (₹ in Crore)
31 <sup>st</sup> March, 2013	10
31 <sup>st</sup> March, 2014	12
31 <sup>st</sup> March, 2015	08

The Board of directors of the company at its meeting decides to contribute to a charitable organization, for charitable purposes, a sum of ₹ 3 Crore out of the net profits of the financial year ended 31<sup>st</sup> 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 ₹ 1 Crore only?  
CS (Executive) – Dec 2015 (4 Marks)

**Ans.: Company to contribute to charitable funds [Section 181]:** The Board of Directors of a company may contribute to *bona fide* charitable and other funds. However, if contribution to charitable and other funds exceeds 5% of its average net profits for the 3 immediately preceding financial years, prior permission of the company in general meeting shall be required.

As per the facts given in case, the board of directors of PQR Ltd. desires to contribute ₹ 3 Crore to a charitable organization, which is more than 5% of its average net profits for the 3 immediately preceding financial years, hence prior permission of the company in general meeting shall be required.

If the board of directors of PQR Ltd. desires to contribute ₹ 1 Crore to a charitable organization, answer will be still same that is to say prior permission of the company in general meeting shall be required as ₹ 1 Crore is more than 5% of its average net profits of the 3 immediately preceding financial years.

**Working Note:**

$$\text{Average net profit} = \frac{10 \text{ Crore} + 12 \text{ Crore} + 8 \text{ Crore}}{3} = 10 \text{ Crore}$$

$$5\% \text{ of Average net profit} = 10 \text{ Crore} \times 5\% = 0.5 \text{ Crore}$$

**Que. No. 16] State the power of Board to make contributions to the National Defence Fund.**

**Can company contribute ₹ 5 lakhs to Prime Minister's relief fund?**

**CS (Final) – June 1996 (2 Marks)**

**Ans.: Power of Board and other persons to make contributions to national defence fund, etc. [Section 183]:** The Board of Directors of any company or any person or authority exercising the powers of the Board of Directors of a company, or of the company in general meeting, may, contribute such amount as it thinks fit to the National Defence Fund or any other Fund approved by the Central Government for the purpose of national defence.

Board can contribute amount under this section by passing resolution at board meeting or passing circular resolution.

**No limit on contribution:** There is a limit on the amount that a company may contribute under this section.

**Disclosure of contribution:** Every company shall disclose in its profits and loss account the total amount contributed by it to National Defence Fund or any other Fund approved by the Central Government.

**Approved funds u/s 293B of the Companies Act, 1956: [corresponding to Section 183 of the Companies Act, 2013]**

1. The Chief Secretary to the Government of Andhra Pradesh, Hyderabad, National Defence Fund, Andhra Pradesh
2. The National Defence Fund, Andhra Pradesh State People's Committee, Andhra Pradesh
3. The Bihar State National Defence And Jawans Welfare Fund, Bihar
4. The Chief Minister's Defence Fund, Kerala State Kerala
5. The National Defence Fund, Madras, Tamil Nadu
6. The Chief Minister's Defence Services Welfare Fund, Rajasthan, Rajasthan
7. The Chief Minister's Defence Forces Welfare Fund, Lucknow, Uttar Pradesh
8. The Chief Minister's Defence Purposes Fund of Uttar Pradesh, Lucknow, Uttar Pradesh
9. The Chief Minister's West Bengal Account National Defence Fund, West Bengal
10. Gujarat Chief Minister's Samik Fund, Gujarat
11. Prime Minister's National Relief Fund

**Que. No. 17] State the provisions of the Companies Act, 2013 relating to loans to directors**  
**CS (Executive) – June 2012 (6 Marks)**

**Ans.: Loan to directors, etc. [Section 185]:**

- (1) A company shall not 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. However, 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 utilized by the recipient of the loan or guarantee or security and any other relevant fact and
  - (b) The loans are utilised by the borrowing company for its principal business activities.

The expression "any person in whom any of the director of the company is interested" 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 25% 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.

**No prohibition in certain cases:** The prohibition of Section 185 shall not apply to –

- (a) The giving of any loan to a managing or whole-time director as a part of the conditions of service extended by the company to all its employees or 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 1 year, 3 year, 5 year or 10 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. However, the loans made under clauses (c) and (d) are utilized by the subsidiary company for its principal business activities.

**Effects of contravention of Section 185:** If any loan is advanced or a guarantee or security is given or provided in contravention of the provisions under Section 185, the company shall be punishable with fine which shall not be less than ₹ 5,00,000 but which may extend to ₹ 25,00,000.

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 6 months or
- with fine which shall not be less than ₹ 5,00,000 but which may extend to ₹ 25,00,000 or
- with both.

As per Rule 10 of the Companies (Meeting of Board and its Powers) Rules, 2014, Section 185 do not apply to following transactions :

- (1) 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 is exempted from the requirements under this section.
- (2) 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.

However, such are utilized by the subsidiary company for its principle business activities.

#### Judicial Views:

- ♦ If the company sells 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 loan to the director, it simply amounts to credit sale. [*Fredie Ardeshir Mehta vs. Union of India*, (1991) 1 Comp LJ 437 (Bom)]
- ♦ The company had given an advance of ₹ 5,000 to the wife of Managing Directors who was employed by the Company on monthly salary. The Madras High Court held that salary advance do not amount to loan and it cannot be said that an offence has been committed. [*M.R. Electronics Components Ltd. & Others vs. Assistant ROC*, (1986) 3 Comp. L.J. 28 (Mad.)]

**Que. No. 18] A loan given to the wife of the managing director who is a bona fide employee of the company need not necessarily be treated as loans given to relatives of directors of the company. Comment.**  
CS (Inter) - Dec 2005 (5 Marks)

**Ans.:** As per Section 185, the company cannot give any direct or indirect loan to director or to any other person in whom the director is interested.

In the case of *M.R. Electronics Components Ltd. & Others vs. Assistant ROC* (1986) 3 Comp. L.J. 28 (Mad.), it was held that if the company gives advance salary to its employee, it does not amount to loan and there is no contravention of Section 185. Thus, a loan given as advance salary to the wife of the managing director who is a bona fide employee of the company need not necessarily be treated as loans given to relatives of directors of the company.

**Que. No. 19] The Managing Director of a public limited company applied for purchasing a company's flat. The price of the flat is ₹ 40 lakh. The Managing Director suggested that he may be allowed to pay ₹ 20 lakh and the balance of ₹ 20 lakh may be recovered from his salary in 40 instalments. 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.**

CS (Inter) - Dec 2000 (4 Marks)

CS (Executive) - Dec 2011 (8 Marks), Dec 2014 (4 Marks)

**Ans.:** In *Fredie Ardeshir Mehta vs. Union of India*, (1991) 1 Comp LJ 437 (Bom) it was held that if the company sells 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 loan to the director.

In view of above, the observation made by Accounts Department that purchasing flat by MD will tantamount to providing house building advance is not correct.

**Que. No. 20] Gold Ltd. is a listed company with paid-up capital of ₹ 125 Crores and free reserves of ₹ 250 Crores. Silver Pvt. Ltd. has approached Gold Ltd. for a loan of ₹ 300 Crore to set up a manufacturing plant. Comment whether Gold Ltd. can give aforesaid loan to Silver Pvt. Ltd. keeping in view that Raman is a director in both the companies.**

CS (Inter) - June 2006 (4 Marks)

**Ans.:** As per Section 185, a company cannot directly or indirectly advance any loan, including any loan represented by a book debt to its directors or to any other person in whom the director is interested.

The expression "to any other person in whom director is interested" included a private company of which any director is a director or member.

Thus, Gold Ltd. cannot give loan to Silver Pvt. Ltd.

#### BOARD'S SANCTION FOR CONTRACTS IN WHICH DIRECTORS ARE INTERESTED

**Que. No. 21] It is mandatory for every director to disclose his interest or nature of his concern in other companies in which he is director. Comment.**

CS(Executive) - June 2016 (5 Marks)

**A director failed to disclose interest in a contract in which he was interested and the same was approved at the board meeting. Comment.**  
CS (Inter) - June 2003 (4 Marks)

**Explain the position of an interested director in the light of the provisions of Section 184.**

CS (Inter) - June 1999 (8 Marks), Dec 2005 (5 Marks)

**Ans.:** Disclosure of interest by director [Section 184(1)]: Every director shall at the first Board meeting in which he participates as a director disclose his concern or interest in any company or bodies corporate, firms, or other association which shall include the disclosure of shareholding held by him in Form MBP - 1.

Whenever there is any change in the disclosures already made, then fresh discourse should be made at the first Board meeting held after such change.

**Disclosure of interest in a contract or arrangement by director [Section 184(2)]:** Every director shall disclose the nature of his concern or interest at the meeting of the Board and shall not participate in meeting in which is directly or indirectly, concerned or interested in a contract or arrangement or proposed contract or arrangement.

The contract or arrangement may be -

- (a) with a body corporate in which
  - (i) director or director in association with any other director, holds more than 2% shareholding of that body corporate, or
  - (ii) director 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 become interested at a later stage:** If at the time when the contract or arrangement was entered into, the director was not interested director, but afterwards he becomes interested director, he shall disclose his interest at the first board meeting held after he becomes an interested director.

**Effect of contract entered without disclosure [Section 184(3)]:** A contract or arrangement entered into by the company without disclosure 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.

**Punishment for director for contravention [Section 184(4)]:** If a director of the company contravenes the provisions of Section 184(1) or (2), such director shall be punishable –

- with imprisonment for a term which may extend to 1 year or
- with fine which may extend to ₹ 1,00,000 or
- with both.

**Non-applicability of Section 184 [Section 184(5)]:** Noting in Section 184 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 2% of the paid-up share capital in the other company or the body corporate. (While calculating 2% shares in other company or body corporate, only investment of director is considered. Investment of his relative is not considered.)

**Some Important Points:**

- ♦ Section 184 applies to all companies, whether it is public company or private company.
- ♦ As per Section 184(2), an interested director shall not participate in the discussion and voting on the contract or arrangement in which he is interested. Thus, the presence of the interested director shall not be counted for determining quorum with respect to such contract.
- ♦ As per Section 167, the office of a director shall become vacant, in case –
  - (a) He fails to disclose his concern or interest in the contract or arrangement in which he is interested.
  - (b) He participates in the discussion and voting on the contract or arrangement in which he is interested

**Que. No. 21A] Barkha Ltd. has 4 directors on its Board. A Board meeting was convened which was attended by only 2 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.**

CS (Executive) – Dec 2016 (4 Marks)

**Ans.:** The appointment as an additional director of a person who is related to a director has been held not to violate the requirement of section 184 because such appointment does not constitute any "contract or arrangement" of the company with the sitting director [Shailesh Harilal Shah vs. Matushree Textiles Ltd. (1994) 2 Comp LJ 291 at 301: AIR 1994 Bom 20].

The director in question was not accordingly disentitled from participation and voting at a meeting of the Board.

**Que. No. 22] Director of ABC Ltd. are not holding any shares in MDJ Ltd. Similarly directors of MDJ Ltd. are not holding any shares in ABC Ltd. But, wife of director 'A' of ABC Ltd. holds 40% paid up capital of MDJ Ltd. Board of directors of ABC Ltd. entered into a contract with MDJ Ltd for purchase of goods and director 'A' did not disclose his indirect interest in MDJ Ltd. Examine whether 'A' has violated any provisions of the Companies Act, 2013 and also the validity of the contract.**

CA (Final) – Nov 1996 (4 Marks)

**Ans.:** As per Section 184(2), every director shall disclose the nature of his concern or interest at the meeting of the Board and shall not participate in meeting in which is directly or indirectly, concerned or interested in a contract or arrangement or proposed contract or arrangement.

As per facts given in case, 'A' is required to disclose his interest since he is indirectly interested in a contract, as his wife hold 40% paid up capital of MDJ Ltd.

Consequences of failure to disclose his interest are as follows:

- (1) 'A' shall vacate the office of director [Section 167]
- (2) The contract shall be voidable at the option of ABC Ltd. [Section 184(3)]
- (3) He shall be punishable –
  - (a) with imprisonment for a term which may extend to 1 year or
  - (b) with fine which shall not be less than ₹ 50,000 but which may extend to ₹ 1,00,000 or
  - (c) with both [Section 184(4)]

**Que. No. 23] X Ltd. entered into contract with M Ltd. for purchase of raw material of ₹ 2,50,000 at the prevailing market price. The director of X Ltd., Mr. B, was holding shares of the value of 1% of the paid up capital of M Ltd. Another director of X Ltd., Mr. C was holding 1.5% paid up capital of M Ltd. Mr. B has already given general notice to X Ltd. that he was interested in M Ltd. Comment.** CA (Final) – Nov 2000 (4 Marks)

**Ans.:** As per Section 184(2), every director of a company who is in any way, whether directly or indirectly, concerned or interested in a contract or arrangement or proposed contract or arrangement entered into or to be entered into with a body corporate in which director or director with any other director, holds more than 2% shareholding of that body corporate shall disclose the nature of his concern or interest at the meeting of the Board in which the contract or arrangement is discussed and shall not participate in such meeting.

In the present case, the aggregate shareholding of Mr. B and Mr. C is more than 2% of the paid up share capital of M Ltd. and thus Section 184(2) is attracted. Hence, Mr. B and Mr. C both are required to disclose the nature of their interest i.e. their shareholding in M Ltd. in the Board meeting of X Ltd. in which the contract or arrangement between X Ltd. and M Ltd. is first discussed.

The general notice given by Mr. B in terms of Section 184(1) is not sufficient as requirement of Section 184(2) are independent of Section 184(1). Thus by non-disclosure both Mr. B and Mr. C has contravened Section 184(2).

Consequences of failure to disclose his interest are as follows:

- (1) Both Mr. B and Mr. C shall vacate the office of director [Section 167]
- (2) The contract shall be voidable at the option of X Ltd. [Section 184(3)]
- (3) Both Mr. B and Mr. C shall be punishable –
  - (a) with imprisonment for a term which may extend to 1 year or
  - (b) with fine which shall not be less than ₹ 50,000 but which may extend to ₹ 1,00,000 or
  - (c) with both [Section 184(4)]

**Que. No. 24] Mr. G, a Director of Sam Ltd. was interested in a contract to be entered into by the company. The Articles of Association of Sam Ltd. contained a clause, which prohibited the directors from voting on the resolution in respect of any contract in which he is interested. The matter in respect of the said contract was put up for approval of the shareholders in a general meeting. The general meeting was attended by Mr. G and he also voted on the resolution. Mr. G, claims that he has a right to vote on the resolution in the general meeting.** CA (Final) – Nov 2005 (3 Marks)

**Ans.:** When a director exercises his voting right as a shareholder, he is free to vote in his own best interests like any other shareholder. An article in the articles of association prohibiting a director from voting on a resolution in respect of a contract in which he is interested does not debar him from voting thereon as a shareholder in a general meeting. [*East Pant Du United Lead Mining Co. Ltd. vs. Merry Weather* (13 WR 216)]

A shareholder may vote as he pleases even when his interests are different from or opposed to those of the company. Shareholders are not trustees for the company or for one another. The restriction in the article pertaining to voting applies only to the board meetings and not to the general meetings.

In view of the above legal pronouncements, there cannot be any restriction on the voting right of a director in a general meeting where he is voting as a shareholder. Hence, the contention of Mr. G is correct.

**Que. No. 25]** PQR Ltd. having paid-up capital of ₹ 50 lakh, entered into a contract with the company XYZ Ltd. in which director D was holding 20% shares. The director did not disclose interest at the time of approval of the contract by the board. Comment.

CS (Inter) - Dec 2000 (4 Marks)

**Ans.:** As per Section 184(2), every director of a company who is in any way, whether directly or indirectly, concerned or interested in a contract or arrangement or proposed contract or arrangement entered into or to be entered into with a body corporate in which director or director with any other director, holds more than 2% shareholding of that body corporate shall disclose the nature of his concern or interest at the meeting of the Board in which the contract or arrangement is discussed and shall not participate in such meeting.

In the present case, the aggregate shareholding of 'D' is 20% which is more than 2% of the paid up share capital of XYZ Ltd. and thus Section 184(2) is attracted. Hence, 'D' is required to disclose the nature of his interest i.e. their shareholding in XYZ Ltd. in the Board meeting of PQR Ltd. in which the contract or arrangement between XYZ Ltd. and PQR Ltd. is first discussed. Thus, by non-disclosure 'D' has contravened Section 184(2).

Consequences of failure to disclose his interest are as follows:

- (1) 'D' shall vacate the office of director [Section 167]
- (2) The contract shall be voidable at the option of PQR Ltd. [Section 184(3)]
- (3) 'D' shall be punishable -
  - (a) with imprisonment for a term which may extend to 1 year or
  - (b) with fine which shall not be less than ₹ 50,000 but which may extend to ₹ 1,00,000 or
  - (c) with both [Section 184(4)]

**Que. No. 26]** Rana is a director of Urmi Exports Ltd. Urmi Exports Ltd. wishes to enter into a contract with Srilakshmi Creations Pvt. Ltd., a company registered in Mauritius in which Mrs. Rana is a director. What compliances, if any, are required under the Companies Act, 2013?

CS (Inter) - June 2005 (5 Marks)

**Ans.:** As per Section 184(2), every director shall disclose the nature of his concern or interest at the meeting of the Board and shall not participate in meeting in which is directly or indirectly, concerned or interested in a contract or arrangement or proposed contract or arrangement.

As per facts given in case, Rana is required to disclose his interest since he is indirectly interested in a contract, as his wife is director of Srilakshmi Creations Pvt. Ltd.

Consequences of failure to disclose his interest are as follows:

- (1) Rana shall vacate the office of director [Section 167]
- (2) The contract shall be voidable at the option of Urmi Exports Ltd. [Section 184(3)]
- (3) Rana shall be punishable -
  - (a) with imprisonment for a term which may extend to 1 year or
  - (b) with fine which shall not be less than ₹ 50,000 but which may extend to ₹ 1,00,000 or
  - (c) with both [Section 184(4)]

Further as per Section 189 the particulars of the contract must be entered in "register of contract in which directors are interested" with prescribed period and it should be signed by all the directors present in the next board meeting.

**Que. No. 27]** Write a short note on: Register of contracts or arrangements in which directors are interested

**Ans.:** Register of contracts or arrangements in which directors are interested [Section 189]: Every company shall keep one or more registers giving separately the particulars of all contracts or arrangements to Section 184 (2) or Section 188 applies, in prescribed manner and containing prescribed particulars.

**Rule 16 of the Companies (Meeting of Board and its Powers) Rules, 2014**

**Placing and signing of register:** After entering the particulars, register shall be placed before the next meeting of the Board and signed by all the directors present at the meeting.

**Disclosure:** Every director or KMP shall, within a period of 30 days of his appointment, or relinquishment of his office, disclose to the company the particulars specified in Section 184 (1) relating to his concern or interest in the other associations which are required to be included in the register or other information relating to himself as may be prescribed.

**Place of keeping and inspection:** The register shall be kept at the registered office and it shall be open for inspection at such office during business hours and extracts may be taken and copies may be required by any member of the company shall be furnished by the company in prescribed manner on payment of prescribed fees.

**Placing the register at the AGM:** The register shall be produced at the commencement of every AGM 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.

**Non-applicability:** Following contract or arrangement shall not be required to be included in the register, if

- (a) it relates to the sale, purchase or supply of any goods, materials or services if the value of goods and materials or the cost of services does not exceed ₹ 5,00,000 in the aggregate in any year; or
- (b) it relates to a banking company for the collection of bills in the ordinary course of its business.

**Penalty:** Every director who fails to comply with the provisions of this section and the rules made thereunder shall be liable to a penalty of ₹ 25,000.

**Rule 16 of the Companies (Meeting of Board and its Powers) Rules, 2014** makes the following provisions regarding the "register of contracts or arrangements in which directors are interested"

- (1) Every company shall maintain one or more registers in Form No. MBP. 4, and shall enter therein the particulars of -

- (a) company or companies or bodies corporate, firms or other association of individuals, in which any director has any concern or interest, as mentioned under Section 184(1).

However, the particulars of the company or companies or bodies corporate in which a director himself together with any other director holds 2% or less of the paid-up share capital would not be required to be entered in the register

- (b) contracts or arrangements with a body corporate or firm or other entity as mentioned under Section 184(2), in which any director is, directly or indirectly, concerned or interested and
- (c) contracts or arrangements with a related party with respect to transactions to which section 188 applies.
- (2) The entries in the register shall be made at once, whenever there is a cause to make entry, in chronological order and shall be authenticated by the Company Secretary of the company or by any other person authorized by the Board for the purpose.
- (3) The register shall be kept at the registered office of the company and the register shall be preserved permanently and shall be kept in the custody of the Company Secretary of the company or any other person authorized by the Board for the purpose.
- (4) The company shall provide extracts from such register to a member of the company on his request, within 7 days from the date on which such request is made upon the payment of fee specified in the articles of the company but not exceeding ₹ 10 per page.

**Que. No. 28] Define the term 'related party' as defined in Companies Act, 2013.**

**Ans.: Related Party [Section 2(76)]:** 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 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 2% of its paid-up share capital
- (vi) any body 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 clauses (vi) and (vii) shall apply to the advice, directions or instructions given in a professional capacity

- (viii) any body 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 venturer of a company
- (ix) such other person as may be prescribed.

**Relative [Section 2(77)]:** Relative, with reference to any person, means anyone who is related to another, if -

- (i) they are members of a Hindu Undivided Family
- (ii) they are husband and wife or
- (iii) one person is related to the other in such manner as may be prescribed

As per 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 (the term "Father" includes step-father)
- (2) Mother (the term "Mother" includes the step-mother)
- (3) Son (the term "Son" includes the step-son)
- (4) Son's wife
- (5) Daughter
- (6) Daughter's husband
- (7) Brother (term "Brother" includes the step-brother)
- (8) Sister (the term "Sister" includes the step-sister)

**Que. No. 29] State the legal requirements to be complied with by company for entering related party transactions.**

What transactions are considered as 'related party transactions' under the Companies Act, 2013? CS (Executive) - June 2015 (4 Marks)

What do you understand by the term 'office or place of profit' held by a relative of a director in the company? CS (Inter) - Dec 1999 (4 Marks), June 2000 (4 Marks)

**Ans.: Related party transactions [Section 188(1)]:** A company may enter into related party transaction only with the approval by a resolution at a meeting of the Board. A related party transaction cannot be approved by circular resolution.

The provision applies to following related party contracts or arrangements:

- (a) sale, purchase or supply of any goods or materials
- (b) selling or disposing of, or buying, property of any kind
- (c) leasing of property
- (d) availing or rendering of services
- (e) appointment of any agent for purchase or sale of goods, materials, services or property
- (f) related party's appointment to any office or place of profit in the company, its subsidiary company or associate company
- (g) underwriting the subscription of any securities or derivatives of the company:

"Office or place of profit" means any office or place -

- (i) Where such office or place is held by a director, if the director holding it receives from the company anything by way of remuneration over and above the remuneration to which he is entitled as director, by way of salary, fee, commission, perquisites, any rent-free accommodation, or otherwise;
- (ii) Where such office or place is held by an individual other than a director or by any firm, private company or other body corporate, if the individual, firm, private company or body corporate holding it receives from the company anything by way of remuneration, salary, fee, commission, perquisites, any rent-free accommodation, or otherwise

In case of company having share capital of not less than ₹ 10 Crore, related party transaction can be entered only after approval of shareholder by passing ordinary resolution in general meeting.

**Related party not to vote at the general meeting:** A member who is a related party shall not vote on resolution at the general meeting called to approve any contract or arrangement with related party. However, this provision shall not apply to company in which 90% or more members in numbers are relative of promoters or are related parties.

**Non-applicability:** Provisions of Section 188 shall not apply to any transactions entered into by the company in its ordinary course of business and which are on an arm's length basis.

The expression "arm's length transaction" means a transaction between two related parties that is conducted as if they were unrelated, so that there is no conflict of interest.

**Relaxation in case of holding and wholly owned subsidiary:** In case related party transaction between holding company and its wholly owned subsidiary, passing of resolution in general meeting is not required if accounts of holding company and its subsidiary are consolidated and placed before shareholder at general meeting for approval.

In case of private company, a holding, subsidiary or associate company or subsidiary of its holding company will not be considered as 'related party'. Thus, restrictions on related party transactions will not apply if a private company enters into contract or arrangement with its holding, subsidiary or associate company or subsidiary of its holding company. However, if holding, subsidiary or associate company is public company provisions will apply.

**Disclosure in Board's report of related party transaction [Section 188(2)]:** Every contract or arrangement entered into Section 188(1) shall be referred to in the Board's report to the shareholders along with the justification for entering into such contract or arrangement.

**Consequences if contract or arrangement is not ratified by Board or general meeting [Section 188(3) & (4)]:** If contract or arrangement is entered into by a director or any other employee, without obtaining the consent of the Board or approval by a ordinary resolution in the general meeting under Section 188(1) and if it is not ratified by the Board or, as the case may be, by the shareholders at a meeting within 3 months from the date on which such contract or arrangement was entered into, then following consequences shall follow:

- (i) such contract or arrangement shall be voidable at the option of the Board or shareholder
- (ii) if the contract or arrangement is with a related party to any director, or is authorized by any other director, the directors concerned shall indemnify the company against any loss incurred by it
- (iii) the company may proceed against a director or any other employee who had entered into such contract or arrangement in contravention of the provisions of this section for recovery of any loss sustained by it as a result of such contract or arrangement.

**Penalty [Section 188(5)]:** Any director or any employee of a company, who had entered into or authorized the contract or arrangement in violation of the provisions of this section shall -

- (1) In case of listed company, be punishable
  - with imprisonment for a term which may extend to 1 year or
  - with fine which shall not be less than ₹ 25,000 but which may extend to ₹ 5,00,000 or
  - with both
- (2) In case of any other company, be punishable
  - (a) with fine which shall not be less than ₹ 25,000 but which may extend to ₹ 5,00,000.

**Rule 15 of the Companies (Meetings of Board and its Powers) Rules, 2014** makes the following provisions relating to related party transactions:

The agenda of the Board meeting at which the resolution is proposed to be moved shall disclose-

- (i) the name of the related party and nature of relationship
- (ii) the nature, duration of the contract and particulars of the contract or arrangement
- (iii) the material terms of the contract or arrangement including the value, if any
- (iv) any advance paid or received for the contract or arrangement, if any
- (v) the manner of determining the pricing and other commercial terms, both included as part of contract and not considered as part of the contract
- (vi) whether all factors relevant to the contract have been considered, if not, the details of factors not considered with the rationale for not considering those factors
- (vii) any other information relevant or important for the Board to take a decision on the proposed transaction.

In following cases, related party transaction requires prior approval of shareholder in general meeting by way of **special resolution**:

- (a) as contracts or arrangements with respect to clauses (a) to (e) of Section 188(1) with criteria, as mentioned below:
  - (i) sale, purchase or supply of any goods or materials, directly or through appointment of agent, amounting to 10% or more of the turnover of the company or ₹ 100 Crore, whichever is lower, as mentioned in Section 188(1)(a) & (e)
  - (ii) selling or otherwise disposing of or buying property of any kind, directly or through appointment of agent, amounting to 10% or more of net worth of the company or ₹ 100 Crore, whichever is lower, as mentioned in Section 188(1)(b) & (e)
  - (iii) leasing of property of any kind amounting to 10% or more of net worth of the company or 10% or more of turnover or ₹ 100 Crore, whichever is lower, as mentioned in Section 188(1)(c)
  - (iv) availing or rendering of any services, directly or through appointment of agent, amounting to 10% or more of the turnover of the company or ₹ 50 Crore, whichever is lower, as mentioned in Section 188(1)(d) & (e)
- (b) appointment to any office or place of profit in the company, its subsidiary company or associate company at a monthly remuneration exceeding ₹ 2,50,000 as mentioned in Section 188(1)(f) or
- (c) remuneration for underwriting the subscription of any securities or derivatives thereof of the company exceeding 1% of the net worth as mentioned in Section 188(1)(g).

The explanatory statement to be annexed to the notice of a general meeting convened pursuant to Section 101 for passing special resolution shall contain the following particulars, namely:

- (a) Name of the related party
- (b) Name of the director or key managerial personnel who is related, if any
- (c) Nature of relationship
- (d) Nature, material terms, monetary value and particulars of the contract or arrangement
- (e) Any other information relevant or important for the members to take a decision on the proposed resolution.

**Que. No. 30]** Kith & Consultants Pvt. Ltd. seeks your legal advice regarding the following appointments relating to directors and their relative.

- (1) Miss Niece, a relative of a director, is to be appointed as Chief Public Relation Officer on a salary of ₹ 65,000 per month.
- (2) Mr. Well-connected, a relative of director, is to be appointed as Chief Executive Officer on salary of ₹ 3,00,000 per month.
- (3) Mr. Nephew, who is relative of the director, is to be appointed as Managing Director on monthly salary of ₹ 3,50,000 plus other perquisites as applicable to other executives of the company.

Advise explaining relevant provisions of the Companies Act, 2013.

CA (Final) – May 2002 (6 Marks)

**Ans.:** The term 'related party' is defined in Section 2(76) and legal requirements to be complied with by company for entering 'related party transaction' are specified in Section 188. Keeping in view the provisions of Section 2(76) and Section 188, answers to given problems is as follows:

- (1) Miss Niece is a relative of a director. As per Section 2 (76), a relative of director is a related party. Thus, appointment of Miss Niece as a Chief Public Relation Officer on a salary of ₹ 65,000 p.m. amounts to appointment of a related party to an office or place of profit in the company. However, such appointment does not require the prior approval of the members by passing a special resolution since the monthly remuneration does not exceeds ₹ 2,50,000.

The appointment of Miss Niece as Chief Public Relation Officer on a salary of ₹ 65,000 p.m. is to be made by complying the following:

- (a) Consent of the Board is to be obtained by passing a resolution at a Board Meeting.
- (b) The agenda of the Board Meeting in which the approval of the Board is to be obtained shall contain the particulars prescribed under Rule 15(1) of the Companies (Meeting of Board and its Powers) Rules, 2014.
- (c) If any director is interested in such appointment, he shall not be present at the Board Meeting during discussion on such appointment.

- (2) Mr. Well-connected is a relative of a director. As per Section 2(76), a relative of director is a related party. Thus, appointment of Mr. Well-connected as a Chief Executive Officer on a salary of ₹ 3,00,000 p.m. amounts to appointment of a related party to an office or place of profit in the company. Such appointment require the prior approval of the members by passing a special resolution since the monthly remuneration exceeds ₹ 2,50,000.

The appointment of Mr. Well-connected as Chief Executive Officer on a salary of ₹ 3,00,000 per month is to be made by complying the following:

- (a) Consent of the Board is to be obtained by passing a resolution at a Board Meeting.
- (b) The agenda of the Board Meeting in which the approval of the Board is to be obtained shall contain the particulars prescribed under Rule 15(1) of the Companies (Meeting of Board and its Powers) Rules, 2014.
- (c) If any director is interested in such appointment, he shall not be present at the Board Meeting during discussion on such appointment.
- (d) The explanatory statement annexed to the notice of general meeting in which special resolution is passed, shall contain the prescribed particulars.
- (e) If Mr. Well-connected is also member of the company, he shall not vote on such special resolution.

- (3) Mr. Nephew is a relative of a director. As per Section 2(76), a relative of director is a related party. However, when a person is appointed as managing director, he does not anything more than the remuneration to which he is entitled as a director and thus he cannot be said to be appointment to any office or place of profit in the company and hence Section 188 is not attracted.

**Que. No. 31]** Reliable Casing Ltd. is a subsidiary of Unique Machineries Ltd. and its Board of Director have appointed on a consolidated monthly salary of ₹ 3,00,000 to Ram Singh, a director of Unique Machineries Ltd., as its Factory Manager. State the legal requirements to be complied with under the Companies Act, 2013 to give effect to above appointment.

CA (Final) – May 1997 (2 Marks)

**Ans.:** The term 'related party' is defined in Section 2(76) and legal requirements to be complied with by company for entering 'related party transaction' are specified in Section 188. Keeping in view the provisions of Section 2(76) and Section 188, answers to given problems is as follows:

- (i) A subsidiary company i.e. Reliable Casing Ltd. proposes to appoint Ram Singh, a director of its holding company i.e. Unique Machineries Ltd. Such appointments amounts to holding office or place of profit and provisions of the Section 188 get attracted. Thus, Ram Singh can be appointed as factory manager after complying the following provisions:
  - (a) Consent of the Board is to be obtained by passing a resolution at a Board Meeting.
  - (b) The agenda of the Board Meeting in which the approval of the Board is to be obtained shall contain the particulars prescribed under Rule 15(1) of the Companies (Meeting of Board and its Powers) Rules, 2014.
  - (c) The apportionment shall require the prior approval of members by a special resolution as monthly remuneration is exceeding ₹ 2,50,000.
  - (d) The explanatory statement annexed to the notice of general meeting in which special resolution is passed, shall contain the prescribed particulars.

**Que. No. 32]** Rakesh Sharma, not related to any director of the Unique Machineries Ltd. appointed as Chief Accountant on 1.6.2015, but his relative has been appointed as additional director of Unique Machineries Ltd. w.e.f. 1.7.2015.

CA (Final) – May 1997 (2 Marks)

**Ans.:** Rakesh Sharma is not a relative of director at the time of his appointment and thus he not related party at the time of his appointment as per Section 2(76). Hence, provision of Section 188 is not attracted and he can be appointed as Chief Accountant in Unique Machineries Ltd. at a monthly salary of ₹ 3,00,000 without requiring any compliance with any legal requirement of Section 188.

**Que. No. 33]** Sweet Tea Ltd. 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 Ltd. is a partner.
- (2) R & T Pvt. Ltd. in which one of the director of Sweet Tea Ltd. is a member.
- (3) Strong Tea Ltd. in which one of the directors of Sweet Tea Ltd. is a director holding 3% of the paid up capital of Strong Tea Ltd.

Advise the steps that should be taken by Sweet Tea Ltd. taking into account the relevant provisions of the Companies Act, 2013 for entering into contracts in which the directors are interested.

CA (Final) – May 2014 (8 Marks)

**Ans.:** The term 'related party' is defined in Section 2(76) and legal requirements to be complied with by company for entering 'related party transaction' are specified in Section 188. Keeping in view the provisions of Section 2(76) and Section 188, answers to given problems is as follows:

- (1) Tea Bros., a partnership firm in which a director of Sweet Tea Ltd. is a partner, is related party as per Section 2(76) and hence provisions of Section 188 are attracted.
- (2) R & T Pvt. Ltd. in which one of the director of Sweet Tea Ltd. is a member, is related party as per Section 2(76) and hence provisions of Section 188 are attracted.
- (3) Strong Tea Ltd. in which one of the directors of Sweet Tea Ltd. is a director holding 3% of the paid up capital of Strong Tea Ltd., is related party as per Section 2(76) as holding of director is more than 2% and hence provisions of Section 188 are attracted.

Following legal requirements are required to be complied with for sale of tea to any of the above parties:

- (a) Consent of the Board is to be obtained by passing a resolution at a Board Meeting.
- (b) The agenda of the Board Meeting in which the approval of the Board is to be obtained shall contain the particulars prescribed under Rule 15(1) of the Companies (Meeting of Board and its Powers) Rules, 2014.
- (c) If any director is interested in such contract or arrangement, he shall not be present at the Board Meeting during discussion on any such contract or arrangement.
- (d) The contract or arrangement shall require the prior approval of the member by a special resolution if the value of the contract or arrangement for sale, purchase or supply of any goods or materials exceeds 10% of the turnover or ₹ 100 Crore, whichever is lower.
- (e) The explanatory statement annexed to the notice of general meeting in which special resolution is passed, shall contain the prescribed particulars.
- (f) If member is related party, he shall not vote on special resolution.

**Que. No. 34] The Managing Director of a public company wants to purchase furniture of the company's guest house at a book value. Comment.**

**CS (Inter) - Dec 2001 (4 Marks)**

**Ans.:** As per Section 2(76), a director of the company is a related party and sale of furniture to director is related party transaction and hence provisions of Section 188 get attracted.

If company's share capital is not less than ₹ 10 Crore, related party transaction can be entered only after approval of shareholder by passing **ordinary resolution** in general meeting.

However, as per Rule 15 of Companies (Meeting of Board and its Power) Rules, 2014, such transaction will require prior approval of shareholder by way of passing special resolution if value of property exceeds 10% of **net worth** of the company or ₹ 100 Crore, whichever is lower.

Following legal requirements are required to be complied with for sale of furniture of the company's guest house at a book value to the managing director:

- (a) Consent of the Board is to be obtained by passing a resolution at a Board Meeting.
- (b) The agenda of the Board Meeting in which the approval of the Board is to be obtained shall contain the particulars prescribed under Rule 15(1) of the Companies (Meeting of Board and its Powers) Rules, 2014.
- (c) If any director is interested in such contract, he shall disclose his interest and shall not be present at the Board Meeting during discussion on any such contract or arrangement.
- (d) The explanatory statement annexed to the notice of general meeting in which special resolution is passed, shall contain the prescribed particulars.

- (e) If managing director is also members of company, he cannot vote at the meeting of shareholder requiring ordinary or special resolution.

**Que. No. 35] In what way does the Companies Act, 2013 restricts the non-cash transactions involving directors of a public limited company? Explain.**

**CA (Final) - Nov 2014 (8 Marks)**

**Ans.:** Non-cash transaction means acquiring or selling assets for consideration other than cash.

**Restriction on non-cash transactions involving directors [Section 192]:** No company shall enter into following non-cash transactions-

- (a) A director of the company or its holding, subsidiary or associate company or a person connected with him acquires assets for consideration other than cash from the company or
- (b) The company acquires assets from director or person connected with directors.

Non-cash transactions can be entered into by the company only with the approval of shareholder in general meeting.

If the director or connected person is a director of its holding company, approval shall also be obtained by passing a resolution in general meeting of the holding company.

**Notice of general meeting approving non-cash transaction [Section 192(2)]:** 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 duly calculated by a registered valuer.

- Contract to be voidable [Section 192(3)]:** Any arrangement entered into by a company or its holding company in contravention of the provisions of Section 192 shall be voidable at the option of the company.

However, in following cases the contract is not voidable at the option of company:

- (a) If the company has been indemnified by any other person for any loss or damage caused to it or
- (b) Third party acquires rights *bona fide* for value and without notice of the contravention.

**Que. No. 35A] 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.**

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

**Ans.:** **Restriction on non-cash transactions involving directors [Section 192]:** No company shall enter into following non-cash transactions-

- (a) A director of the company or its holding, subsidiary or associate company or a person connected with him acquires assets for consideration other than cash from the company or
- (b) The company acquires assets from director or person connected with directors.

Non-cash transactions can be entered into by the company only with the approval of shareholder in general meeting.

As per the facts given in case, the 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 general meeting, which is not valid as per Section 192 of the Companies Act, 2013. The company should have taken approval of shareholder in general meeting by way of passing special resolution.

### BOARD MEETING

**Que. No. 36]** State the number of board meeting that a company must hold each year as per the Companies Act, 2013.

**Ans.: Meetings of Board [Section 173(1)]:**

**First Board Meeting:** Every company shall hold the first meeting of the Board of Directors within 30 days of the date of its incorporation.

**Subsequent Board Meetings:** Every company shall hold a minimum 4 meetings of its Board of Directors every year. The gap between two board meetings should not be more than 120 days.

In case of One Person Company (OPC), small company and dormant company

- At least one meeting of the Board of Directors has been conducted in each half of a calendar year, and
- The gap between the two meetings is not less than 90 days.

No board meeting is required to be held by OPC in which there is only one director on its Board. [Section 173(5)]

**Que. No. 37]** During the year 2015, A Ltd. held four meetings of Board on 2nd January, 2015, 10th May 2015, 16th October, 2015, and 31st December, 2015. Examine whether this was in accordance with the provisions of the Companies Act, 2013.

CS (Final) – June 1995 (5 Marks)

**Ans.: As per Section 173(1),** every company shall hold a minimum 4 meetings of its Board of Directors every year. The gap between two board meetings should not be more than 120 days.

As per facts given in case, gap between various meetings are shown below:

2 <sup>nd</sup> January, 2015 to 10 <sup>th</sup> May 2015	127 days
10 <sup>th</sup> May 2015 to 16 <sup>th</sup> October, 2015	158 days
16 <sup>th</sup> October, 2015, to 31 <sup>st</sup> December, 2015	75 days

Thus, from the above calculation, it is clear that company has contravened provisions of Section 173(1) for the meetings held on 10<sup>th</sup> May 2015 & 16<sup>th</sup> October, 2015.

**Que. No. 38]** Following are the dates of Board Meetings held by the Jolly Ltd. during the year 2015:

**First Meeting – 15.1.2015**

**Second Meeting – 25.4.2015**

**Third Meeting – 31.7.2015**

**Fourth Meeting – 21.10.2015**

However, in fourth meeting was adjourned due to want of quorum and held on 10.11.2015. Do you think that company has contravened provisions of Section 173(1) of the Companies Act, 2013?

**Ans.: As per Section 173(1),** every company shall hold a minimum 4 meetings of its Board of Directors every year. The gap between two board meetings should not be more than 120 days.

As per facts given in case, gap between various meetings are shown below:

15.1.2015 to 25.4.2015	100 days
25.4.2015 to 31.7.2015	97 days
31.7.2015 to 21.10.2015	92 days

In case of fourth meeting date of original meeting will be taken and not the date of adjourned meeting. This is so because adjourned meeting is mere continuance of original meeting.

Since Jolly Ltd. has held all the four Board Meeting during the calendar year 2015 and the gap between any two meetings is not more than 120 days, it has complied with Section 173(1).

**Que. No. 39]** Anubhav Ltd. held four board meeting in a calendar year with an interval of more than 3 months in between two board meeting. Comment.

CS (Inter) – Dec 2003 (4 Marks)

**Ans.: As per Section 173(1),** every company shall hold a minimum 4 meetings of its Board of Directors every year. The gap between two board meetings should not be more than 120 days.

As per facts given in case gap of two meetings is more than 3 months (average 90 days) but if it has held the meetings keeping gap of not be more than 120 days, the Anubhav Ltd. has complied the Section 173(1) of the Act.

**Que. No. 40]** The Board of directors of a company met thrice in the year 2015 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 requirements of meetings to be held in a calendar year or violated the requirements thereof?

CS (Executive) – Dec 2013 (4 Marks)

**Ans.: As per Section 173(1),** every company shall hold a minimum 4 meetings of its Board of Directors every year. The gap between two board meetings should not be more than 120 days.

If the gap between 1<sup>st</sup> & 2<sup>nd</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> meeting is not more than 120 days then there is no default of Section 173(1).

In case of 4<sup>th</sup> meeting, it is stated in problem that, meeting was held at all due to want of quorum and hence there is default of Section 173(1).

**Que. No. 41]** State the provisions relating to holding of Board Meeting through video conferencing under the Companies Act, 2013.

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. Advice the Board.

CS (Executive) – June 2015 (4 Marks)

**Ans.: Manner of participation in Board Meetings [Section 173(2)]:** The participation of directors in a meeting of the Board may be either in person (personally present) or through video conferencing or other audio visual means.

The system of video conferencing or other audio visual means must be capable of recording and recognizing the participation of the directors and of recording and storing the proceedings of such meetings along with date and time.

As per Rule 4 of the Companies (Meetings of Board and its Powers) Rules, 2014 following matters shall not be dealt with in a meeting 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 accounts and
- (v) The approval of the matter relating to amalgamation, merger, demerger, acquisition and takeover.

**Procedure for conducting meetings of Board through video conferencing or other audio visual means [Rule 3 of the Companies (Meetings of Board and its Powers) Rules, 2014]:** A company shall comply with the following procedure, for convening and conducting the Board meetings through video conferencing or other audio visual means.

- (1) Every Company shall make necessary arrangements to avoid failure of video or audio visual connection.
- (2) The Chairperson of the meeting and the Company Secretary, if any, shall take due and reasonable care-
  - (a) to safeguard the integrity of the meeting by ensuring sufficient security and identification procedures;
  - (b) to ensure availability of proper video conferencing or other audio visual equipment or facilities for providing transmission of the communications for effective participation of the directors and other authorized participants at the Board meeting;
  - (c) to record proceedings and prepare the minutes of the meeting;
  - (d) to store for safekeeping and marking the tape recording(s) or other electronic recording mechanism as part of the records of the company at least before the time of completion of audit of that particular year.
  - (e) to ensure that no person other than the concerned director are attending or have access to the proceedings of the meeting through video conferencing mode or other audio visual means; and
  - (f) to ensure that participants attending the meeting through audio visual means are able to hear and see the other participants clearly during the course of the meeting;

Provided that the persons, who are differently abled, may make request to the Board to allow a person to accompany him.

- (3) (a) The notice of the meeting shall be sent to all the directors in accordance with the provisions of Section 173(3) of the Act.
  - (b) 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.
  - (c) 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.
  - (d) If the director intends to participate through video conferencing or other audio visual means, he shall give prior intimation to that effect sufficiently in advance so that company is able to make suitable arrangements in this behalf.
  - (e) The director, who desire, to participate may intimate his intention of participation through the electronic mode at the beginning of the calendar year and such declaration shall be valid for one calendar year.
  - (f) In the absence of any intimation under clause (c), it shall be assumed that the director shall attend the meeting in person.
- (4) At the commencement of the meeting, a roll call shall be taken by the Chairperson when every director participating through video conferencing or other audio visual means shall state, for the record, the following namely:-
  - (a) name;
  - (b) the location from where he is participating;
  - (c) that he has received the agenda and all the relevant material for the meeting; and
  - (d) that no one other than the concerned director is attending or having access to the proceedings of the meeting at the location mentioned in clause (b);

- (5) After the roll call, the Chairperson or the Company Secretary shall inform the Board about the names of persons other than the directors who are present for the said meeting at the request or with the permission of the Chairperson and confirm that the required quorum is complete.

*Explanation:* 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 any provisions of the Act or the rules.

The Chairperson shall ensure that the required quorum is present throughout the meeting.

- (6) With respect to every meeting conducted through video conferencing or other audio visual means authorized under these rules, the scheduled venue of the meeting as set forth in the notice convening the meeting, which shall be in India, shall be deemed to be the place of the said meeting and all recordings of the proceedings at the meeting shall be deemed to be made at such place.
- (7) The statutory registers which are required to be placed in the Board meeting as per the provisions of the Act shall be placed at the scheduled venue of the meeting and where such registers are required to be signed by the directors, the same shall be deemed to have been signed by the directors participating through electronic mode, if they have given their consent to this effect and it is so recorded in the minutes of the meeting.
- (8) Every participant shall identify himself for the record before speaking on any item of business on the agenda.
 

If a statement of a director in the meeting through video conferencing or other audio visual means is interrupted or garbled, the Chairperson or Company Secretary shall request for a repeat or reiteration by the Director.
- (9) If a motion is objected to and there is a need to put it to vote, the Chairperson shall call the roll and note the vote of each director who shall identify himself while casting his vote.
- (10) From the commencement of the meeting and until the conclusion of such meeting, no person other than the Chairperson, Directors, Company Secretary and any other person whose presence is required by the Board shall be allowed access to the place where any director is attending the meeting either physically or through video conferencing without the permission of the Board.
- (11) At the end of discussion on each agenda item, the Chairperson of the meeting shall announce the summary of the decision taken on such item along with names of the directors, if any, who dissented from the decision taken by majority.

The minutes shall disclose the particulars of the directors who attended the meeting through video conferencing or other audio visual means.

- (12) The draft minutes of the meeting shall be circulated among all the directors within fifteen days of the meeting either in writing or in electronic mode as may be decided by the Board.

Every director who attended the meeting, whether personally or through video conferencing or other audio visual means, shall confirm or give his comments in writing, about the accuracy of recording of the proceedings of that particular meeting in the draft minutes, within seven days or some reasonable time as decided by the Board, after receipt of the draft minutes failing which his approval shall be presumed.

After completion of the meeting, the minutes shall be entered in the minute book as specified under Section 118 of the Act and signed by the Chairperson.

*Explanation:* "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 an intermediary and to participate effectively in the meeting.

**Que. No. 42] State the provisions of the Companies Act, 2013 in respect of notice of Board Meeting.**

**Ans.: Notice of Board Meeting [Section 173(3)]:** 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. Such notice shall be sent by hand delivery or by post or by electronic means.

**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.

However, 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.

**Penalty [Section 173(4)]:** Every officer of the company who fails to give notice shall be liable to a penalty of ₹ 25,000.

**Que. No. 43] Advise the company with reference to the relevant provisions of the Companies Act about sending notice of board meetings to the following directors:**

- Mr. Rohit, a director, who intimates his inability to attend the next board meeting.
- Mr. Bipin Ram, who has gone abroad for four months and an alternate director, has been appointed in his place.
- Mr. James is a director residing abroad representing the foreign collaborator and the Articles of Association of the company provide for sending notice to such directors by e-mail.

CA (Final) – May 2003 (7 Marks)

**Ans.:** As per Section 173(3), 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. Such notice shall be sent by hand delivery or by post or by electronic means. Keeping in view the provisions of the Section 173(3), answer to given problem is as follows:

- Notice is to be sent to every director even if he waives the right to receive the notice. Waiver of right to receive the notice by a director does not exempt the company from its duty to serve notice to every director. Thus, the notice of Board Meeting must be sent to Mr. Rohit.
- As per facts given in case, a director has gone abroad for a period of more than 3 months and in his absence an alternate director appointed under Section 161(2) will attend and participate the meetings of the board of directors. Thus, notice of board meeting should be sent to alternate director. (As alternate director is also director)
- Section 173(1) specifically authorizes to send notice by electronic means, hence notice sent to director residing abroad representing the foreign collaborator is valid.

**Que. No. 44] Discuss the requirements of issuing notice for the adjourned board meetings.**

**Ans.:** An adjourned meeting is merely continuation of original meeting. Notice need not be given of an adjourned meeting other than meeting that has been adjourned *sine die*.

**Que. No. 45] Mr. P and Mr. Q who are the directors of the Company informed the Company their inability to attend the meeting because the notice of the meeting was not served on them. Discuss whether there is any default on the part of the Company and the consequences thereof.**

CA (Final) – Nov 2009 (3 Marks)

**Ans.:** As per Section 173(3), 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. Such notice shall be sent by hand delivery or by post or by electronic means.

In *Parmeshwari Prasad Gupta vs. Union of India* (1974) 44 Comp Cas 1, it was held that even accidental omission to give notice to single director would render the resolutions passed at that meeting void. Thus, by not sending the notice to the directors Mr. P and Mr. Q, the company has defaulted in compliance of Section 173(3).

Further every officer of the company who fails to give notice shall be liable to a penalty of ₹ 25,000 as per Section 173(4).

**Que. No. 46] Write a short note on: Quorum for board meetings**

The quorum for board meeting should be present throughout the meeting.

CS (Inter) – Dec 2007 (5 Marks)

**Ans.:** Quorum for meetings of Board [Section 174(1)]: The quorum for a meeting of the Board of Directors of a company shall be higher of the following two:

- 1/3<sup>rd</sup> of its total strength or (fraction rounded up to next)
- Two directors

The article of the company may provide for higher quorum.

"Total strength" shall not include directors whose places are vacant.

The participation of the directors by video conferencing or by other audio visual means shall also be counted for the purposes of quorum.

Example on quorum for meetings of Board (when none of director is interested):

Total Directors	2	3	4	5	6	7	8	9	10	11	12	13
[A] Total Director $\times \frac{1}{3}$ (rounded up to next)	1	1	2	2	2	3	3	3	4	4	4	5
[B] Minimum directors required	2	2	2	2	2	2	2	2	2	2	2	2
Quorum for a meeting of the Board	2	2	2	2	2	3	3	3	4	4	4	5
[A] or [B] whichever is higher												

**Quorum in case of interested director present at the board meeting [Section 174(3)]:** Where at any time the number of interested directors exceeds or is equal to 2/3<sup>rd</sup> (fraction rounded up to next) of the total strength of Directors, the number of directors who are not interested directors and present at the meeting, being not less than two, shall be the quorum during such time.

**Example:** XYZ Ltd. has total 11 directors. In the meeting of board of directors all the 11 directors are present and out of them 8 directors are interested in particulars item of transaction.

Since number of director exceeds 2/3<sup>rd</sup> of the total strength of directors, the number of directors who are not interested and present at the meeting, being not less than two, shall be the quorum. Thus, quorum for board meeting will be 3 directors.

**When meeting can be held without quorum [Section 174(2)]:** If number falls below minimum required to form quorum, the continuing directors may act for following the purpose only –

- Increasing the number of directors to that fixed for the quorum or
- Summoning a general meeting of the company.

They cannot act for any other purpose.

**Que. No. 47] The quorum for board meeting should be present throughout the meeting.**

CS (Inter) – Dec 2007 (5 Marks)

**Ans.:** Presence of quorum throughout the meeting: In the case of a board meeting, 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 such stage, the business transacted is void. [Balakrishna vs. Balu Subudhi AIR 1949 Pat 184]

174 P  
Que. No. 47A] Star Gen Ltd. held a meeting of its Board of directors on 31<sup>st</sup> October, 2016 at its registered office. Though the company has 12 directors on its board, only 5 directors were present at the commencement of meeting. Thereafter, even while the meeting was in progress, 2 more directors left the meeting and remaining directors carried on the proceedings of the meeting. Discuss the validity of decisions, if any, taken by the remaining 3 directors. CS (Executive) – Dec 2012 (4 Marks)

Ans.: Quorum for meetings of Board [Section 174(1)]: The quorum for a meeting of the Board of Directors of a company shall be higher of the following two:

- 1/3<sup>rd</sup> of its total strength or (in fraction rounded up to next)
- Two directors

The article of the company may provide for higher quorum.

**Presence of quorum throughout the meeting:** In the case of a board meeting, 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 such stage, the business transacted is void. [Balakrishna vs. Balu Subudhi, AIR 1949 Pat 184]

As per facts given in case required quorum is present at the commencement of meeting but 2 directors left during the meeting hence quorum is below required number and hence for subsequent business transacted without required quorum are void.

174 P  
Que. No. 48] In a meeting of the Board, only 3 directors were present out of the total of 11 directors. None of the 3 directors was interested in any of the items of the agenda. Examine the validity of the meeting. CS (Final) – June 1995 (5 Marks)

Ans.: As per Section 174(1), the quorum for a meeting of the Board of Directors of a company shall be higher of the following two:

- 1/3<sup>rd</sup> of its total strength or (fraction rounded up to next)
- Two directors

As there are total 11 directors, 1/3<sup>rd</sup> of the 11 comes to 4 (3.67 rounded up to next). Thus, at least 4 directors must be present at the board meeting. However, only 3 directors are present and hence meeting cannot be held due want of quorum.

174 P  
Que. No. 49] In a meeting of the Board, only 7 directors were present out of the total of 11 directors and only 2 directors was not interested in one of the transaction. How should meeting deal with the matter? CS (Final) – June 1995 (5 Marks)

Ans.: As per Section 174(1), the quorum for a meeting of the Board of Directors of a company shall be higher of the following two:

- 1/3<sup>rd</sup> of its total strength or (fraction rounded up to next)
- Two directors

As per Section 174(3), where at any time the number of interested directors exceeds or is equal to 2/3<sup>rd</sup> of the total strength of Directors, the number of directors who are not interested directors and present at the meeting, being not less than two, shall be the quorum during such time.

As per facts given in case, 2/3<sup>rd</sup> of 11 comes to 8 ( $11 \times 2/3 = 7.33$ , rounded up to next). In meeting 7 directors are present out of which only 2 directors are not interested, that mean only 5 directors are interested. Since condition specified in Section 174(3) is not satisfied relaxation

that directors present or two directors will form quorum is not available. For this transaction quorum will be governed by Section 174(1).

As per Section 174(1), quorum comes to 4 ( $11 \times 1/3 = 3.66$ , rounded up to next). As only two non-interested directors are present there is no valid quorum for the transaction and thus it cannot be discussed and voted upon.

174 P  
Que. No. 49A] 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. CS (Executive) – Dec 2016 (4 Marks)

Ans.: As per Section 174 (1), the quorum for a meeting of the Board of Directors of a company shall be higher of the following two:

- 1/3<sup>rd</sup> of its total strength or (in fraction rounded up to next)
- Two directors

The article of the company may provide for higher quorum.

**Stricter provisions should be followed:** The Articles may provide for a higher quorum than what is prescribed under the law. 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.

The company may provide by its Articles higher number but not a lower number or proportion to constitute a valid quorum. [Amrit Kaur Puri v. Kapurthala Flour Oil & General Mills Co. P. Ltd. (1984) 56 Comp. Cas. 194 (P&H)]. Further, the Articles may provide for the presence of the Foreign Director at all Meetings. Such provision should be adhered to.

Thus, provisions contained in article of Rooftop Ltd. is valid as per the provisions of the Companies Act, 2013.

Que. No. 50] What are the provisions of the Companies Act, 2013, if at the board meeting required quorum is not present?

Ans.: If at the board meeting required quorum is not present [Section 174(4)]: Where a meeting of the Board could not be held for want of quorum, then, unless the articles of the company otherwise provide, the meeting shall automatically stand adjourned to the same day at the same time and place in the next week or if that day is a national holiday, till the next succeeding day, which is not a national holiday, at the same time and place.

Even at such adjourned meeting, 'quorum' is essential. As per Guidance Note on Board Meeting, issued by ICSI, if there is no quorum at the adjourned meeting also, the meeting stands dissolved as meeting cannot be adjourned for quorum again.

Que. No. 50A] 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. CS (Executive) – Dec 2016 (5 Marks)

Ans.: As per Section 96(2), an annual general meeting can be called during business hours, that is, between 9 a.m. and 6 p.m. on any day that is not a National Holiday.

There is no similar provision for holding board meeting. Thus, the meetings of the board of directors may be held at any place convenient to the directors even outside the business hours and even on a national holiday unless the articles provide otherwise.