1

Declaration and Payment of Dividend

Question 1 : [NOV 2012]

The Board of Directors of Nimbahera Chemicals Limited proposes to transfer more than 10% of the profits of the company to the reserves for the current year. Advise the Board of Directors of the said company mentioning the relevant provisions of the Companies Act, 2013.

Answer

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

Question 2

A Public Company has been declaring dividend at the rate of 20% on equity shares during the last 3 years. The Company has not made adequate profits during the year ended 31st March, 2015, but it has got adequate reserves which can be utilized for maintaining the rate of dividend at 20%. Advise the Company as to how it should go about if it wants to declare dividend at the rate of 20% for the year 2014-15 as per the provisions of the Companies Act, 2013.

Answer

As per Rule 3 of the *Companies (Declaration and Payment of Dividend) Rules), 2014,* in the event of inadequacy or absence of profits in any year, a company may declare dividend out of surplus subject to the fulfillment of the following conditions:

1. The rate of dividend declared shall not exceed the average of the rates at which dividend was declared by it in the three years immediately preceding that year;

   Provided that this sub-rule shall not apply to a company, which has not declared any dividend in each of the three preceding financial year.

2. The total amount to be drawn from such accumulated profits shall not exceed one-tenth of the sum of its paid-up share capital and free reserves as appearing in the latest audited financial statement;

3. The amount so drawn shall first be utilised to set off the losses incurred in the financial year in which dividend is declared before any dividend in respect of equity shares is declared;

4. The balance of reserves after such withdrawal shall not fall below 15% of its paid up share capital as appearing in the latest audited financial statement.

In the given case therefore, the company can declare a dividend of 20% provided it has the required residual reseve, after such payment, of 15% of its paid up capital as appearing it its latest audited financial statement. The company should have the dividend recommended by the Board and put up for the approval of the members at the Annual General Meeting as the authority to declare lies with the members of the company.

Question 3

The Annual General Meeting of ABC Limited declared a dividend at the rate of 30 percent payable on paid up equity share capital of the Company as recommended by Board of Directors on 30th April, 2014. But the Company was unable to post the dividend warrant to Mr. Ranjan, an equity shareholder of the Company, up to 30th June, 2014. Mr. Ranjan filed a suit against the Company for the payment of dividend along with interest at the rate of 20 percent per annum for default period. Decide in the light of provisions of the Companies Act, 2013, whether Mr. Ranjan would succeed? Also state the directors' liability in this regard under the Act.

Answer

Section 127 of the Companies Act, 2013 lays down the penalty for non payment of dividend within the prescribed time period. Under section 127 where a dividend has been declared by a company but has not been paid or the warrant in respect thereof has not been posted within thirty days from the date of declaration to any shareholder entitled to the payment of the dividend:

(a) every director of the company shall, if he is knowingly a party to the default, be punishable with imprisonment which may extend to two years and with fine which shall not be less than one thousand rupees for every day during which such default continues; and

(b) the company shall be liable to pay simple interest at the rate of eighteen per cent. per annum during the period for which such default continues.

Therefore, in the given case Mr Rajan will not succeed in his claim for 20% interest as the limit under section 127 is 18% per annum.

Question 4 [NOV 2014]

The Board of Directors of XYZ Company Limited at its meeting declared a dividend on its paid-up equity share capital which was later on approved by the company`s Annual General Meeting. In the meantime the directors at another meeting of the Board decided by passing a resolution to divert the total dividend to be paid to shareholders for purchase of investments for the company. As a result dividend was paid to shareholders after 45 days. Examining the provisions o f the Companies Act, 2013, state:

(i) **Whether the act of directors is in violation of the provisions of the Act and also the consequences that shall follow for the above act of directors?**

(ii) **What would be your answer in case the amount of dividend to a shareholder is adjusted by the company against certain dues to the company from the shareholder?**

Answer

Payment of dividend; delay in payment; adjustment against dues (**Section 127 of the Companies Act, 2013):**

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

In the present case, the Board of Directors of XYZ Company Limited at its meeting declared a dividend on its paid-up equity share capital which was later on approved by the company's Annual General Meeting. In the meantime the directors at another meeting of the Board decided by passing a resolution to divert the total dividend to be paid to shareholders for purchase of investment for the company. As a result dividend was paid to shareholders after 45 days.

(i) The Board of Directors of XYZ Company Limited is in violation of section 127 of the Companies Act, 2013 as it failed to pay dividend to shareholders within 30 days due to their decision to divert the total dividend to be paid to shareholders for purchase of investment for the company.

Consequences: The following are the consequences for the violation of above provisions:

(a) Every director of the company shall, if he is knowingly a party to the default, be punishable with imprisonment which may extend to two years and shall also be liable for a fine which shall not be less than one thousand rupees for every day during which such default continues.

(b) The company shall also be liable to pay simple interest at the rate of 18% p.a. during the period for which such default continues.

(ii) If the amount of dividend to a shareholder is adjusted by the company against certain dues to the company from the shareholder, then failure to pay dividend within 30 days shall not be deemed to be an offence under Proviso to section 127 of the Companies Act, 2013.

Question 5 [MAY 2015]

(i) **Referring to the provisions of the Companies Act, 2013, examine the validity of the following:**

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

(ii) **WL Limited is facing loss in business during the current financial year 2015-16. In the immediate preceding three financial years, the company had declared dividend at the rate of 8%, 10% and 12% respectively. To maintain the goodwill of the company, the Board of Directors has decided to declare 12% interim dividend for the current financial year. Examine the applicable provisions of the Companies Act, 2013 and state whether the Board of Directors can do *so?* [RTP MAY 2018, NOV 2018]**

Answer

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

In the given instance, the Board of Directors of ABC Limited proposes to declare dividend at the rate of 20% to the equity share holders, in spite of the fact that the company has defaulted in repayment of public deposits accepted before the commencement of the Companies Act, 2013. So according to the above provision, declaration of dividend by the ABC Limited is not valid

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

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

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

Question 6 [2015 NOV] [RTP 2018 NOV]

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

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

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

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

Answer

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

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

(ii) **Section 127,** inter-alia, provides that no offence shall be deemed to have been committed where the dividend could not be paid by reason of operation of law.

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

Queston: 7 [2016 NOV]

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

(i) **Mr. Ashok, holding equity shares of face value of Rs.10 lakhs has not paid an amount of Rs. 1 lakh towards call money on shares. Can the same be adjusted against the dividend amount payable to him?**

(ii) **Ms. Nini was the holder of 1,000 equity shares on 31st March, 2016, but she has transferred the shares to Mr. Raj, whose name has been registered on 20th May, 2016. Who will be entitled to the above dividend?**

Answer

(i) The given problem is based on the proviso provided in the **section 127 (d) of the Companies Act, 2013.** As per the law where the dividend is declared by a company and there remains calls in arrears and any other sum due from a member, in such case no offense shall be deemed to have been committed where the dividend has been lawfully adjusted by the company against any sum due to it from the shareholder.

As per the facts given in the question, Mr. Ashok is holding equity shares of face value of Rs. 10 Lakhs and has not paid an amount of Rs. 1 lakh towards call money on shares. Referring to the above provision, Mr. Ashok is eligible to get Rs. 1.20 lakh towards dividend, out of which an amount of Rs. 1 lakh can be adjusted towards call money due on his shares. Rs. 20,000 can be paid to him in cash or by cheque or in any electronic mode.

According to the above mentioned provision, company can adjust sum of Rs. 1 lakh due towards call money on shares against the dividend amount payable to Mr. Ashok.

(ii) **According to section 123(5),** dividend shall be payable only to the registered shareholder of the share or to his order or to his banker. Facts in the given case state that Ms. Nini, the holder of equity shares transferred the shares to Mr. Raj whose name has been registered on 20th May 2016. Since, he became the registered shareholder before the declaration of the dividend in the Annual general meeting of the company held on 20th September 2016, so, Mr. Raj will be entitled to the dividend.

Question. 8: ***[2017 MAY]***

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

Answer

(a) Section 124 of the Companies Act, 2013 contains provisions regarding unpaid dividend as under:

(i) **Declared dividend not paid or claimed to be transferred to the special account:** Where a dividend has been declared by a company but has not been paid or claimed within thirty days from the date of the declaration to any shareholder entitled to the payment of the dividend, the company shall, within seven days from the date of expiry of the said period of thirty days, transfer the total amount of dividend which remains unpaid or unclaimed to a special account to be opened by the company in that behalf in any scheduled bank to be called the unpaid Dividend Account.

(ii) **Preparing of statement of particulars of the unpaid dividend :** The company shall, within a period of ninety days of making any transfer of an amount to the unpaid Dividend Account, prepare a statement containing the names, their last known addresses and the unpaid dividend to be paid to each person and place it on the website of the company, if any, and also on any other website approved by the Central Government for this purpose in such forms, manner and other parti culars as may by prescribed.

(iii) **Default in transferring of amount:** If any default is made in transferring the total amount referred to in sub-section (1) or any part thereof to the Unpaid Dividend Account of the company then the company shall pay from the date of such default, interest on so much of the amount as has not been transferred to the said account, at the rate of twelve per cent per annum and the interest accruing on such amount shall ensure to the benefit of the members of the company in proportion to the amount remaining unpaid to them.

(iv) . **Apply for payment of claimed amount:** Any person claiming to be entitled to any money transferred under sub-section (1) to the Unpaid Dividend Account of the company may apply to the company for payment of the money claimed.

(v) **Transfer of unclaimed amount to Investor Education and Protection Fund (IEPF):** Any money transferred to the Unpaid Dividend Account of a company in pursuance of this section which remains unpaid or unclaimed for a period of seven years from the date of such transfer shall be transferred by the company along with interest accrued, if any, thereon to the Fund established under section 125(1) and the company shall send a statement in the prescribed form of the details of such transfer to the authority which administers the said fund and that authority shall issue a receipt to the company as evidence of such transfer.

(vi) **Transfer of shares to IEPF:** All shares in respect of which dividend has not been paid or claimed for seven consecutive years or more shall be transferred by the company in the name of Investor Education and Protection Fund along with a statement containing such details as may be prescribed.

Right of owner of shares transferred to IEPF to claim from IEPF:

Provided that any claimant of shares transferred above shall be entitled to claim the transfer of shares from Investor Education and Protection Fund in accordance with such procedure and on submission of such documents as may be prescribed.

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

(vii) **In case of contravention:** If a company fails to comply with any of the requirements of this section, the company shall be punishable with fine which shall not be less than five lakh rupees but which may extend to twenty -five lakh rupees and every officer of the company who is in default shall be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees.

Accordingly, Supreme Ltd. has to transfer the unpaid dividend amount of Rs. 50,000 on disputed shares plus Rs. 1.50 lakh on account of unclaimed dividend to a specially opened unpaid Dividend Account within 7 days after 30th October, 2016.

If any default is made in complying with the above provision, the company as well as every officer of the company, who is in default, shall be punishable as mentioned above.

Question: 9 : [2017 NOV]

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

(i) **Examine the validity of the Board's decision under the provisions of the Companies Act, 2013.**

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

Answer

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

Further a dividend when declared becomes a debt and a shareholder is entitled to recovery of the same after expiry of 30 days as prescribed under Section 127 of the Companies Act, 2013. Section 2(14A) of the Act defines dividend to include interim dividend. Therefore dividend once declared becomes a debt and payable within 30 days of declaration.

In the present case, Universal Limited declared an interim dividend for the second time. After declaration, the Board of Directors decided to revoke the second interim dividend as its financial position was poor.

In view of the above, the Board of directors cannot revoke the second interim dividend.

Therefore, decision of the Board to revoke the declared 2nd Interim dividend is invalid..

(ii) **Transfer to Reserves**: A company may, before the declaration of any dividend in any financial year, transfer such percentage of its profits for that financial year as it may consider appropriate to the reserves of the company. Therefore, the company may transfer such percentage of profit to reserves before declaration of dividend as it may consider necessary. Such transfer is not mandatory and the percentage to be transferred to reserves is to be decided at the discretion of the company.

Hence, the Board may transfer more than 10% of the profits of the company to the reserves for the current year before the declaration of any dividend.

Question: 10 : [MAY 2018]

M/s Growmore Plantations Limited, a listed company has unpaid/unclaimed dividend in respect of 150000 Equity Shares for the past continuous 7 years. This period of 7 years ended on 30th June, 2017. Mr. Prasad the CFO of the company is of the opinion that these 150000 Equity Shares should have been transferred to the DEMAT Account of the Investor Education & Protection Fund (IEPF) Authority within 30 days from the end of the 7 years period i.e. by 30th July, 2017 respectively. Is the opinion of the CFO correct as per the provisions of the Companies Act, 2013 read with rules framed there under? What would be your answer had this continuous period of 7 years expired on 30 th November, 2017. Also state the condition under which these equity shares will not be transferred to the IEPF Authority by the company.

Answer:

"According to Section 124(6) of the Companies Act, 2013, all shares in respect of which dividend has not been paid or claimed for seven consecutive years or more shall be transferred by the company in the name of Investor Education and Protection Fund along with a statement containing such details as may be prescribed. The shares shall be transferred irrespective of the fact whether the said dividend has been transferred or to be transferred to the Fund or not.

According to Rule 6(1)of IEPF Authority (Accounting, Audit, Transfer and Refund) Rules, 2016, the shares shall be credited to DEMAT Account of the Authority to be opened by the Authority for the said purpose, within a period of thirty days of such shares becoming due to be transferred to the Fund.

Proviso to the Rule states that in cases where the period of 7 years provided under Section 124(5) has been completed or being completed during the period from 7th September, 2016 to 31st October, 2017, the due date of transfer of such shares shall be deemed to be 31st October, 2017.

In the light of the above provision of law read with the rules, in the case of M/s Growmore Plantations Limited, the due date shall be 31st October, 2017 and 30 days from the due date will be 30th November, 2017 for transfer of shares to the authority. Hence, the opinion of Mr. Prasad, CFO is incorrect.

If this continuous period of 7 years expired on 30th November, 2017, then also the equity shares shall be credited to DEMAT Account of the Authority within a period of thirt y days of such shares becoming due to be transferred to the Fund i.e. 30th December, 2017.

Condition under which these equity shares will not be transferred to IEPF Authority:

According to Explanation to Section 124(6) of the Act, it is hereby clarified that in case any dividend is paid or claimed for any year during the said period of seven consecutive years, the share shall not be transferred to IEPF.

Also, in respect of which there is specific Order of Court, Tribunal or statutory authority restraining the transfer of such shares and payment of dividends or where such shares are pledged or hypothecated under the provisions of the Depository Act, 1996 or the shares already been transferred under sub-Rule 6(1) the Company shall not transfer the shares to the fund.

Question: 11 : [MAY 2018 RTP]

(i) **Brix Limited has earned a profit of Rs. 1,000 crore for the financial year 2016-17. It has proposed a dividend @ 8.75%. However, it does not intend to transfer any amount to the reserves of the company out of the profits earned. Can Brix Limited do so**

(ii) **The Director of Som Limited proposed dividend at 12% on equity shares for the financial year 2016-17. The same was approved in the Annual General Meeting of the company held on 20th September, 2017. The Directors declared the approved dividends.**

Mr. Ninja was the holder of 1,000 equity shares on 31st March, 2017, but he has transferred the shares to Mr. Raj, whose name has been registered on 20th May, 2017. Who will be entitled to the above dividend.

(iii) **Mr. Alok, holding equity shares of face value of Rs. 10 lakh has not paid an amount of Rs. 1 lakh towards call money on shares. Can the same be adjusted against the dividend amount payable to him?**

Answer

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

(ii) According to **section 123(5) of the Companies Act, 2013**, dividend shall be payable only to the registered shareholder of the share or to his order or to his banker. Facts in the given case state that Mr. Ninja, the holder of equity shares transferred the shares to Mr. Raj whose name has been registered on 20th May 2017. Since, he became the registered shareholder before the declaration of the dividend in the Annual general meeting of the company held on 20th September 2017, so, Mr. Raj will be entitled to the dividend.

(iii) Yes, as per law, where the dividend is declared by a company and there remains calls in arrears and any other sum due from a member, in such case the dividend can be lawfully adjusted by the company against any sum due to it from the shareholder.

Thus, company can adjust sum of Rs. 1 lakh due towards call money on shares against the dividend amount payable to Mr. Alok.

7

Compromises, Arrangements & Amalgamations

Question 1 [MAY 2015]

A scheme provides for Amalgamation of PQL International Limited, a foreign company, with DHP Limited, an Indian company registered under the Companies Act, 1956. Referring to the provisions of the above Act, decide whether the scheme providing amalgamation of a foreign company as a transferor company can be sanctioned by the Court (NCLT).

Answer

Provision: As per Section 234 of Company Act 2013, If the Transferor Company is foreign Company and Transferee company is Indian Company or Vice-versa is allowed provided rules of RBI is followed and sanction by RBI is done. After RBI approval in case of transfer of asset section 232 is followed otherwise section 230 is followed.

Fact of Case: Transferor company is foreign company & Transferee company is Indian company.

Explanation: In above case Transferor Company is foreign company and Transferee company is Indian company which is allowed after considering above provision. It means in the present case this is valid.

Conclusion: Hence after considering above fact we decide **such kind of acquisition is valid as per section 234.**

Question 2: [MAY 2016]

A scheme of amalgamation was approved by overwhelming majority of members of both the merging companies at meetings called as per directions of the Court. When the scheme of amalgamation was awaiting sanction of the Court, the exchange ratio was questioned by a small group of members of one of the merging companies. The exchange ratio was fixed by a reputed firm of Chartered Accountants.

Examine with reference to the decided case law under the Companies Act, 1956 whether the dissenting shareholders will succeed? Would your answer be different if the exchange ratio was objected to by the Central Government?

Answer:

Refer Section 232 of Company Act 2013 ,

Small Group of Member can not object. Central Govt. may direct the Tribunal to look after the matter, Central govt.will not pass any order

Question 3 : [NOV 2016]

The Central Government in the public interest ordered for the amalgamation of ABC Limited and DEF Limited into a single company named KPN Limited through a notification in the official gazette. In this connection the prescribed authority ordered that the equity shareholders of ABC Limited were to be provided with a cash compensation of Rs. 2,000/- and two equity shares in KPN Limited for every single equity share held in ABC Limited. Mr. Ganesh, an equity shareholder of ABC Limited was dissatisfied not only with the amalgamation but also with the compensation offered by the prescribed authority. Advise him whether he can challenge the above amalgamation order of the Central Government. Also advise him within how many days and before which authority he can prefer an appeal against the order of the prescribed authority. Advise him referring to the provisions of the Companies Act, 1956 in this regard.

Answer :

Refer Section 237 of Company Act 2013

Question 4 : [MAY 2017]

The shareholders and creditors of Superfine Limited, in a meeting convened for approval of a scheme of reconstruction of the company, passed resolutions. The scheme of reconstruction provided for the following:

(i) Sale of plant and machineries and appropriation of proceeds for payment of outstanding wages, tax dues and repayment of loan.

(ii) Unsecured creditors to forego 60% of their claims against the company and receive debentures for the balance amount. A few shareholders and creditors raised objections against the said arrangements.

Advise the directors about the steps to be taken to give effect to the proposed scheme under the Companies Act, 1956.

Answer:

Refer Section 230 of Company Act 2013

Question 5 : [RTP NOV 2017, RTP MAY 2018] : [NEW COURSE STUDY Q.]

A meeting of members of DEF Limited was convened under the orders of the Court for the purpose of considering a scheme of compromise and arrangement. The meeting was attended by 300 members holding 9,00,000 shares. 120 members holding 7,00,000 shares in the aggregate voted for the scheme. 140 members holding 2,00,000 shares in aggregate voted against the scheme. 40 members holding 1,00,000 shares abstained from voting. Examine with reference to the relevant provisions of the Companies Act, 2013 whether the scheme was approved by the requisite majority?

Answer:

As per section 230 (6), of the Companies Act, 2013 where majority of persons at a meeting held **representing 3/4th in value,** voting in person or by proxy or by postal ballot, agree to any compromise or arrangement and if such compromise or arrangement is sanctioned by the Tribunal by an order.The majority of person representing 3/4th Value shall be counted of the following:

- ✓ the creditors, or
- ✓ class of creditors or
- ✓ members or
- ✓ class of members, as the case may be,

The majority is dual, in number and in value. A simple majority of those voting is sufficient. Whereas the 'three-fourths' requirement relates to value. The **three-fourths value** is to be computed with reference to **paid-up capital held by members present and voting at the meeting.**

In this case 300 members attended the meeting, but only 260 members voted at the meeting. As 120 members voted in favor of the scheme the requirement relating to majority in number (i.e. 131) is not satisfied.

260 members who participated in the meeting held 9,00,000 shares, three-fourth of which works out to 6,75,000 while 120 members who voted for the scheme held 7,00,000 shares. The majority representing three-fourths in value is satisfied.

Thus, in the instant case, the scheme of compromise and arrangement of DEF Limited is **not approved** as though the value of shares voting in favor is significantly more, the number of members voting in favor do not exceed the number of members voting against.

Question 6 : [RTP NOV 2018]

Cotton On Yarn Ltd., and Country Cotton Blossom Ltd., are two listed companies engaged in the Business of Textiles. The companies are not making profits and as such their share's market price have gone down. A substantial portion of t heir share capital is held by Central Government as well as some Public Financial Corporations. In order to increase the share value, the Central Government wants to amalgamate the aforesaid two companies into a single company. Examine the powers of Central Government to amalgamate the two companies in public interest as per the provisions of the Companies Act, 2013.

Answer:

Central Government may by order provide for amalgamation in public interest.

According to **Section 237 of the Companies Act, 2013**, where the Central Government is satisfied that it is essential in the public interest that two or more companies should amalgamate, the Central Government, may, by order notified in the official gazette, provide for the amalgamation of those companies into a single company with such constitution, with such property, powers, rights, interests, authorities and privileges and with such liabilities, duties and obligations, as may be specified in the order.

Continuation by or against the transferee company of any legal proceedings

The order may also provide for the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company and such consequential, incidental and supplemental provisions as may, in the opinion of the Central Government, be necessary to give effect to amalgamation.

Same interest rights or compensations

Every member or creditor including a debenture holder of each of the transferor companies before the amalgamation shall have, as nearly as may be, the same interest in or rights against the transferee company as he had in the company of which he was originally a member or creditor and in case the interest or rights of such member or creditor in or against the transferee company are less than the interest in or rights against the original company, he shall be entitled to compensation to that extent, which shall be assessed by such authority as may be prescribed and every such assessment shall be published in the official gazette and the compensation so assessed shall be paid to the member or creditor concerned by the transferee company.

Question 7 : [RTP NOV 2018]

CPR Ltd. and TJC Ltd. are wholly owned by Government of Tamil Nadu. As a policy matter, the Government issued administrative orders for merging TJC Ltd. with CPR Ltd. in the public interest. State the authority with whom the application for merger is required to be filed under the provisions of the Companies Act, 2013. Also state the provisions governing the preservation of Books and Records of TJC Ltd. after merger under the said Act.

Answer:

Authority to whom the application for merger is to be made

According to **Section 237 of the Companies Act, 2013**, where the Central Government is satisfied that it is essential in the public interest that two or more companies should amalgamate, the Central Government may, by order notified in the Official Gazette, provide for the amalgamation of those companies into a single company.

Thus, In the given situation of merger between two wholly owned Government companies in public interest, there is no specific authority with whom the application for merger is required as the Central Government shall by notification in the Official Gazette, will provide for the amalgamation of the two said companies into a single company.

Preservation of books and records of amalgamated companies

According to Section 239 of the Companies Act, 2013, the books and papers of a Company which has been amalgamated with, or whose shares have been acquired by, another Company shall not be disposed of without the prior permission of the Central Government and before granting such permission, that Government may appoint a person to examine the books and papers or any of them for the purpose of ascertaining whether they contain any evidence of the commission of an offence in connection with the promotion or formation, or the management of the affairs, of the transferor company or its amalgamation or the acquisition of its shares

Question 8 : [MOCK TEST PAPER MAY 2018 & MOCK TEST PAPER NOV 2018]

Ramakrishna Ltd. and Jai Ram Ltd. went into a merger arrangement. State the provisions related to the registration of offer involving transfer of shares as per the Companies Act, 2013.

Answer:

Registration of offer of Schemes involving transfer of shares [Section 238]

(1) **Registration of circular/ offer involving transfer of shares:** In relation to every offer of a scheme or contract involving the transfer of shares or any class of shares in the transferor company to the transferee company under section 235,—

(a) every circular containing such offer and recommendation to the members of the transferor company by its directors to accept such offer shall be accompanied by such information and in such manner as prescribed in Rule 28;

(b) every such offer shall contain a statement by or on behalf of the transferee company, disclosing the steps it has taken to ensure that necessary cash will be available; and

(c) every such circular shall be presented to the Registrar for registration and no such circular shall be issued until it is so registered.

The Registrar may refuse, for reasons to be recorded in writing, to register any such circular which does not contain the information required to be given under clause (a) or which sets out such information in a manner likely to give a false impression, and communicate such refusal to the parties within thirty days of the application.

(1) **Appeal against the order of the registrar**: An appeal shall lie to the Tribunal against an order of the Registrar refusing to register any circular under sub-section (1).

(2) **In case of failure of registration:** The director who issues a circular which has not been presented for registration and registered under clause (c) of sub-section (1), shall be punishable with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees.

Question 9 : [MOCK TEST PAPER MAY 2018]

Long Lasting Ltd. applied to the Tribunal for the approval of proposed merger scheme. State the process to be complied with for the approval of the proposed merger scheme drawn by the directors of the Long Lasting Ltd.

Answer:

Filing of an application for purpose of reconstruction or companies involving merger/ amalgamation or transfer of undertaking, property etc.:

Where an application is made to the Tribunal under **section 230 f**or the sanctioning of a compromise or an arrangement proposed between a company and any such persons as are mentioned in that section, and it is shown to the Tribunal—

(a) that the compromise or arrangement has been proposed for the purposes of, or in connection with, a scheme for the reconstruction of the company or companies involving merger or the amalgamation of any two or more companies; and

(b) that under the scheme, the whole or any part of the undertaking, property or liabilities of any company (hereinafter referred to as the transferor company) is required to be transferred to another company (hereinafter referred to as the transferee company), or is proposed to be divided among and transferred to two or more companies, the Tribunal may on such application, order a meeting of the creditors or class of creditors or the members or class of members, as the case may be, to be called, held and conducted. Where an order has been made by the Tribunal, the merging companies or the companies in respect of which a division is proposed, shall also be required to circulate the relevant information for the meeting in compliance with section 232(2) of the Companies Act, 2013.

Question 10 : [MOCK TEST PAPER MAY 2018] [NEW COURSE STUDY Q.]

ABC Limited is a wholly owned subsidiary company of XYZ Limited. The Company wants to make application for merger of Holding and Subsidiary Companies under Section 232. The Company Secretary of the XYZ Limited is of the opinion that company cannot apply for merger as per section 232. The company shall have to apply for merger as per section 233 i.e. Fast Track Merger. Is the contention of Company Secretary being valid as per law?

Answer:

As per section 233 (1), notwithstanding the provisions of section 230 and section 232, a scheme of merger or amalgamation may be entered between,

- 2 or more small companies
- a holding company and its wholly-owned subsidiary company. If 100% of its share capital is held by the holding company, except the shares held by the nominee or nominees to ensure that the number of members of subsidiary company is not reduced below the statutory limit as provided in section 187
- such other class or classes of companies as may be prescribed.

The provisions given for fast track merger in the section 233 are in the optional nature and not a compulsion to the company. If a company wants to make application for merger as per section 232, it can do so.

Hence, here the Company Secretary of the XYZ limited has erred in the law and his contention is not valid as per law. The company shall have an option to choose between normal process of merger and fast track merger.

Question 11: [NEW COURSE STUDY Q.]

A meeting of members of ABC Limited was convened under the orders of the Court to consider a scheme of compromise and arrangement. Notice of the meeting was sent in the prescribed manner to all the 600 members holding in the aggregate 25,00,000 shares. The meeting was attended by 450 members holding 15,00,000 shares. 210 members holding 11,00,000 shares voted in favor of the scheme. 180 members holding 3,00,000 shares voted against the scheme. The remaining members abstained from voting.

Examine with reference to the relevant provisions of the Companies Act, 2013 whether the scheme is approved by the requisite majority.

Answer:

As per section 230 (6), of the Companies Act, 2013 where majority of persons at a meeting held representing 3/4th in value,voting in person or by proxy or by postal ballot, agree to any compromise or arrangement and if such compromise or arrangement is sanctioned by the Tribunal by an order. The majority of person representing 3/4th Value shall be counted of the following:

- the creditors, or
- class of creditors or
- members or
- class of members, as the case may be,

The majority is dual, in number and in value. A simple majority of those voting is sufficient. Whereas the 'three-fourths' requirement relates to value. The three-fourths value is to be computed with reference to paid-up capital held by members present and voting at the meeting.

In this case out of 600 members, 450 members attended the meeting, but only 390 members voted at the meeting. As 210 members voted in favor of the scheme the requirement relating to majority in number (i.e. 196) is satisfied. 390 members who participated in the meeting held 14,00,000, three-fourth of which works out to 10,50,000 while 210 members who voted for the scheme held 11,00,000 shares. As both the requirements are fulfilled, the scheme is approved by the requisite majority.

8

Prevention of Oppression and Mismanagement

Note: Chapter XVI of the Companies Act, 2013 i.e. Prevention of oppression and Mismanagement covering sections 241 to 246 has been notified by the Ministry of Corporate Affairs on 1st June, 2016.

Question 1 [PRACTICE MANUAL .]

What is meant by oppression'? State whether the aggrieved party would succeed in obtaining relief from Tribunal on the ground of oppression in the following cases:

(i) **The majority of the Board of directors override the minority directors and the minority directors apply to Tribunal complaining oppression by majority directors.**

(ii) **A petition by majority shareholders complaining oppression by minority s hareholders. Give your answer according to the provisions of the Companies Act, 2013.**

Answer

Oppression: Oppression, according to the Dictionary meaning of the word, is any act exercised in a manner burdensome, harsh and wrongful. The meaning of the term 'oppression' was explained by Lord Cooper in the Scottish case of *Elder v. Elder and Watson Ltd*, as given below:

"The conduct complained of should be at the lowest involve a feasible departure from the standards of fair dealing and the violation of the conditions of fair play on which every shareholder entrusting his money to the company is entitled to rely.

(i) **Oppression of a member as a director**: The oppression dealt with by **section 241 of the Companies Act, 2013,** is only oppression of members in their character as such; and it is only in that character they can involve section 241. The harsh treatment, for instance, of a member who is a director or other officer or employee, by the Board of directors or management does not come within section 241. It has been held in *Re. Bellador Silk Ltd.* that if the majority of the Board of directors override the minority directors the latter cannot resort to section 241 and hence the minority directors will not succeed in getting relief from Tribunal on the ground of oppression.

(ii) **Right not confined to minority**: **According to section 244,** the right to apply for relief under section 241/242 is given to 100 members or 1/10th of the total number of members or any member or members holding not less than 1/10th of the issued share capital of the company. There is nothing in this section which suggests even indirectly that unless the application is made by minority shareholders it is not maintainable. The right to apply is, therefore, not confined to oppressed minority of the shareholders alone. It was held by Calcutta High Court in *Re. Sindhri Iron Foundry (P) Ltd*. that the oppressed majority also might apply for relief under section 241. Therefore, the petitioners are likely to succeed in getting relief provided the other condition laid down in section 242 (i.e. that to wind up the company would unfairly prejudice such members, but that otherwise the facts would justify the making of a winding-up order on just and equitable ground) is satisfied, even though the Delhi High Court held a contrary view in *Suresh Kumar Sanghi v. Supreme Motors Ltd***.**

Question 2 [MAY 2002] [PRACTICE MANUAL & NEW STUDY Q.]

ABC Private Limited is a company in which there are eight shareholders. Can a member holding less than one-tenth of the share capital of the company apply to the Tribunal for relief against oppression and mismanagement? Give your answer according to the provisions of the Companies Act, 2013.

Answer

Under section 244 of the Companies Act, 2013, in the case of a company having share capital, the following member(s) have the right to apply to the Tribunal under section 241:

(a) Not less than 100 members of the company or not less than one -tenth of the total number of members, whichever is less; or

(b) Any member or members holding not less than one-tenth of the issued share capital of the company provided the applicant(s) have paid all the calls and other sums due on the shares.

In the given case, since there are eight shareholders. As per the condition (a) above, 10% of 8 i.e. 1 satisfies the condition. Therefore, a single member can present a petition to the Tribunal, regardless of the fact that he holds less then one-tenth of the company's share capital.

Question 3 [NOV 2008, MAY 2013, MAY 2015] [RTP & MTP MAY 2018] [PM & NEW STUDY Q.]

The issued and paid up capital of MNC Limited is Rs 5 crores consisting of 5,00,000 equity shares of Rs. 100 each. The said company has 500 members. A petition was submitted before the Tribunal signed by 80 members holding 10,000 equity shares of the company for the purpose of relief against oppression and mismanagement by the majority shareholders. Examining the provisions of the Companies Act, 2013, decide whether the said petition is maintainable. Also explain the impact on the maintainability of t he above petition, if subsequently 40 members, who had signed the petition, withdrew their consent.

Answer

Right to apply for oppression and mismanagement: As per the provisions of **Section 244 of the Companies Act, 2013**, in the case of a company having share capital, members eligible to apply for oppression and mismanagement shall be lowest of the following:

100 members; or

1/10th of the total number of members; or

Members holding not less than 1/10th of the issued share capital of the company.

The share holding pattern of MNC Limited is given as follows:

Rs. 5,00,00,000 equity share capital held by 500 members

The petition alleging oppression and mismanagement has been made by some members as follows:

(i) No. of members making the petition – 80

(ii) Amount of share capital held by members making the petition – Rs. 10,00,000

The petition shall be valid if it has been made by the lowest of the following :

100 members; or

50 members (being 1/10th of 500); or

Members holding Rs. 50,00,000 share capital (being 1/10th of Rs. 5,00,00,000)

As it is evident, the petition made by 80 members meets the eligibility criteria specified under section 244 of the Companies Act, 2013 as it exceeds the minimum requirement of 50 members in this case. Therefore, the petition is maintainable.

The consent to be given by a shareholder is reckoned at the beginning of the proceedings. The withdrawal of consent by any shareholder during the course of proceedings shall not affect the maintainability of the petition [*Rajamundhry Electric Corporation Vs. V. Nageswar Rao A.I.R. (1956) Sc. 2013.]*

Question 4 [NOV 1998, NOV 2008, NOV 2009] [PRACTICE MANUAL & NEW STUDY Q.]

A group of members of XYZ Limited has filed a petition before the Tribunal alleging various acts of oppression and mismanagement by the majority shareholders of the company. The Petitioner group holds 12% of the issued share capital of the company. During the pendancy of the petition, some of the petitioner group holding about 5% of the issued share capital of the company wish to disassociate themselves from the petition and they along with the other majority shareholders have submitted before the Tribunal that the petition may be dismissed on the ground of non-maintainability. Examine their contention having regard to the provisions of the Companies Act, 2013.

Answer

The argument of the majority shareholders that the petition may be dismissed on the ground of non-maintability is not correct. The proceedings shall continue irrespective of withdrawl of consent by some petitioners. It has been held by the Supreme Court in Rajmundhry Electric Corporation vs. V. Nageswar Rao, AIR (1956) SC 213 that if some of the consenting members have subsequent to the presentation of the petition withdraw their consent, it would not affect the right of the applicant to proceed with the petition. Thus, the validity of t he petition must be judged on the facts as they were at the time of presentation. Neither the right of the applicants to proceed with the petition nor the jurisdiction of Tribunal to dispose it of on its merits can be affected by events happening subsequent to the presentation of the petition.

Question 5 [RTP NOV 2017] [PRACTICE MANUAL & NEW STUDY Q.]

A group of shareholders consisting of 25 members decide to file a petition before the Tribunal for relief against oppression and mismanagement by the Board of Directors of M/s Fly By Night Operators Ltd. The company has a total of 300 members and the group of 25 members holds one –tenth of the total paid –up share capital accounting for one-fifteenth of the issued share capital. The main grievance of the group is the due to mismanagement by the board of directors, the company is incurring losses and the company has not declared any dividends even when profits were available in the past years for declaration of dividend. In the light of the provisions of the Companies Act, 2013, advise the group of shareholders regarding the success of (i) getting the petition admitted and (ii) obtaining relief from the Tribunal.

Answer

Section 244 of the Companies Act, 2013 provides the right to apply to the Tribunal for relief against oppression and mis-management. This right is available only when the petitioners hold the prescribed limit of shares as indicated below:

(i) In the case of company having a share capital, not less than 100 members of the Company or not less than one tenth of the total number of its members whichever is less or any member or members holding not less than one tenth of the issued share capital of the company, provided that the applicant(s) have paid all calls and other dues on the shares.

(ii) In the case of company not having share capital, not less than one-fifth of the total number of its members.

Since the group of shareholders do not number 100 or hold 1/10 th of the issued share capital or constitute 1/10th of the total number of members, they have no right to approach the Tribunal for relief.

However, the Tribunal may, on an application made to it waive all or any of the requirements specified in (i) or (ii) so as to enable the members to apply under section 241.

As regards obtaining relief from Tribunal, continuous losses cannot, by itself, be regarded as oppression (*Ashok Betelnut Co. P. Ltd. vs. M.K. Chandrakanth*).

Similarly, failure to declare dividends or payment of low dividends also does not amount to oppression. (*Thomas Veddon V.J. (v) Kuttanad Robber Co. Ltd*).

Thus the shareholders may not succeed in getting any relief from Tribunal.

Question 6 [NOV 2013] [PRACTICE MANUAL]

Examine the merits of the following petitions made under Sections 241 of the Companies Act, 2013 in the light of judicial pronouncements made in this regard:

A group of shareholders holding 12% of the issued share capital of Unique Products Limited have filed a petition before the Tribunal alleging various acts of illegal, invalid and irregular transactions entered into in the name of the Company.

Answer

According to Sections 244 of the Companies Act, 2013, a group of shareholders of Unique Products Limited must hold atleast 10% of the issued share capital of the Company or satisfy other requirements under section 244 of the Companies Act, 2013. Since the group holds 12% of the issue capital they are entitled to file a petition before the Tribunal under 241 of the Companies Act, 2013 by alleging that the affairs of the Company are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members of the Company. However, on the basis of *Sheth Mohanlal Ganpatram V. Shri Sayaji Jubilee Colton and Jute Mills Company Ltd*., mere illegal, invalid or irregular transactions entered into in the name of the company do not constitute a ground for invoking the provisions of section 241 unless it is proved that they are oppressive to any shareholder or prejudicial to the interest of the company or to the public interest.

Thus, in the present case, the petition filed by the group of shareholders will fail unless they can prove to the satisfaction of the Tribunal that the acts complained of in the petition are oppressive and prejudicial to the interest of the company and the public interest. And that to wind up the company would unfairly prejudice such member or members, but that otherwise those facts would justify the making of a winding up order on the ground that it was just and equitable that the Company should be wound up.

Question 7 : [MAY 2017]

A group of shareholders holding 20% of the issued share capital of DEF Limited have filed a petition before the Tribunal alleging the following:

(i) Various acts of illegal, invalid and irregular transactions entered into the name of the company.

(ii) Losses incurred due to mismanagement by the board of directors.

(iii) Non-declaration of dividend despite having sufficient profits in the past years.

Examine the merits of the above petitions made under Section 241 of the Companies Act, 2013 in the light of the judicial pronouncements made in this.

Answer:

According to Sections 244 of the Companies Act, 2013, a group of shareholders of DEF Limited must hold atleast 10% of the issued share capital of the Company or satisfy other requirements under section 244 of the Companies Act, 2013. Since the group holds 20% of the issued share capital they are entitled to file a petition before the Tribunal under **Section 241 of the Companies Act, 2013** by alleging that the affairs of the Company are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members of the Company. However, on the basis of *Sheth Mohanlal Ganpatram vs. Shri Sayaji Jubilee Cotton and Jute Mills Company Ltd.,* mere illegal, invalid or irregular transactions entered into in the name of the company do not constitute a ground for invoking the provisions of section 241 unless it is proved that they are oppressive to any shareholder or prejudicial to the interest of the company or to the public interest.

Similarly, losses incurred due to mismanagement by the board of directors, cannot, by itself, be regarded as oppression *(Ashok Betelnut Co. P. Ltd. vs. M.L. Chandrakanth).*

Also, failure to declare dividends or payment of low dividends also does not amount to oppression. *(Thomas Veddon V.J. vs. Kuttanad Robber Co. Ltd.).*

Thus, in the present case, the petition filed by the group of shareholders will fail unless they can prove to the satisfaction of the Tribunal that the acts complained of in the petition are oppressive and prejudicial to the interest of the company and the public interest.

Question 8 : [MAY 2018]

M/s Sunshine Oils Limited, a listed company as at 31st March, 2018 as per the audited financial statements is having 200 depositors with Rs.50 Crores of deposit in the company. Out of the total 200 depositors 20 depositors of the company have formed a group and have appointed Mr. Ram (a practicing advocate who is not one of the depositor) as their representative to file an application in the National Company Law Tribunal (NCLT) to bring a Class Action suit against the management of the company as they are of the opinion that the management and conduct of affairs of the company are being conducted in a manner which is prejudicial to the interest of the depositors being oppressive. Will the application of Mr. Ram be admitted by the Honourable Tribunal. Discuss with reference to the provisions of the Companies Act, 2013?

Answer:

M/s. Sunshine Oils Limited, a listed company as at 31st March, 2018, as per the audited financial statements is having 200 depositors with Rs. 50 crores of deposit in the company. Out of total 200 depositors, 20 depositors of the company have formed a group and have appointed Mr. Ram (a practising Advocate who is not one of the depositors) as their representative. To bring a class action suit against the management of the Company.

Section 245(3)(ii) of the Companies Act, 2013 prescribes that the requisite number of depositors to file an application shall not be less than 100 depositors or not less than such percentage of the total number of depositors as may be prescribed, whichever is less. However, Section 245(3)(ii) of the Companies Act, 2013 is silent regarding the minimum percentage of the depositors and no Rules have been prescribed till date.

Further, as per **Section 432**, a party to any proceeding or appeal before the Tribunal or Appellate Tribunal as the case may be, may appear in person or authorize one or more Chartered Accountant or Company Secretaries or Cost Accountants or legal practioners or any other person to present his case before the Tribunal or Appellate Tribunal as the case may be.

Section 245(10) states that subject to the compliances of this section, an application may be filed or any other action may be taken under this section by any person, group of persons or any association of persons representing the persons affected by any act or omission, specified in sub-section(1). In view of the above, the application of Mr. Ram who is a representative of depositors will be admitted by the Hon'ble Tribunal, provided, the requirement of minimum number of members filing the application under Section 245(3)(ii) is fulfilled.

Question 9 : [RTP MAY 2017]

ABC limited used the business resources of the company in favour of the majority shareholders and completely excluded the minorities from the affairs of the company. As of consequences, minority members filed an application to Tribunal to look into the matter on the regulation of conduct of affairs of the company in future. State in the light of the Companies Act, 2013, the action to be taken by the Tribunal in the given situation.

Answer:

The given problem is based on the **section 242 of the Companies Act, 2013** which deals with the powers of the Tribunal. According to the given provision if, on any application made **under section 241,** the Tribunal is of the opinion that the company's affairs have been or are being conducted in a manner prejudicial or oppressive to any member or members or prejudicial to public interest or in a manner prejudicial to the interests of the company, with a view to bringing to an end the matters complained of the Tribunal may, on the application of any party to the proceeding, make any interim order which it thinks fit for regulating the conduct of the company's affairs upon such terms and conditions as appear to it to be just and equitable as per the section 241(4) of the Companies Act, 2013.

Tribunal may on application of the minorities make any interim order of appointment of administrator/officer for overseeing the affairs of the company made on the application that established prima facie the fact that business resources of the company were being used only for the benefit of the majority shareholders and the minority shareholder was totally excluded from the affairs of the company.

Question 10 : [RTP NOV 2018]

A group of depositors in M/s. Bright Limited, a listed company, appointed Mr. Fair, an advocate as a representative to file an application in the National Company Law Tribunal (NCLT) on the behalf of the depositors to bring a Class Action suit against the management of the company as they are of the opinion that the management and conduct of affairs of the company are being conducted in a manner which is prejudicial to the interest of the depositors being oppressive.

Examine in the given situation, whether the appointment of Mr. Fair is valid as regards to the filling of the application before the Tribunal in the light to the provisions of the Companies Act, 2013?

Answer:

In the given instance, an appointment of Mr. Fair was made by a group of depositors of M/s. Bright Limited(listed company), as their representative to bring a class action suit against the management of the Company.

The given problem will be dealt with **Section 432 read with the 245(10) of the Companies Act, 2013.** Section 432 states that a party to any proceeding or appeal before the Tribunal or Appellate Tribunal as the case may be, may appear in person or authorize one or more Chartered Accountant or Company Secretaries or Cost Accountants or legal practioners or any other person to present his case before the Tribunal or Appellate Tribunal as the case may be.

Whereas, Section 245(10) of the Companies Act, 2013, provides that an application may be filed or any other action may be taken under this section by any person, group of persons or any association of persons representing the persons affected by any act or omission, specified in section 245(1) subject to the compliances of this section.

In view of the above, the appointment of Mr. Fair is valid and an application of Mr. Fair who is a representative of depositors, will be admitted by the Hon'ble Tribunal, provided, the requirement of minimum number of members filing the application under Section 245(3)(ii) is fulfilled.

Question 11 : [MOCK TEST PAPER MAY 2018]

The members of company with no paid up share capital, filed a complaint against change in the management of the company due to which it was likely that the affairs of the company will be conducted in a manner that it will be prejudicial to the interest of i ts 25 members. Total number of members of company were 100. On inquiry and investigation on the complaint, having a reasonable ground to believe that the transfer or disposal of assets of the company may be against to the interests of its shareholders. The Tribunal passed an order that such transfer or disposal of assets shall not be made during one year of such order.

Evaluate on the basis of the given facts, the following situations according to the Companies Act, 2013:

(i) Eligibility of the members to file a complaint.

(ii) Where if the management dispose of the certain assets in contravention to the order of the Tribunal.

Answer:

(i) **Section 244 of the Companies Act, 2013** provides the eligibility of members who hold the right to file the application under section 241 for oppression and mismanagement with the Tribunal. These qualification as provided in section 244 ensure that only the persons with sufficient interest in the affairs of the company can file the petition under section 241 of the Act. According to the section in the case of a company not having a share capital, not less than one-fifth of the total number of its members are eligible to make an application before the Tribunal. Where any members of a company are entitled to make an application under Section 244 (1), any one or more of them having obtained the consent in writing of the rest, may make the application on behalf and for the benefit of all of them.

In the given scenario, requirement of minimum numbers of members is fulfilled i.e. it is more than $1/5^{th}$ of the total number of its members of the company (1/5x 100= 20). So the members of the company are eligible to file the petition to tribunal under section 241.

However, the Tribunal may, on an application made to it in this behalf, waive all or any of the requirements specified in section 244, so as to enable the members to apply under section 241.

(ii) **According to section 221 of the Companies Act, 2013**, if it appears to the Tribunal, on a complaint made by members as specified under section 244(1) that the removal, transfer or disposal of funds, assets, properties of the company is likely to take place in a manner that is prejudicial to the interests of its members, Tribunal ordered that such transfer, removal or disposal shall not take place during such period not exceeding three years as may be specified in the order or may take place subject to such conditions and restrictions as the Tribunal may deem fit.

Here in the given case, management disposed of the certain assets within 1 year of such order of Tribunal. So accordingly, the company shall be punishable with fine which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to three years or with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees, or with both.

Question 12 : [MOCK TEST PAPER NOV 2018]

Mr. B. Dutt is the Managing Director of Food Plaza Restaurants Private Limited. FPRPL was incorporated in furtherance of a Joint Venture Agreement ("JVA") between Mr. B. Dutt and Jack India Pvt. Limited (JIPL) in 2017, both having 50% of equal share in the said company. FPRPL was to be governed by the terms and conditions set out in its Memorandum of Association and its Articles of Association.

JIPL held the Board meeting, without giving prior notice of such meeting to Mr. B. Dutt, took decision to remove Mr. B. Dutt with an allegation of mismanagement of fund in FPRPL. JIPL pressurised him to sell his shares at Rs. 5 crore, against Rs. 15 crore which is the fair market price of Mr. B. Dutt shares.
Advise whether Mr. B. Dutt has right to claim any relief and would he succeed in obtaining relief from Tribunal on the ground of oppression by JIPL?

Answer:

As per the given instance, the act of JIPL to remove Mr. B. Dutt a Managing director of FPRPL and pressurizing him to sell his shares much below the fair market price is an act of oppression and violations **of Section 241 and 242 of the Companies Act, 2013.** Mr. B. Dutt was not given prior notice of board meeting and no chance to disprove the false allegations made against him.

According to Section 242(2), the Tribunal without prejudice to the generality of the powers under sub-section (1) can order for -

a. the regulation of conduct of affairs of the company in future;

b. the purchase of shares or interests of any members of the company by other members thereof or by the company;

c. in the case of a purchase of its shares by the company, the consequent reduction of its share capital;

d. restrictions on the transfer or allotment of the shares of the company;

e. the termination, setting aside or modification, of any agreement entered between the company and the managing director, any other director or manager, upon such terms and conditions as may, in the opinion of the Tribunal, be just and equitable in the circumstances of the case;

f. the termination, setting aside or modification of any agreement between the company and any person other than those referred to in clause (e):

Provided that no such agreement shall be terminated, set aside or modified except after due notice and after obtaining the consent of the party concerned;

g. the setting aside of any transfer, delivery of goods, payment, execution or other act relating to property made or done by or against the company within three months before the date of the application under this section, which would, if made or done by or against an individual, be deemed in his insolvency to be a fraudulent preference;

h. removal of the managing director, manager or any of the directors of the company;

i. recovery of undue gains made by any managing director, manager or director during the period of his appointment as such and the manner of utilisation of the recovery including transfer to Investor Education and Protection Fund or repayment to identifiable victims;

j. the manner in which the managing director or manager of the company may be appointed subsequent to an order removing the existing managing director or manager of the company made under clause (h);

k. appointment of such number of persons as directors, who may be required by the Tribunal to report to the Tribunal on such matters as the Tribunal may direct;

l. imposition of costs as may be deemed fit by the Tribunal;

m. Any other matter for which, in the opinion of the Tribunal, it is just and equitable that provision should be made.

The above mentioned case, falls within the purview of the Section 241 and 242 of the Companies Act 2013, ensuring that the transfer of shares to the company (JIPL) by the member will not effect to the interests of the company or any of its shareholders. It gives broad powers to the Tribunal, leading to the establishment of its jurisdiction, even when a separate JVA exist.

Tribunal can pass an order for purchase of shares/interest of any members of the company by other members thereof or by the company if it thinks fit.

Under Section 242(2) of the Companies Act, 2013, Mr. B. Dutt can be reappointed as the Managing director of the company by the Tribunal and it can also issue orders for the future conduct of the company along with provision of just and equitable relief to the applicant (i.e. Mr. B Dutt).

9

Winding Up

Question 1: [MAY 2018]

M/s Sagar Retail Mega Mart Ltd. applied for winding up on 1st April, 2018 before the Honourable Tribunal by passing a special resolution as per the provision of section 271(1)(a) of the Companies Act, 2013 on account of fall in business and continued losses but not due to inability to pay debts. The company was in the business of ordinary retail trade of multiple branded goods. A few shareholders of the company have alleged before the Honourable Tribunal that the company had failed to maintain proper books of accounts for over a period of more than three years immediately prior to the date of winding up application and the sole reason cited by them in support of their allegation is that no proper statements of all goods sold and purchased by the company have been kept as such every officer in default must be punished as per the provisions of the Companies Act, 2013. Mr. Ravi the CFO and officer in default do not refute the allegation of non-maintenance but is of the opinion that this act as per the provision of the Companies Act, 2013 is not punishable. Decide whether the opinion of the CFO is correct. Would your answer be different had the business of the company be wholesale trade instead of ordinary retail trade?

Answer:

Failure to maintain proper books of accounts [Section 338(1) of the Companies Act, 2013]

- where a company is being wound up, if it is shown that proper books of account were not kept by the company throughout the period of two years immediately preceding the commencement of the winding up,
- every officer of the company who is in default shall, unless he shows that he acted honestly and that in the circumstances in which the business of the company was carried on, the default was excusable,
- be punishable with imprisonment for a term which shall be not less than one year but which may extend to three years and with fine which shall not be less than I lakh rupees but which may extend to three lakh rupees.

Conditions when it shall be deemed that proper books of account have not been kept [Section 338(2) of the Act]: For the purposes of sub-Section (1), it shall be deemed that proper books of account have not been kept in the case of any company,—

- where the business of the company has involved dealings in goods, statements of the annual stock takings and, except in the case of goods sold by way of ordinary retail trade, of all goods sold and purchased, have not been kept.

In the instant case, no proper statements of all goods sold and purchased by the company engaged in ordinary retail trade is kept. It shall be deemed that proper books of account have been kept as ordinary retail trade is an exception under sub- Section (2). Thus, opinion of CFO is correct and punishable.

If the company is engaged in wholesale trade instead of ordinary retail trade, then it is deemed that proper statements of all goods sold and purchased by the company engaged in wholesale retail trade is not kept for more than 3 years period immediately prior to the date of winding up application. Hence, in this case, the CFO opinion will not hold good and will be punishable.

Question 2: [RTP NOV 2017, RTP MAY 2018] [MTP MAY 2018] [NEW COURSE STUDY Q.]

Winding up proceedings has been commenced by the tribunal against DEF Limited, a government company (Central Government is a member). Even after completion of one year from the date of commencement of winding up proceedings, it is not possible to conclude the same. The liquidator is of the opinion that the statement shall be filled with tribunal and registrar only.

(i) Validate the opinion made by the liquidator and penalty that can be imposed on the liquidator for contravention of the provision as per Companies Act, 2013.

(ii) What will be your answer if the DEF Limited is a non-government company?

Answer:

Section 348 of the Companies Act, 2013 states that, if the winding up of a company is not concluded within one year after its commencement then the Company Liquidator shall file a statement in such form containing such particulars as may be prescribed. Such statement shall be filled within two months of the expiry of such year and it shall be filled continuously thereafter until the winding up is concluded, at intervals of not more than one year or at such shorter intervals as may be prescribed. The statement shall be duly audited, by a person qualified to act as auditor of the company and position of with respect to the proceedings in the liquidation,

The statement shall be filled with the tribunal in the case of a winding up by the Tribunal. A copy shall simultaneously be filed with the Registrar and shall be kept by him along with the other records of the company.

Where a statement relates to a Government company in liquidation, the Company Liquidator shall forward a copy thereof,

- ✓ to the Central Government, if that Government is a member of the Government company;
- ✓ to any State Government, if that Government is a member of the Government company; or
- ✓ to the Central Government and any State Government, if both the Governments are members of the Government company.

DEF Limited is a Government Company

In the current scenario, we can understand that the DEF Limited is a government company in which Central Government is a member and hence statement is also required to file to the Central Government along with the Tribunal and Registrar. So, the opinion by the Company Liquidator is not tenable in the eyes of the law and he is liable for penal action under the act.

The company liquidator shall be punishable with fine which may extend to five thousand rupees for every day during which the failure continues.

DEF Limited is a Non-Government Company

In the current scenario, the DEF Limited is a non-government company hence statement is only required to file with the Tribunal and Registrar only. So, the opinion by the Company Liquidator is tenable in the eyes of the law and he is not liable for any penal action under the act.

Question 3: [RTP NOV 2017]

Universal, a foreign company, incorporated in Australia was carrying on its business in Delhi related to manufacturing of automobile parts. Due to failure of its compliance with the respective law of the country under which it was incorporated, it was ceased to exist. Decide in the light of the Companies Act, 2013 the status of the company and the effect on the conduct of business in India.

Answer:

Section 376 of the Companies Act, 2013 provides the law related to the power of wind up Foreign Companies, although dissolved. Provision states that where a body corporate incorporated outside India which has been carrying on business in India, ceases to carry on business in India, it may be wound up as an unregistered company under this Part (i.e., Part I of the Chapter 21 which deals with the companies authorized to register under this Act), notwithstanding that the body corporate has been dissolved or otherwise ceased to exist as such under or by virtue of the laws of the country under which it was incorporated.

As per the facts given in the question, Universal, a foreign company, incorporated in Australia ceased to exist as per the law of the country, also ceased to carry on business in Delhi. Accordingly, Universal Company may be wound up as an unregistered company although it ceased to exist in Australia.

Question 4: [RTP NOV 2018]

LED Bulb Ltd., has made default in filing financial statements and annual returns for a continuous period of 4 financial years ending on 31st March, 2017. The Registrar of Companies having jurisdiction approached the Central Government to accord sanction to present a petition to Tribunal (NCLT) for the winding up of the company on the above ground under Section 272 of the Companies Act, 2013

Examine the validity of the RoC move, explaining the relevant provisions of the Companies Act, 2013. State the time limit for passing an order by the Tribunal under Section 273 of the Companies Act, 2013?

Answer:

Validity of RoC's action

According to **Section 271(d) of the Companies Act, 2013,** a Company may, on a petition under **Section 272**, be wound up by the Tribunal, if the Company has made a default in filing with the Registrar its financial statements or annual returns for immediately preceding five consecutive financial years.

In the instant case, the move by RoC to present a petition to Tribunal for the winding up of LED Bulb Ltd. is not valid as the Company has made default in filing financial statements and annual returns for a continuous period of 4 financial years ending on 31st March, 2017.

Time limit for passing of an Order under section 273: An order under section 273 of the Act shall be made within ninety days from the date of presentation of the petition.

Question 5: [NEW COURSE STUDY Q.]

XYZ Limited is being would up by the tribunal. All the assets of the company have been charged to the company's bankers to whom the company owes RS. 5 crores. The company owes following amounts to others:

- **Dues to workers – RS. 1,25,00,000**
- **Taxes Payable to Government – RS.30,00,000**
- **Unsecured Creditors – RS. 60,00,000**

You are required to compute with the reference to the provision of the Companies Act, 2013 the amount each kind of creditors is likely to get if the amount realized by the official liquidator from the secured assets and available for distribution among creditors is only RS. 4,00,00,000/-

Answer

Section 326 of the Companies Act, 2013 is talks about the overriding preferential payments to be made from the amount realized from the assets to be distributed to various kind of creditors. According to the proviso given in the section 326 the security of every secured creditor shall be deemed to be subject to a pari passu change in favor of the workman to the extent of their portion.

$$\text{Worknan}^{u}\text{s Share to Secured Asset} = \frac{\text{Amount Realied} * \text{Worknan}^{u}\text{s Dues}}{\text{Worknan}^{u}\text{s Dues} + \text{Secured Loan}}$$

$$\text{Worknan}^{u}\text{s Share to Secured Asset} = \frac{4,00,00,000 * 1,25,00,000}{1,25,00,000 + 5,00,00,000}$$

$$4,00,00,000 * \frac{1}{5}$$

$$\text{Worknan}^{u}\text{s Share to Secured Assets} = 80,00,000$$

Amount available to secured creditor is Rs. 400 Lakhs – 80 Lakhs = 320 Lakhs

Hence, no amount is available for payment of government dues and unsecured creditors.

Question 6 [MOCK TEST PAPER MAY 2018 & NOV 2018] [NEW COURSE STUDY Q.]

Skyline Ltd. was ordered to be wound up compulsory on a petition filed on 10th February, 2018 before Tribunal. The official liquidator who has taken control for the assets and other records of the company has noticed that the Managing Director of the company has transferred certain properties belonging to the company to one of its creditor "Vansh (Pvt.) Ltd", in which his son was interested. This was causing huge monetary loss to the company. The sale took place on 15th September, 2017.

(i) Examine what action the official liquidator can take in this matter having regard to the provisions of the Companies Act, 2013.

(ii) Determine the rights and liabilities of fraudulently preferred persons by mortgage of charge of property to him to secure the company's debt.

Answer

The official liquidator can invoke the provisions contained in **Section 328 of the Companies Act, 2013** to recover the sale of assets of the company. According to Section 328, if the Tribunal is satisfied that there is a preference transfer of property, movable or immovable, or any delivery of goods, payment, execution made, taken or done by or against a company within six months before making winding up application, the Tribunal may order as it may think fit and may declare such transaction invalid and restore the position.

Since in the present case, the sale of immovable property took place on 15 th September, 2017 and the company went into liquidation on an application filed on 10th February, 2018 i.e., within 6 months of making winding up application and such transfer of property has resulted a loss to the company.

The official liquidator will be able to succeed in proving the case under Section 328 by way of fraudulent preference as the property was sold to a Vansh (Pvt.) company, a creditor in which the son of the ex-managing director was interested.

Hence, the transaction made will be regarded as invalid and restore the position of the company as if no transfer of immovable property has been made.

Determination of rights and liabilities of fraudulently preferred persons: According to section 331 of the Companies Act, 2013, where a company is being wound up and anything made, taken or done after the commencement of this Act is invalid under section 328 as a fraudulent preference of a person interested in property mortgaged or charged to secure the company's debt, then, without prejudice to any rights or liabilities arising, apart from this provision, the person preferred shall be subject to the same liabilities, and shall have the same rights, as if he had undertaken to be personally liable as a surety for the debt,-

- to the extent of the mortgage or charge on the property, or
- value of his interest,

Whichever is less.

Question 7 [MOCK TEST PAPER MAY 2018]

X, a foreign company, with a place of business in India, ceases to carry on business in India. State the legal position of such foreign company under the Companies Act, 2013.

Answer

According to **section 376 of the Companies Act, 2013**, where any body corporate incorporated outside India which has been carrying on business in India, ceases to carry on business in India, it may be wound up as an unregistered company under part II of chapter XXI of the Companies Act, 2013, notwithstanding that the body corporate has been dissolved or otherwise ceased to exist as such under or by virtue of the laws of the country under which it is incorporated.

Question 8 [PRACTICE MANUAL]

Prerna Ltd. had gone into liquidation and a liquidator was appointed to administer the assets and liabilities of the Company. The liquidator of the Company finds that the assets of the Company are not sufficient to meet out the liabilities. He therefore, calls on the contributories including the past members as per List B to contribute towards the assets. The past members object to the liquidator's act on the ground that since there are no more members of the Company, they are not liable to contribute. Referring to the provisions of the Companies Act, 2013 decide:

(i) **Whether the contention of the past member is tenable and can they be exempted from the liability to contribute?**

(ii) **What would be your answer in case the members in question are the present members?**

Answer

(i) Past Member are Liable to Contribute unpaid amount on share held by them.To that extent their objection is not application.

(ii) The Present Member are Liable to the Extent of the amount remaining unpaid on the shares in the case of company limited by shares.In case of company Limited by Guarantee,to the amount undertaken to be contributed by him to the assets of the company.

Question 9 [PRACTICE MANUAL]

A listed Public Company was ordered to be wound up by the order of the Bombay High Court. While ordering the winding up, the Court ordered the Official Liquidator to submit a preliminary report to the Court as per the provisions contained in the Companies Act. Referring to the provisions of the Companies Act, 1956, state briefly the details to be given in the preliminary report of the Official Liquidator.

Answer

Where the Tribunal has made a winding up order or appointed a Company Liquidator, such liquidator shall, **within sixty days** from the order, submit to the Tribunal, a report containing the following particulars, namely:—

Contents of Liquidator's Repor

- The nature and details of the assets of the company including their location and value, stating separately the cash balance in hand and in the bank, if any, and the negotiable securities, if any, held by the company. The valuation of the assets shall be obtained from registered valuers for this purpose.
- Amount of capital issued, subscribed and paid-up
- Amount of capital issued, subscribed and paid-up
- The existing and contingent liabilities of the company including names, addresses and occupations of its creditors, stating separately the amount of secured and unsecured debts, and
- The existing and contingent liabilities of the company including names, addresses and occupations of its creditors, stating separately the amount of secured and unsecured debts, and
- In the case of secured debts, particulars of the securities given, whether by the company or an officer thereof, their value and the dates on which they were given In the case of secured debts, particulars of the securities given, whether by the company or an officer thereof, their value and the dates on which they were given
- The debts due to the company and the names, addresses and occupations of the persons from whom they are due and the amount likely to be realised on account thereof
- Guarantees, if any, extended by the company
- List of contributories and dues, if any, payable by them and details of any unpaid call
- Details of trade marks and intellectual properties, if any, owned by the company
- Details of subsisting contracts, joint ventures and collaborations, if any
- Details of holding and subsidiary companies, if any
- Details of legal cases filed by or against the company
- Any other information which the Tribunal may direct or the Company Liquidator may consider necessary to include

Question 10 [NOV 2005, MAY 2008 & PRACTICE MANUAL]

ABC Ltd. was a supplier of Raw Materials to SAM Ltd., which could not make payment to ABCLtd. owing to huge losses and financial constraints. Ultimately, SAM Ltd, went into liquidation and Official Liquidator was appointed. ABC Ltd. filed a suit for recovery of its dues. The Court awarded a decree in favour of ABC Ltd. Armed with the Court's decree, ABC Ltd. approached the Official Liquidator to pay the amount to it in preference over dues of the workmen. The workmen protested the demand of ABC Ltd. and contended that their dues rank paripassu with the Secured Creditors and will override all other claims of other creditors even where a decree has been passed.

You are required to ascertain the validity of the argument of the workmen in the light of the provisions of the Companies Act, 2013 and the decide cases on the subject

Answer

Section 326 of the Companies Act, 2013 is talks about the overriding preferential payments to be made from the amount realized from the assets to be distributed to various kind of creditors. According to the proviso given in the section 326 the security of every secured creditor shall be deemed to be subject to a pari passu change in favor of the workman to the extent of their portion.

The Contention of Workmen of SAM Ltd. Is Valid & Company Liquidator will have to pay their dues.

Question 11 [MAY 2003, NOV 2008 & PRACTICE MANUAL]

Jain Limited, a company incorporated under the Companies Act, 2013 is being wound up by the court. After realization of the assets of the company, the officia l liquidator has an amount or 70,00,000 at his disposal towards payment of creditors of the said company. The details of creditors are as follows:

(i)	**Unsecured creditors**	**50,00,000**
(ii)	**Taxes and duties payable to Government**	**5,00,000**
(iii)	**Dues to workers**	**30,00,000**
(iv)	**Dues to secured creditors**	**40,00,000**

The available amount with the liquidator, obviously, is not sufficient to meet the claims of all the creditors. Moreover, the company had already created a charge on all the assets of the company in favour of the secured creditors. Explain the procedure to be followed by the liquidator for payment of dues as provided in the Companies Act, 2013.

Answer

Section 326 of the Companies Act, 2013 is talks about the overriding preferential payments to be made from the amount realized from the assets to be distributed to various kind of creditors. According to the proviso given in the section 326 the security of every secured creditor shall be deemed to be subject to a pari passu change in favor of the workman to the extent of their portion.

$$\text{Workman's Share to Secured Asset} = \frac{\text{Amount Realied} * \text{Workman's Dues}}{\text{Workman's Dues} + \text{Secured Loan}}$$

$$\text{Workman's Share to Secured Asset} = \frac{70,00,000 * 30,00,000}{30,00,000+40,00,000}$$

$$70,00,000 * \frac{3}{7}$$

$$\text{Worknan}^{u}\text{s Share to Secured Assets} = 30,00,000$$

Amount available to secured creditor is Rs. 70 Lakhs – 30 Lakhs = 40 Lakhs

Hence, no amount is available for payment of government dues and unsecured creditors.

Question 12 [NOV 2013 & PRACTICE MANUAL]

Bharat Textiles Limited incurred huge losses during the last three financial years and it s financial position was bad. The Company created a legal mortgage on some of its immovable properties in favour of a bank on 1st September, 2012 in the hope that by keeping good faith with the bank it could get further advances from the bank and the same could be utilized to revive the Company. Some creditors filed winding up petition in the court on 15 th January, 2013. The court passed an order of winding up on 1st August, 2013. Answer the following with reference to the provisions of the Companies Act, 2013:

(i) **What is meant by 'Fraudulent Preference'? State the effect of 'Fraudulent Preference'.**

(ii) **Whether the creation of legal mortgage by the Company in favour of the bank would amount to fraudulent preference?**

Answer

(i) FRAUDULENT PREFERENCE [SECTION 328]

Where a company has given preference to a person who is-

- one of the creditors of the company, or
- a surety or guarantor for any of the debts or other liabilities of the company,

and the company does anything or suffers anything done which has the effect of putting that person into a position which, in the event of the company going into liquidation, will be better than the position he would have been in if that thing had not been done prior to six months of making winding up application, -

the Tribunal, if satisfied that, such transaction is a fraudulent preference may order as it may think fit for restoring the position to what it would have been if the company had not given that preference.

(ii) Creation of legal mortgage on some of its immovable properties in favour of a bank for getting advance or loan in good faith is not Fraudulent Preference. The Transcation is made in good faith for carrying out business of company.

Question 13 [MAY 2004 & PRACTICE MANUAL]

A Company created a floating charge of its Current Assets in favour of a Bank to secure a Current Account, which was in debit of Rs.5 lakhs and also to secure further Working Capital facilities provided by the bank. The charge created on 1st January, 2003 was duly registered with the registrar of Companies. The bank advanced Rs.10 lakhs subsequent to the creation of charge. The company has gone into voluntary liquidation pursuant to a resolution passed on 1st September, 2003. Examine the validity of the floating charge in case it is a creditors' voluntary winding up, but there is no fraudulent preference. Would your answer be different, if it was a member's voluntary winding up? Give your answer referring to the provisions of the Companies Act, 2013.

Answer

Section 332 of the Companies Act, 2013 deals with effect of floating charge**.**

Where a company is being wound up,

- a floating charge on the undertaking or property of the company created within the 12 months immediately preceding the commencement of the winding up,

shall, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid, except for the amount of any cash paid to the company at the time of, or subsequent to the creation of, and in consideration for, the charge, together with interest on that amount at the rate of 5 % per annum or such other rate as may be notified by the Central Government in this behalf.

The voluntary winding up commences at the time when the resolution for voluntary winding up is passed by the company

Members' voluntary winding up is permissible only when the company is solvent and declaration of solvency is made. In the case of members' voluntary winding up, the position is different. As the company is solvent, the floating charge is valid for the entire debt of Rs.15 lakhs including the pre-existing debt of Rs. 5 lakh (at the time of creation of charge).

In this case,the floating charge was created within 12 months preceding the commencement of winding up and hence the provisions of Section 332 are attracted

If declaration of solvency is not made, the winding up would be termed as creditors' voluntary winding up. In the case of creditors' voluntary winding up, the company cannot be considered as solvent. In view of the position explained above the floating charge is valid only to the extent of advances made subsequent to the creation of charge i.e. Rs. 10 lakhs plus interest at 5%.

Question 14 [NOV 2009 & PRACTICE MANUAL]

M/s Raman Ltd. was wound up by the Court. The official liquidator invited claims from its creditors which stood as under:

Income tax dues	**Rs. 11 lakhs**
Sales tax dues	**Rs. 5 lakhs**
Dues of workers	**Rs. 25 lakhs**
Unsecured loans payable to directors	**Rs. 25 lakhs**
Trade creditors who supplied raw material	**Rs. 15 lakhs**
Secured creditor being the bankers of the company	**Rs. 75 lakhs**
	Rs. 156 lakhs

Official Liquidator could realize only Rs.80 lakhs by sale of assets and realizations made from the company's debtors, which is not sufficient to pay to all the creditors. Please decide the order of priority for payment to creditors explaining the relevant provisions of the Companies Act, 2013.

Answer

Under section 326 of the Companies Act, 2013, (i) workmen's dues, and (ii) debts due to secured creditor shall be paid in priority of all debts, and shall be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions. Income tax dues and sales tax dues are preferential creditors under **section 327** of the Act, and subject to the provisions of section 326, the same may be paid in priority to the claims of unsecured creditors.

In the present case, the available funds are only to the extent of Rs. 80 lakhs which will be distributed amongst the secured creditor and workmen in proportion to their dues, as follows:

Workmen

(1/4th of Rs. 80 lakhs) = Rs. 20 lakhs

Secured creditor

(3/4th of Rs. 80 lakhs) = Rs. 60 lakhs

As such, the dues of preferential creditors (namely, Income tax and sales tax dues) and unsecured creditors (unsecured loan and trade debtors) cannot be paid any amount.

Question 15 [MAY 2003, NOV 2015 & PRACTICE MANUAL]

Best Plastics Limited is being wound up by the Court. The Official Liquidator after realization of the assets has an amount of Rs. 28 lakhs in his hand towards payment of creditors of the company. Details of creditors are as follows:

(i) **Secured Creditors Rs. 20 lakhs**

(ii) **Workers wages Rs. 15 lakhs**

(iii) **Income Tax payable - Rs. 2 lakhs**

(iv) **Unsecured Creditors - Rs.40 lakhs**

Total Creditors Rs. 77 lakhs

Since the available amount in the hands of Liquidator is only Rs. 28 lakhs, which is insufficient to meet the claims of all the above creditors, explain the procedure you would follow for payment of the above in accordance with the provisions of the Companies Act, 2013, assuming that the company has created a charge on all the assets of the company in favour of secured creditors.

Answer

In accordance with the provisions of the Companies Act, 2013, as contained under **Section 327,** payment of debts out of available funds with the Official Liquidator is to be made as per procedure laid down there under. However, Section 326 provides for overriding of the preferential payments as mentioned in **Section 327.** According to **Section 326,** in the winding up of a company,

(i) workmen's dues; and

(ii) debts due to secured creditors, shall be paid in priority to all other debts.

The above debts have to be paid in full unless the assets are insufficient to meet them, in which case they shall abate in equal proportions.

Applying the above provisions in the given case, the funds available with the Official Liquidator are not even sufficient to meet fully the dues payable to secured creditors and workers. Thus tax dues to the tune of Rs. 2 lakhs, payable to Government Authorities will not get any payment even though they are to be considered as preferential payments as per Section 327 of the Act. The Secured Creditors dues and workmen dues will get abated equally and they get Rs. 16 lakhs and Rs.12 lakhs respectively. The other creditors will not get anything.

Question 16 [MAY 2000 & NOV 2002 & PRACTICE MANUAL]

By an order of the Court M/s ABC Limited was wound up with effect from 15.3.2017. Mr. Gupta, who ceased to be a member of the Company from 1.6.2016 received a notice from the liquidator to deposit a sum of Rs.15,000 as his contribution towards the liability on the shares previously held by him. Mr. Gupta seeks your opinion about his liability under the Companies Act, 2013.

Answer **Refer Section 285 of Company Act 2013**

'Contributory' is a term used in the case of winding up of a company. A Contributory can be past or present member and is liable to contribute to the assets of the company in the event of winding up.

In the instant case, Mr. Gupta ceased to be a member of the Company when it went into liquidation from 15.3.2017. Thus, Mr. Gupta will be treated as a past member. He will not be required to contribute to the assets of the company if the following conditions are fulfilled:

(1) If Mr. Gupta had ceased to be a member of the company for a period of one year or upwards before the commencement of the winding up. In this case, since one year has not elapsed, Mr. Gupta will be liable to contribute to the assets of the company.

(2) If the debt or liability of the company was contracted or incurred after he ceased to be a member.

(3) If the present members are able to satisfy the contributions required to be made by them under the Act.

In any case, the liability of the past or present member cannot exceed the unpaid amount on the shares and if the shares are fully paid up, no contribution is required to be made by the members past or present.

Question 17 [NOV 2002 & NOV 2012 & PRACTICE MANUAL]

Explain the term "Overriding Preferential Payments" under the provisions of the Companies Act, 2013. ABC Limited is being wound-up by the Court. The official liquidator has realized Rs. 100 lakh by selling the land and buildings mortgaged by the company in favour of its bankers. The company ows Rs. 200 lakh to the bank. The bank has claimed that the amount realised by sale of land and buildings must be paid in full to it in preference to the workmen's dues to the extent of Rs. 50 lakh. Examine the Bank's claim with reference to the provisions of the Companies Act, 2013.

Answer

Refer Section 326 of Company Act 2013

Apply Question 11 Formula

In view of the provisions of Sec. 326 the contention of the bank that whole of Rs. 100 lacs realized from the sale of land, etc. shall be paid to the bank towards repayment of loan is not tenable, only a sum of Rs. 80 lacs shall be paid.

Thus, Official Liquidator will have to pay Rs. 20 Lacs to Workmen and Rs. 80 Lacs to the Bank.

Question 18 [NOV 2007 & PRACTICE MANUAL]

Info-tech Overtrading Ltd. was ordered to be wound up compulsory by an order dated 15 th October, 2007 of the Delhi High Court. The official liquidator who has taken control for the assets and other records of the company has noticed the following:

(i) **The Managing Director of the company has sold certain properties belonging to the company to a private company in which his son was interested causing loss to the company to the extent of Rs. 50 lakhs. The sale took place on 10th May, 2007.**

(ii) **The company created a floating charge on 1st January, 2007 in favour of a private bank for the overdraft facility to the extent of Rs. 5 crores, by hypothecating the current assets viz., stocks and book debts.**

Examine what action the official liquidator can take in this matter. Having regard to the provisions of the Companies Act, 2013.

Answer

The official liquidator can invoke the provisions contained in **Section 328 of the Companies Act, 2013** to recover the sale of assets of the company. According to Section 328 any transfer of property, movable or immovable made within 6 months before the commenceme nt of winding up will be deemed to be a fraudulent preference and hence invalid in the eyes of laws. Since in the present case, the sale of immovable property took place on 10 th May, 2007 and the company went into liquidation on 15th October, 2007 i.e., within 6 months before the winding up of the company and since the sale has resulted in a loss of Rs. 50 lakhs to the company.The official liquidator will be able to succeed in proving the case under Section 328 by way of fraudulent preference as the property was sold to a private company in which the son of the ex-managing was interested.

According to **Section 332 of the Companies Act**, any floating charge created within 12 months of the commencement of the winding up will be treated as invalid unless it is proved that the company immediately after the creation of charge was solvent. In the present case it may be difficult for the Bank, the charge holder to prove that the company was solvent after the creation of the floating charge. The charge holder i.e., the Bank is however, entitled to recover from the company. The amount advanced along with 5% interest. Further preferential debts under Section 327 will have priority over debts secured by a floating charge. The official liquidated may thus prove that the floating charge created by the company is invalid.

11

Companies Incorporated Outside India

Question 1 [PRACTICE MANUAL]

Examine with reference to the provisions of the Companies Act, 2013 whether the following companies can be treated as foreign companies:

(i) **A company incorporated outside India having a share registration office at Mumbai.**

(ii) **Indian citizens incorporated a company in Singapore for the purpose of carrying on business there.**

Answer

Section 2(42) of the Companies Act, 2013 defines a "foreign company" as any company or body corporate incorporated outside India which:

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

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

According section 386 of the Companies Act, 2013, for the puproses of Chapter XXII of the Companies Act, 2013 (Companies incorporated outside India), expression "Place of business" includes a share transfer or registration office.

Accordingly, to qualify as 'foreign company' a company must have the following features:

(a) it must be incorporated outside India; and

(b) it should have a place of business in India.

(c) That place of business may be either in its own name or through an agent or may even be through the electronic mode; and

(d) It must conduct a business activity of any nature in India.

(i) Therefore, a company incorporated outside India having a share registration office at Mumbai will be treated as a foreign company provided it conducts any business activity in India.

(ii) In the case of a company incorporated in Singapore for the purpose of carrying on business in Singapore will not fall within the definition of a foreign company. Its incorporation by Indian citizen is immaterial. In order to be a foreign company it has to have a place of business in India and must conduct a business activity in India.

Question 2 [RTP NOV 2017] [PRACTICE MANUAL][NEW COURSE STUDY Q.]

(i) As per provisions of the Companies Act, 2013, what is the status of XYZ Ltd., a Company incorporated in London, U.K., which has a share transfer office at Mumbai? [RTP MAY 2018]

(ii) ABC Ltd., a foreign company having its Indian principal place of business at Kolkata, West Bengal is required to deliver various documents to Registrar of Companies under the provisions of the Companies Act, 2013. You are required to state, where the said company should deliver such documents.

(iii) In case, a foreign company does not deliver its documents to the Registrar of Companies as required under section 380 of the Companies Act, 2013, state the penalty prescribed under the said Act, which can be levied.

Answer

(i) In terms of the definition of a foreign company under **section 2 (42) of the Companies Act, 2013** a "foreign company" means any company or body corporate incorporated outside India which:

a. Has a place of business in India whether by itself or through an agent, physically or through electronic mode; and

b. Conducts any business activity in India in any other manner

According **section 386 of the Companies Act, 2013,** for the puproses of Chapter XXII of the Companies Act, 2013 (Companies incorporated outside India), "Place of business" includes a share transfer or registration office.

From the above definition, the status of XYZ Ltd. will be that of a foreign company as it is incorporated outside India, has a place of business in India and it may be presumed that it carries on a business activity in India

(ii) **The Companies Act, 2013 vide section 380** requires every foreign company is required to deliver to the Registrar for registration, within 30 days of the establishment of office in India, documents which have been specified therein.According to *the Companies (Registaration of Foreign Companies) Rules, 2014*, any document which any foreign company is required to deliver to the Registrar shall be delivered to the Registrar having jurisdiction over New Delhi.

(iii) The Companies Act, 2013 lays down the governing provisions for foreign companies in Chapter XXII which is comprised of sections 379 to 393. The penalties for non filing or for contravention of any provision for this chapter including for non filing of documents with the Registrar as required by section 380 and other sections in this chapter are laid down in section 392 of the Act which provides that if a foreigncompany contravenes the provisions of this Chapter, the foreign company shall be punishable with a fine which shall not be less than Rs. 1,00,000 but which may extend to Rs. 3,00,000 and in the case of a continuing offence, with an additional fine which may extend to Rs. 50,000 for every day after the first during which the contravention continues and every officer of the foreign company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than Rs. 25,000 but which may extend to Rs. 5,00,000, or with both.

Question 3 [NOV 2017] [RTP MAY 2016] [PRACTICE MANUAL]

Joel Ltd. was incorporated in London with a paid up capital of 10 million pounds. Mr. Y an Indian citizen holds 25% of the paid up capital. X Ltd. a company registered in India holds 30% of the paid up capital of Joel Ltd. Joel Ltd. has recently established a share transfer office at New Delhi.

(i) **The company seeks your advice as to what formalities it should observe as a foreign company under Companies Act, 2013.**

(ii) **State briefly the requirements relating to filing of accounts with the Registrar of Companies by the foreign company in respect of its global business as well as Indian business.**

Answer

(i) In terms of the definition of a foreign company under **section 2 (42) of the Companies Act, 2013** a "foreign company" means any company or body corporate incorporated outside India which:

a. Has a place of business in India whether by itself or through an agent, physically or through electronic mode; and

b. Conducts any business activity in India in any other manner.

According **section 386 of the Companies Act, 2013,** for the puproses of Chapter XXII of the Companies Act, 2013 (Companies incorporated outside India), "Place of business" includes a share transfer or registration office.

Further, **section 379** states that where not less than 50% of the paid-up share capital, whether equity or preference or partly equity and partly preference, of a foreign company is held by one or more citizens of India or by one or more companies or bodies corporate incorporated in India, or by one or more citizens of India and one or more companies or bodies corporate incorporated in India, whether singly or in the aggregate, such company shall comply with the provisions of this Chapter and such other provisions of this Act as may be prescribed with regard to the business carried on by it in India as if it were a company incorporated in India.

In the case given in the question, the following facts are given:

a. Joel Ltd. was incorporated in London and has a place of business (share transfer office) in India, hence, it is a foreign company.

b. Its shareholding comprises of 25% held by Y who is a citizen of India and 30% by X Ltd. which is a company registered in India. Together the two Indian shareholders hold 55% of the share capital of Joel Ltd.

Therefore, although Joel Ltd. is a foreign company, due to the holding of more than 50% of its share capital by two Indian entities, it will be covered under section 379 and will be treated as a company incorporated in India or as an Indian Company.

However, it may be noted that under section 379, the application of the Companies Act, 2013 on Joel Ltd. will be only in respect of business carried by it in India and not in relation to its business anywhere outside India.

(i) The Companies Act, 2013 under Chapter XXII does not require a foreign company to file any documents in relation to its global business.

1. Under section 380 of the Act, a foreign company is required to file for registration within 30 days of the establishment of a place of business in India the following documents with the Registrar:

(a) a certified copy of the charter, statutes or memorandum and articles, of the company or other instrument constituting or defining the constitution of the company. If the instruments are not in the English language, a certified translation thereof in the English language;

(b) the full address of the registered or principal office of the company;

(c) a list of the directors and secretary of the company containing such particulars as may be prescribed;

In relation to the nature of particulars to be provided as above, the *Companies (Registration of Foreign Companies) Rules, 2014*, provide that the list of directors and secretary or equivalent (by whatever name called) of the foreign company shall contain the following particulars, for each of the persons included in such list, namely:

(1) personal name and surname in full;

(2) any former name or names and surname or surnames in full;

(3) father's name or mother's name and spouse's name;

(4) date of birth;

(5) residential address;

(6) nationality;

(7) if the present nationality is not the nationality of origin, his nationality of origin;

(8) passport Number, date of issue and country of issue; (if a person holds more than one passport then details of all passports to be given)

(9) income-tax permanent account number (PAN), if applicable;

(10) occupation, if any;

(11) whether directorship in any other Indian company, (Director Identification Number(DIN), Name and Corporate Identity Number (CIN) of the company in case of holding directorship);

(12) other directorship or directorships held by him;

(13) Membership Number (for Secretary only); and

(14) e-mail ID.

(d) the name and address or the names and addresses of one or more persons resident inIndia authorised to accept on behalf of the company service of process and any notices or other documents required to be served on the company;

(e) the full address of the office of the company in India which is deemed to be its principal place of business in India;

(f) particulars of opening and closing of a place of business in India on earlier occasion or occasions;

(g) declaration that none of the directors of the company or the authorize drepresentative in India has ever been convicted or debarred from formation of companiesand management in India or abroad; and

(h) any other information as may be prescribed.

2. According to section 381 of the Companies Act, 2013:

(i) Every foreign company shall, in every calendar year,—

(a) make out a balance sheet and profit and loss account in such form, containing such particulars and including or having attached or annexed thereto such documents as may be prescribed under Rules 4 & 5 of the Companies(Registration of Foreign Companies)Rules, 2014, and

(b) deliver a copy of those documents to the Registrar.

Question 4 [MAY 2014] [PRACTICE MANUAL] [NEW COURSE STUDY Q.]

DEJY as Company Limited incorporated in Singapore desires to establish a place of business at Mumbai. You being a practising Chartered Accountant havebeen appointed by the company as a liaison officer, for compliance of legal formalities on behalf of the company. Examining the provisions of the Companies Act, 2013, state the documents you are required to furnish on behalf of the company, on the establishment of a place of business at Mumbai.

Answer: REFER ANSWER OF Q.3 (ii)

Question 5 [NOV 2014] [PRACTICE MANUAL]

X Inc is a company registered in UK and carrying on Trading Activity, with Principal Place of Business in Chennai. Since the company did not obtain registration or make arrangement to file Return, the State VAT Officer having jurisdiction, intends to serve show cause notice on the Foreign Company. As Standing Counsel for the department, advise the VAT Officer on valid service of notice.

Answer

Service of notice on foreign company (**Section 383 of the Companies Act, 2013):**

According to section 383 of the Companies Act, 2013, any process, notice, or other document required to be served on a foreign company shall be deemed to be sufficiently served, if addressed to any person whose name and address have been delivered to the Registrar under section 380 of the Companies Act, 2013, and left at, or sent by post to, the address which has been so delivered to the Registrar or by electronic mode. Hence, the VAT Officer may serve the show cause notice by following the above provisions.

[Assumption: It is assumed that X Inc is a foreign company within the meaning of section 379 of the Companies Act, 2013]

Question 6 [MAY 2015] [RTP MAY 2017] [PRACTICE MANUAL] [NEW COURSE STUDY Q.]

ABC Limited, a foreign company failed to deliver some desired documents to the Registrar of Companies as required under Section 380 of the Companies Act, 2013. State the provisions of penalty prescribed under the said Act, which can be levied on ABC Limited for its failure.

Answer

If a foreign company fails to deliver documents to the Registrar of Companies as required under **section 380 of the Companies Act, 2013**, the foreign company shall be punishable with a fine which shall be not less than Rs. 1,00,000 but which may extend to Rs.3,00,000 and in the case of a continuing offence, with an additional fine which may extend to Rs.50,000 for every day after the first during which the contravention continues. Also, every officer of the foreign company who is in default shall be punishable with an imprisonment for a term which may extend to six months or with a fine which shall not be less than Rs. 25,000 but which my extend to Rs. 5,00,000 or with both. The penalty is provided in section 392 and thus ABC Ltd. is liable for the contravention of section 380 of the Act.

Question 7 [NOV 2015] [RTP MAY 2018] [PRACTICE MANUAL]

[NEW COURSE STUDY Q.]

Robertson Ltd. is a company registered in Thailand. Although, it has no place of business established in India, yet it is doing online business through telemarketing in India. Whether it will be treated as a Foreign Company under the Companies Act, 2013? Explain.

Answer

According to **section 2(42) of the Companies Act, 2013**, "foreign company" means any company or body corporate incorporated outside India which –

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

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

According to the Companies (Registration of Foreign Companies) Rules, 2014, "electronic mode" means carrying out electronically based, whether main server is installed in India or not, including, but not limited to –

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

(b) offering to accept deposits or inviting deposits or accepting deposits or subscriptions in securities in India or from citizens of India;

(c) financial settlements, web based marketing, advisory and transactional services, data base services and products, supply chain management;

(d) online services such as telemarketing, telecommuting, telemedicine, education and information research; and

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

Looking to the above description, it can be said that being involved in business activity through telemarketing, Robertson Ltd., will be treated as foreign company.

Question 8 [MAY 2016] [PRACTICE MANUAL] [NEW COURSE STUDY Q.]

Galilio Ltd. is a foreign company in Germany and it established a place of business in Mumbai. Explain the relevant provisions of the Companies Act, 2013 and rules made thereunder relating to preparation and filing of financial statements, as also the documents to be attached alongwith the financial statements by the foreign company.

Answer

Preparation and filing of financial statements by a foreign company: According to **section 381 of the Companies Act, 2013:**

(i) Every foreign company shall, in every calendar year,—

(a) make out a balance sheet and profit and loss account in such form, containing such particulars and including or having attached or annexed thereto such documents as may be prescribed, and \

(b) deliver a copy of those documents to the Registrar

According to the **Companies (Registration of Foreign Companies) Rules, 2014,** every foreign company shall prepare financial statement of its Indian business operations in accordance with Schedule III or as near thereto as possible for each financial year including:

(1) documents that are required to be annexed should be in accordance with Chapter IX i.e. Accounts of Companies.

(2) The documents relating to copies of latest consolidated financial statements of the parent foreign company, as submitted by it to the prescribed authority in the country of its incorporation under the applicable laws there.

(ii) The Central Government is empowered to direct that, in the case of any foreign company or class of foreign companies, the requirements of clause (a) of section 381(1) shall not apply, or shall apply subject to such exceptions and modifications as may be specified in notification in that behalf.

(iii) If any of the specified documents are not in the English language, a certified translation thereof in the English language shall be annexed. [Section 381 (2)]

(iv) Every foreign company shall send to the Registrar along with the documents required to be delivered to him, a copy of a list in the prescribed form, of all places of business established by the company in India as at the date with reference to which the balance sheet referred to in section 381(1) is made.

According to the Companies (Registration of Foreign Companies) Rules, 2014, every foreign company shall file with the Registrar, along with the financial statement, in Form FC3 with such fee as provided under Companies (Registration Offices and Fees) Rules, 2014 a list of all the places of business established by the foreign company in India as on the date of balance sheet.

According to the Companies (Registration of Foreign Companies) Rules, 2014, if any foreign company ceases to have a place of business in India, it shall forthwith give notice of the fact to the Registrar, and as from the date on which notice is so given, the obligation of the company to deliver any document to the Registrar shall cease, if it does not have other place of business in India.

(v) According to the **Companies (Registration of Foreign Companies) Rules, 2014,**

(a) Further, every foreign company shall, along with the financial statement required to be filed with the Registrar, attach thereto the following documents; namely:-

(1) Statement of related party transaction

(2) Statement of repatriation of profits

(3) Statement of transfer of funds (including dividends, if any)

The above statements shall include such other particulars as are prescribed in the Companies (Registration of Foreign Companies) Rules, 2014.

(b) All these documents shall be delivered to the Registrar within a period of 6 months of the close of the financial year of the foreign company to which the documents relate.

Question 9: [MAY 2018]

M/s EVA Optical Networking India Private Limited having its registered office situated in the city of Gurugram, Haryana State, falling within the jurisdiction of Registrar of Companies, NCT, Delhi & Haryana has filed a petition before the Honorable National Company Law Tribunal, New Delhi Bench (NCLT) under the Companies Act, 2013 seeking an exemption be granted to the petitioner company to change the financial year of the company from 1st April to 31st March presently adopted by following the financial year in below manner:-

(i) **For the next financial year: From 1st April, 2018 to 31st December, 2018 both days inclusive.**

(ii) **For the subsequent financial year: Be changed to a period of one calendar year beginning 1st January of one year and concluding on 31st December of the same year.**

The Petitioner company in its petition avers that it is a part of EVA Optical Networking Singapore Pvt. Ltd., a company incorporated in Singapore (being the parent company) holding 99% of the Equity Share Capital of the petitioner and the remaining 1% of the Equity Share Capital is held by EVA Optical Networking SE, a company incorporated in Germany, which is represented to be the ultimate holding company. The parent company as well as the ultimate holding company follows their Financial Year as 1st January to 31st December of the same year for the purpose of consolidation of accounts and hence in order to streamline the preparation of the consolidated financials of the parent company, the petitioner company is required to align with it. Advise whether the petition will stand before the Honorable NCLT as per the provisions of the Companies Act, 2013. What would be your answer if M/s EVA Optical Networking India Private Limited was registered as a Specified International Financial Services Center (IFSC) private company?

Answer:

According to **Section 2(41) of the Companies Act, 2013**, "financial year", in relation to any company or body corporate, means the period ending on the 31st day of March every year, and where it has been incorporated on or after the 1st day of January of a year, the period ending on the 31st day of March of the following year, in respect whereof financial statement of the company or body corporate is made up:

Provided that on an application made by a company or body corporate, which is a holding company or a subsidiary of a company incorporated outside India and is required to follow a different financial year for consolidation of its accounts outside India, the Tribunal may, if it is satisfied, allow any period as its financial year, whether or not that period is a year.

Further, in case of a Specified IFSC private company, which is a subsidiary of a foreign company, the financial year of the subsidiary may be same as the financial year of its holding company and approval of the Tribunal shall not be required.

As per the facts of the question, EVA Optical Networking Singapore Pvt. Ltd. (incorporated in Singapore) and EVA Optical Networking SE (incorporate in Germany) together hold all the shares of M/s EVA Optical Networking India Private Limited. Thus, M/s EVA Optical Networking India Private Limited is a subsidiary of a foreign company.

1. Applying the above provisions, M/s EVA Optical Networking India Private Limited, can rightfully apply to Honourable NCLT to seek an exemption to change the next financial year of the company from 1st April to 31st March to 1stApril, 2018 to 31st December, 2018 and the subsequent financial year to a period of one calendar year beginning 1st January of one year and concluding on 31st December of the same year in order to streamline the preparation of the consolidated financials of the parent company. Accordingly, the petition will stand before the Hon'ble NCLT as per the provisions of the Companies Act, 2013.

2. If M/s EVA Optical Networking India Private Limited was registered as a Specified International Financial Center (IFSC) private company, its financial year can be same as the financial year of its foreign holding company and approval of the Tribunal shall not be required.The Central Government have exempted such companies in public interest under Section 462 of the Companies, 2013.

Question 10: [MAY 2018]

Chang Limited, a company incorporated in Singapore proposes to issue prospectus offering its securities in India. The Company has no established place of business in India.

The officer in charge of the issue of the prospectus in India seeks your opinion regarding the provisions relating to registration of the prospectus under the Companies Act, 2013. List out the documents required to be enclosed with the prospectus.

Answer:

According to **Section 389 of the Companies Act, 2013**, no person shall issue, circulate or distribute in India any prospectus offering for subscription in securities of a company incorporated or to be incorporated outside India, whether the company has or has not established, or when formed will or will not establish, a place of business in India, unless before the issue, circulation or distribution of the prospectus in India, a copy thereof certified by the chairperson of the company and two other directors of the company as having been approved by resolution of the managing body has been delivered for registration to the Registrar and the prospectus states on the face of it that a copy has been so delivered, and there is endorsed on or attached to the copy, any consent to the issue of the prospectus required by Section 388 and such documents as may be prescribed.

According to the *Companies (Registration of Foreign Companies) Rules, 2014,* the following documents shall be annexed to the prospectus, namely:

(a) any consent to the issue of the prospectus required from any person as an expert;

(b) a copy of contracts for appointment of managing director or anager and in case of a contract not reduced into writing, a memorandum giving full particulars thereof;

(c) a copy of any other material contracts, not entered in the ordinary course of business, but entered within preceding 2 years;

(d) a copy of underwriting agreement; and

(e) a copy of power of attorney, if prospectus is signed through duly authorized agent of directors.

Question 11: [RTP NOV 2018]

Examine and state whether the following Companies can be considered as 'Foreign Company' under the Companies Act, 2013:

(i) A company which is incorporated outside India employs agents in India but has no place of business in India.

(ii) A company incorporated outside India having shareholders who are all Indian citizens.

(iii) A company incorporated in India but all the shares are held by foreigners.

(iv) A company which has no place of business established in India, yet, is doing online business through telemarketing in India.

Answer:

(i) As per **Section 2(42) of the Companies Act, 2013,** a foreign company means any company or body corporate incorporated outside India which-

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

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

A company incorporated outside India and have not established a place of business in India, is not deemed to be a Foreign Company. Thus establishing a place of business is an essential ingredient in the definition. In the given case, the company has not established a place of business India though employs agents in India. It will not be deemed to be a foreign company:

(ii) A company incorporated outside India, will not be deemed to be a Foreign Company even though all the shareholders are Indian citizens, unless it has a place of business in India.

(iii) A company incorporated In India but having all foreign shareholders will be deemed to be an Indian Company as it is not incorporated outside India though it has a place of business in India.

(iv) According to the Companies (Registration of Foreign Companies) Rules, 2014, "electronic mode" means carrying out electronically based, whether main server is installed in India or not, including, but not limited to:

(a) Business to business and business to consumer transactions, data inter-change and other digital supply transactions

(b) Offering to accept deposits or inviting deposits or accepting deposits or subscriptions in India or from citizens of India

(c) Financial settlements, web-based marketing, advisory and transactional services, data based services and products and supply chain management,

(d) Online services such as telemarketing, telecommuting, telemedicine, education and information research.

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

Therefore, looking to the above description, a company which has no place of business established in India, yet doing online business through telemarketing in India will be treated as a foreign company.

Question 12: [RTP MAY 2015]

Explain the provisions of the Companies Act, 2013 relating to the filing of documents by a company incorporated outside India, having a place of business in Mumbai. State whether failure on the part of such a company to comply with the provisions of the Act, shall affect the validity of any contract entered into by the company. Also state whether the company is entitled to bring any suit in respect of any such contract.

Answer:

In accordance with the **provisions of the Companies Act, 2013**, as contained in **Section 380,** every company incorporated outside India (i.e. Foreign Company) shall, within 30 days of the establishment of its place of business in India, deliver to the Registrar for registration:

(i) A certified copy of the charter, statutes or memorandum and articles of the company or other instrument constituting or defining the constitution of a company and, if the instrument is not in the English language, a certified translation thereof in the English language.

(ii) The full address of the registered or principal office of the company.

(iii) A list of the directors and secretary of the company containing such particulars as may be prescribed.

(iv) The name and address or the names and addresses of one or more persons resident in India authorised to accept on behalf of the company service of process and any notices or other documents required to be served on the company.

(v) The full address of the office of the company in India which is deemed to be its principal place of business in India.

(vi) Particulars of opening and closing of a place of business in India on earlier occasion or occasions.

(vii) Declaration that none of the directors of the company or the authorised representative in India has ever been convicted or debarred from formation of companies and management in India or abroad; and

(viii) Any other information as may be prescribed.

Further, in accordance with the provisions of **Section 393 of the Act,** any failure by a company to comply with the provisions of the Act shall not affect the validity of any contract, dealing or transaction entered into by the company or its liability to be sued in respect thereof, but the company shall not be entitled to bring any suit, claim any set-off, make any counter claim or institute any legal proceeding in respect of any such contract, dealing or transaction, until the company has complied with the provisions of the Act applicable to it.

Question 13: **[RTP MAY 2015]**

Under Section 387 of the Companies Act, 2013, what are the particulars required to be contained in a prospectus to be issued by an existing foreign company

Answer:

Under **section 387 (1) of the Companies Act, 2013** no person shall issue, circulate or distribute in India any prospectus offering to subscribe for securities of a company incorporated or to be incorporated outside India, unless the prospectus is dated and signed, and contains particulars with respect to the following matters namely:

(i) the instrument constituting or defining the constitution of the company;

(ii) the enactments or provisions by or under which the incorporation of the company was effected;

(iii) the address in India where the said instrument, enactments or provisions, or copies thereof can be inspected. If the same are not in the English language, a certified translation thereof in the English language should be available for inspection;

(iv) the date on which and the country in which the company would be or was incorporated; and

(v) whether the company has established a place of business in India and, if so, the address of its principal office in India; and

(vi) the matters specified under section 26 (so far as they are applicable) which lays down the matters to be included in a prospectus issued by an Indian Company.

In terms of the proviso to section 387 (1) the above referred points (i), (ii) and (iii), shall not be applicable if the prospectus is issued more than 2 years after the date at which the company is entitled to commence business.

Question 14: **[RTP NOV 2015]**

Aster Ltd., is a company incorporated outside India. 50% of its preference share capital and 20% of its equity share capital is held by companies incorporated in India. It issued prospectus inviting subscriptions in India for its shares but did not state the country in which it is incorporated.

Examine

(i) Is the prospectus of the company valid?

(ii) What other disclosures in the prospectus are required to be made by a foreign company?

Answer:

1. Under section 379 of the Companies Act, 2013 where

a. Not less than 50% of the paid-up share capital,

b. whether equity or preference or partly equity and partly preference, of a foreign company

c. is held either singly or in the aggregate by one or more citizens of India or by one or more companies or bodies corporate incorporated in India,

d. such company shall comply with this Chapter (XXII) and

e. such other provisions of this Act as may be prescribed

f. with regard to the business carried on by it in India

g. as if it were a company incorporated in India.

It may further be added that the chapter XXII which governs the foreign companies is spread from **section 379 to section 393**.

From the above provisions, it is clear that Aster Ltd. will fall within the purview of section 379 as more than 50% (50% preference share capital + 20% equity share capital = 70%) is held by companies incorporated in India.

Further, **section 387 (1) (a) (iv)** requires for the prospectus of a foreign company to include the date on which and the country in which the company would be or was incorporated.

(i) In view of the above provisions, the prospectus issued by Aster Ltd. is a non compliant prospectus. Thus, according to Section 387 the prospectus is not valid

Further, **according to section 393** which states that any failure by a company to comply with the provisions of this Chapter shall not affect the validity of any contract, dealing or transaction entered into by the company or its liability to be sued in respect thereof, but the company shall not be entitled to bring any suit, claim any set-off, make any counter-claim or institute any legal proceeding in respect of any such contract, dealing or transaction, until the company has complied with the provisions of this Act applicable to it. Therefore, it may be concluded that the non disclosure of the country in which it was incorporated will not invalidate the validity of any contract, dealing or transaction entered into by Aster Ltd.

(ii) Under **section 387 (1) of the Companies Act, 2013** no person shall issue, circulate or distribute in India any prospectus offering to subscribe for securities of a company incorporated or to be incorporated outside India, unless the prospectus is dated and signed, and contains the following particulars:

a. the instrument constituting or defining the constitution of the company;

b. the enactments or provisions by or under which the incorporation of the company was effected;

c. the address in India where the said instrument, enactments or provisions,or copies thereof can be inspected. If the same are not in the English language, a certified translation thereof in the English language should be available for inspection;

d. the date on which and the country in which the company would be or was incorporated; and

e. whether the company has established a place of business in India and , if so, the address of its principal office in India, and the matters specified under section 26 (so far as they are applicable) which lays down the matters to be included in a prospectus issued by an Indian Company.

Question 15: [RTP NOV 2016]

Gogoyee Sounds International Limited is a foreign company and it has established a "Share transfer" office in India. Decide, under the provisions of the Companies Act, 2013:

(i) Whether, "Share transfer" office can be deemed to be a "place of business" in India?

(ii) If answer to the above question is in affirmative, what is the law relating to display of name, etc. of a foreign company in India?

Answer:

Display of name etc. of a foreign company (Sections 382 and 386 of the Companies Act, 2013)

Under **section 386(c) of the Companies Act, 2013**, the expression "place of business" includes a share transfer or registration office.

In the instant case the company has established a "share transfer" office in India and hence the law contained in section 382 is applicable to the said company, section 382 of the said Act lays down that –

Every foreign company shall-

(a) conspicuously exhibit on the outside of every office or place where it carries on business in India, the name of the company and the country in which it is incorporated, in letters easily legible in English characters, and also in the characters of the language or one of the languages in general use in the locality in which the office or place is situate;

(b) cause the name of the company and of the country in which the company is incorporated, to be stated in legible English characters in all business letters, bill- heads and letter paper, and in all notices, and other official publications of the country; and

(c) if the liability of the members of the company is limited, cause notice of that fact-

(i) to be stated in every such prospectus issued and in all business letters, bill heads, letter paper, notices, advertisements and other official publications of the company, in legible English characters; and

(ii) to be conspicuously exhibited on the outside of every office or place where it carries on business in India, in legible English characters and also in legible characters of the language or one of the languages in general use in the locality in which the office or place is situate.

[Cover Sec. 439 & 446] Offences and penalties

Question 1 [RTP NOV 2015 & 2017] [NEW COURSE STUDY Q.]

Which offences are deemed to be Non- cognizable under the Companies Act, 2013? Enumerate the relevant provisions.

Answer

Offences to be non-cognizable: According to **section 439 of the Companies Act, 2013**:

(i) Notwithstanding anything in the Code of Criminal Procedure, 1973, every offence under this Act except the offences referred to in sub-section (6) of section 212 shall be deemed to be non-cognizable within the meaning of the said Code.

(ii) No court shall take cognizance of any offence under this Act which is alleged to have been committed by any company or any officer thereof, except on the complaint in writing of the Registrar, a shareholder of the company, or of a person authorised by the Central Government in that behalf.

Whereas in case of a government companies, court shall take cognizance of an offence under this Act which is alleged to have been committed by any company or any officer thereof on the complaint in writing of a person authorized by the Central Government in that behalf. [Vide Notification G.S.R. 463(E) dated 5th June 2015]

(iii) The court may take cognizance of offences relating to issue and transfer of securities and non-payment of dividend, on a complaint in writing, by a person authorised by the Securities and Exchange Board of India.

(iv) Nothing in this sub-section shall apply to a prosecution by a company of any of its officers.

(v) Where the complainant is the Registrar or a person authorised by the Central Government, the presence of such officer before the Court trying the offences shall not be necessary unless the court requires his personal attendance at the trial.

(vi) The above provisions shall not apply to any action taken by the liquidator of a company in respect of any offence alleged to have been committed in respect of any of the matters in Chapter XX or in any other provision of this Act relating to winding up of companies.

(vii) The liquidator of a company shall not be deemed to be an officer of the company.

Question 2 [2015 NOV, RTP MAY 2017] [NEW COURSE STUDY Q.]

In the annual general meeting of XYZ Ltd., while discussing on the matter of retirement and reappointment of director Mr. X, allegations of fraud and financial irregularities were levelled against him by some members.This resulted into chaos in the meeting.The situation was normal only after the Chairman declared about initiating an inquiry against the director Mr. X, however, could not be re-appointed in the meeting. The matter was published in the newspapers next day. On the basis of such news, whether the court can take cognizance of the matter and take action against the director on its own?

Justify your answer with reference to the provisions of the Companies Act, 2013.

Answer

Section 439 of the Companies Act, 2013 provides that offences under the Act shall be non-cognizable. As per this section:

1. Notwithstanding anything in the Code of Criminal Procedure, 1973, every offence under this Act except the offences referred to in sub section (6) of section 212 shall be deemed to be non-cognizable within the meaning of the said Code.

2. No court shall take cognizance of any offence under this Act which is alleged to have been committed by any company or any officer thereof, except on the complaint in writing of the Registrar, a shareholder of the company, or of a person authorized by the Central Government in that behalf.

Thus, in the given situation, the court shall not initiate any suo moto action against the director Mr.X without receiving any complaint in writing of the Registrar of Companies, a shareholder of the company or of a person authorized by the Central Government in this behalf.

Question 3 [MAY 2016]

Mr. Joseph, a member of Armaments Ltd., is aggrieved due to failure of the company to make payment of dividend declared in the AGM held in August, 2015. He makes a complaint, in writing, before the court of competent jurisdiction within the prescribed period of limitation, but the court refused to take cognizance of the alleged offence. Explain the legal position in this regard under the Companies Act, 2013.

Also state the offences under the Companies Act, 2013 which are cognizable and which are non-cognizable.

Answer

Cognizance of offence: A court shall take cognizance of any offence under this Act which is alleged to have been committed by any company or any officer thereof only on the written complaint of -

(a) The Registrar,

(b) A shareholder of the company, or

(c) Of a person authorised by the Central Government in that behalf.

Provided that the court may take cognizance of offences relating to issue and transfer of securities and non-payment of dividend, on a complaint in writing, by a person authorised by the Securities and Exchange Board of India.

In the present case, Mr. Joseph, a member of Armaments Ltd. is aggrieved due to failure of the company to make payment of dividend declared in the AGM held in August 2015. He makes a complaint, in writing, before the court of competent jurisdiction within the prescribed period of limitation, but the court refused to take cogniz ance of the alleged offence.

Here, the Court shall take cognizance of the offence relating to non payment of dividend as the shareholders have made a complaint in writing before the competent jurisdiction.

Cognizable and non-cognizable offences: Overriding the provisions given under the Code of Criminal Procedure, 1973, every offence under the Companies Act, 2013 except the offences referred to in section 212(6) of the Companies Act, 2013, which deals with the investigation into affairs of company by serious fraud investigation office, shall be deemed to be non-cognizable within the meaning of the said Code.

Therefore, the offences as covered under **section 212(6)** shall now be deemed to be cognizable where police officer may arrest person without warrant and are non- bailable. The Companies Act, 2013 establishes the offence covered under section 212(6) as a public wrong which has to be prevented and controlled. This non - bailable nature of the offences deter the offender and the others from committing further and sim.

Question 4 [RTP MAY 2016]

P, a private company committed an offence related to issue of securities to a group of persons. A shareholder among the group, filed a complaint against the company and its officers. Examine the law related to the cognizance of an offence under the Companies Act, 2013. What if, the said company would have been a government company?

Answer

Cognizance of offence: A court shall take cognizance of any offence under this Act which is alleged to have been committed by any company or any officer thereof only on the written complaint of -

(a) The Registrar,

(b) A shareholder of the company, or

(c) Of a person authorised by the Central Government in that behalf.

Provided that the court may take cognizance of offences relating to issue and transfer of securities and non-payment of dividend, on a complaint in writing, by a person authorised by the Securities and Exchange Board of India.

Provided that nothing in this sub-section shall apply to a prosecution by a company of any of its officers.

However, in case of government companies as per the Notification no. G.S.R. 463(E) dated 5th June 2015 , court shall take cognizance of any offences under this Act which is alleged to have been committed by any company or any officer thereof on the complaint in writing of a person authorized by the Central Government in that behalf.

13

E-Governance

Question 1 [MAY 2016] [PRACTICE MANUAL]

What is MCA 21 project and what are its benefits?

Answer

MCA 21 project: This is an innovative project and initiative of the Ministry of Corporate Affairs to enable e-filing. This project covers all the services provided by the Registrar of Companies (ROC) starting from the incorporation of a new company. The project would provide e-services including registration of new companies, filing of various returns and statutory documents under the Companies Act, 1956/2013. The system would also enable filing and access for statutory documents like memorandum of association, articles of association, certificate of incorporation etc.

The project serves the interest of all the key stake holders and the public at large. Also professionals need no longer to visit the officers of ROC and are able to interact with the Ministry using MCA 21 portal from their offices or home. The services of the Ministry of Corporate Affairs with the introduction of MCA 21 will be e-form driven. Form filing will be done using freely downloadable software and it can be done offline. The prerequisite for using the MCA 21 portal will be P-4 computer with printer, windows 2000 / XP / Vista / 7, internet explorer 6.0 version, Adobe Acrobat Reader from version in 9.4 to version 7.5 and digital signature certificate.

Key Benefits

MCA 21 seeks to fulfill the requirements of the various stakeholders. The key benefits of MCA 21 project are:

(i) Expeditious incorporation of companies

(ii) Simplified and ease of convenience in filing of Forms/ Returns

(iii) Better compliance management

(iv) Total transparency through e-Governance

(v) Customer centric approach

(vi) Increased usage of professional certificate for ensuring authenticity and reliability of the Forms / Returns

(vii) Building up a centralised database repository of corporate operating

(viii) Enhanced service level fulfillment

(ix) Inspection of public documents of companies anytime from anywhere

(x) Registration as well as verification of charges anytime from anywhere

(xi) Timely redressal of investor grievances

(xii) Availability of more time for MCA employees for monitoring and supervision

Question 2 [PRACTICE MANUAL]

What is Director Identification Number (DIN) and What is the procedure of obtaining DIN?

Answer

Director Identification Number (DIN): It is an 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 pursuant to **section 153 and 154 of the Companies Act, 2013**.

Any person intending to apply for DIN shall have to make an application **in eForm DIR-3** and should follow the following procedure:

(i) e-Form DIR-3 has to follow the online e-Filing process.

(ii) Attach the photograph and scanned copy of supporting documents i.e. proof of identity, and proof of residence as per the guidelines. Physical documents are not required to submit at DIN cell.

(iii) Along with the supporting documents, Verification as per **Form DIR-4** shall also be attached. This shall contain the Name, Father's name, date of birth and text of declaration and physical signature of the applicant.

(iv) The eForm shall have to be digitally signed and shall be uploaded on MCA21 portal.

(v) Upon upload, pay the fees for eForm DIR-3. Only electronic payment of the fees shall be allowed (I.e. Netbanking / Credit Card). No challan payment will be accepted under revised procedure of DIN allotment.

The applicant is required to get himself/herself registered on the MCA21 Portal to obtain login id, which is necessary for payment of the fees. After obtaining the login-id, Login to the MCA21 portal and click on 'eForm upload' link available under the 'eForms' tab for uploading the eForm DIR-3. eForm DIR-3 will be processed only after the DIN application fee is paid.

(vi) Upon upload and successful payment, **Form DIR-3** is mandatorily to be signed by an Applicant and a practicing professional or secretary (who is a member of ICSI) in whole time employment or the Director of the existing company.

Approved DIN shall be generated in case the form is being signed by a practicing professional and details have not been identified as potential duplicate. Provisional DIN shall be generated in case form is signed by secretary in whole time employment or Director of existing company and details have been found as potential duplicate. A suitable informational message and an email shall be provided to the user that the DIN shall be approved after due verification by the DIN cell.

(vii) Processing of e Form DIR-3: In case, DIR-3 gets certified by the professional (i.e. CA (in whole time practice)/ CS (in whole time practice)/ CWA (in whole time practice)/, the DIN will be approved by the system immediately online (in case it is not potential duplicate).

(viii) Post-approval changes in particulars of Form DIR-3: If there is any change in the particulars submitted in eform DIR-3, applicant can submit e-form DIR-6 online. For instance in the event of change of address of a director, he/ she is required to intimate this change by submitting eform DIR-6 along with the required attested documents.

Question 3 [NOV 2013] [RTP MAY 2015] [PRACTICE MANUAL]

What is Director Identification Number (DIN) and what scanned documents are required to be attached with eform DIR-3?

Answer

Director Identification Number (DIN): It is an 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 pursuant to **section 153 and 154** of the Companies Act, 2013.

Scanned documents required to be attached with eform DIR-3:

(i) High resolution photograph of the applicant.

(ii) PAN is mandatory now. So copy of pan is mandatory for identity, name, father's name and date of birth. Proof of father's name is not required in the case of foreign nationals.

(iii) Copy of passport is mandatory as an id proof in the case of foreign nationals.

(iv) Present Address proof which should not be older than 2 months

(v) Verification as per form DIR-4 as per the format given on the website.

Question 4 [MAY 2015] [RTP NOV 2016] [PRACTICE MANUAL]

Some changes in the particulars of a Director, who has already obtained a Director Identification Number have taken place. Now the Director wants to incorporate the changes in his DIN in the database maintained by the Central Government in this regard. Describe the procedure to be followed by the Director.

Answer

Intimation of changes in particulars specified in DIN application: The Companies (Appointment and Qualification of Directors) Rules, 2014 provides for the procedure for intimation of changes in particulars specified in the DIN application. According to which every individual who has been allotted a DIN under these rules shall, in the event of any change in his particulars as stated in **Form DIR-3,** intimate such change(s) to the Central Government within a period of thirty days of such change(s) in Form DIR-6 in the following manner, namely :-

A. the applicant shall download **Form DIR-6** from the portal and fill in the relevant changes, attach copy of the proof of the changed particulars and verification in the Form DIR-7 all of which shall be scanned and submitted electronically;

B. the form shall be digitally signed by a chartered accountant in practice or a company secretary in practice or a cost accountant in practice;

C. the applicant shall submit the Form DIR-6.

Question : 5 [MAY 2016]

Explain the functioning of the 2 types of Front Office (FO) in accessing MCA 21 portal of the Ministry of Corporate Affairs.

Also state the nature of services which can be availed of by its user on the MCA 21 portal.

Answer :

The implementation of Front Office (FO) is done in two ways, namely, Virtual Front Office (VFO) and Physical Front Office (PFO). VFO is what the citizen has in front while accessing MCA 21 portal. The PFO will be a replacement to the existing ROC counters. PFO will also accept paper documents.However, these will be converted into electronic documents by customer service agents manning PFO. The authorised signatories for a given document to sign digitally will need to appear in person at the PFO.

The user can avail the following services on MCA 21 portal:

- e-filing
- Viewing public document
- Requesting certified copies
- Registering investor complaint
- Tracking transaction status

Question : 6 [MAY 2017]

Surya, a director in New Age Limited holding Directors Identification Number (DIN) wants to make certain changes in the particulars of his DIN. What procedure would you follow to get changes incorporated in the DIN already allotted to Surya?

Answer:

Intimation of changes in particulars specified in DIN application

(1) According to Companies **(Appointment and Qualification of Directors) Rules, 2014**, every individual who has been allotted a DIN under these rules shall, **in the event of any change in his particulars as stated in Form DIR-3,** intimate such change(s) to the Central Government within a period of thirty days of such changes(s) in form DIR – 6 in the following manner, namely:

(i) **The applicant shall download Form DIR – 6** from the portal, fill in the relevant changes, **verify the Form (DIR-7**) and attach duly scanned copy of the proof of the changed particulars and submit electronically.;

(ii) The form shall be **digitally signed** by a **Chartered Accountant in practice** or a **Company Secretary in practice** or a **Cost Accountant in practice**;

(iii) The applicant shall submit the Form DIR -6.

(2) The Central Government, upon being satisfied, after verification of such changed particulars from the enclosed proofs, shall incorporate the said changes and inform the applicant by way of a letter by post or electronically or in any other mode confirming the effect of such change in the electronic database maintained by the Ministry.

(3) The DIN cell of the Ministry shall also intimate the change(s) in the particular s of the director submitted to it in Form DIR-6 to the concerned Registrar(s) under whose jurisdiction the registered office of the company(s) in which such individual is a director is situated.

(4) The concerned individual shall also intimate the change(s) in his particulars to the company or companies in which he is a director within 15 days of such change.

Question : 7 [NOV 2017]

(a) Mr. Vinay Kumar, applied for the first time for allotment of a Directors identification Number (DIN) on 1st November, 2016 as he is planning to incorporate a private limited company in Form No. DIN-3 under the Companies Act, 2013. The status of his DIN applications presently is showing as "Put Under Resubmission". He seeks your guidance as to whether his application has been rejected and is he required to obtain a fresh DIN. Advise.

(b) Explain the process and relevance of back office in MCA-21 Program of the Ministry of Corporate Affairs.

Answer:

(a) **Allotment of DIN** : According to **Section 154 of the Companies Act, 2013**, the Central Government shall, within one month from the receipt of the application under section 153, allot a Director Identification Number (DIN) to the applicant in such manner as may be prescribed.

The status of the DIN applications showing "Put under resubmission": According to Rule 10 of the Companies **(Appointment and Qualifications of Directors) Rules, 2014** of **the Companies Act, 2013**, if the DIN application is put under Resubmission due to following reasons, one can submit additional documents for rectifying DIN application, within a period of 15 days from the date on which it is marked as Resubmission

(i) Proof of Identity/ residence is not enclosed or expired.

(ii) Proof of Date of Birth is not enclosed.

(iii) Supporting documents are not properly attested.

(iv) Non-submission of affidavit (if required).

On resubmitting with the additional documents, same DIN will be approved, if documents are found in correct order as per marked in resubmission.
So, accordingly the application of Mr. Vinay Kumar has not been rejected and does not require t to obtain a fresh DIN.

(b) Process and Relevance of back office in MCA 21 Programme: The back office process relates to:

- Dynamic routing of documents that have been electronically filed to the concerned official within MCA based on the type of service request.
- Electronic workflow systems to support speed and certainty in service delivery
- Supporting all routine tasks such as registrations and approvals
- Storing of all approved documents of companies as part of electronic records, including provision of access to electronic records for the stakeholders
- Enhancing identification of defaulters
- Increasing efficiency of Technical Scrutiny
- Ensuring close follow-up on matters related to compliance management including prosecutions
- Enabling quicker responses to investor grievances
- Providing alerts when the tasks are not carried out within stipulated period

Question : 8 [RTP MAY 2016]

What things should be taken care of while filling an application for allotment of DIN? What procedure has to be followed, if there is any change in particulars of Director

Answer:

Things should be taken care of while filling application for allotment of DIN through e-form DIR-3- Income Tax PAN is mandatory in case of Indian applicants so the applicant details (name, father's name, date of birth) should be as per the PAN details. The particulars filled in form DIR-3 should match with the details given in the supporting documents to be submitted along with DIN application. Any mis-match will lead to rejection of DIN application.

Procedure to be followed, if there is any change in particulars of Director : Director is required to download and fill up eForm DIR-6 for such changes and follow the same process for uploading the same as mentioned for eForm DIR-3. The requested change is taken into the system on verification of the proof enclosed with the application for change request. In the case of change in applicant's name, gazette notification is must with form DIR-6. Married ladies, who are having Id proof with their maiden name, can submit marriage certificate along with application. Verification as per Form DIR-7 of Companies Act, 2013 also needs to be attached to Form DIR-6 as it is a mandatory attachment now.

Question : 9 [MAY 2018]

The e-forms rolled out by the Ministry of Corporate Affairs (MCA) under the provisions of the Companies Act, 2013 and rules framed thereunder are mandatorily numbered alpha-numeric. Explain this concept. What is the chapter wise nomenclature of e-forms provided by MCA in respect of -1. Acceptance of Deposits by Companies & 2. Management and Administration?

Answer:

In order to facilitate easy understanding of the e-forms being rolled out under the provisions of Companies Act, 2013 and Rules made thereunder, forms under the Companies Act are mandatorily numbered alpha-numeric. Initial of forms is to be started with alphabet of two or three letters based on the subject of the Chapter, followed by serial number of the form. This will define the nature of the forms and would be easy to recognise.

Chapter wise nomenclature of e-forms provided by MCA:

Sl.no	Chapter number	Chapter name	Nomenclature of e-forms
1	V	Acceptance of Deposit by Companies	DPT
2	VII	Management and Administration	MGT

14

Special Courts & NCLT

Question 1 [NOV 2017] [NEW COURSE STUDY Q.]

What are provisions related to constitution and working of the Mediation and Conciliation Panel as per Section 442 of the Companies Act, 2013?

Answer

Mediation and Conciliation Panel: In common parlance, Mediation means intervention of some third party in a dispute with the intention to resolve the dispute.

Conciliation means the process of adjusting or settling disputes in a friendly manner through extra judicial means. This new provision introduced by the Companies Act, 2013 has come into force with effect from 1st April, 2014 vide notification dated 26th of March, 2014. **Section 442 of the Companies Act, 2013** deals with the constitution and functioning of the mediation and conciliation panel in order to dispose the matter.

Section 442 lays the following law with respect to the constitution and working of the Mediation and Conciliation Panel:

(1) **Central Government to maintain the Panel of Mediators:** The Central Government shall maintain a panel of experts to be known as Mediation and conciliation panel for mediation between the parties during the pendency of any proceedings before the Central Government or the Tribunal or the Appellate Tribunal under this Act.

Hence, it is important that the case should be pending before the Central Government or the Tribunal or the Appellate Tribunal under this Act.

(2) **Panel consisting of experts:** The panel shall consist of such number of experts having such qualification as may be prescribed.

(3) **Filing of application:** Application for mediation and conciliation can be made by:

(i) any parties to the proceedings. (It shall be accompanied with such fees and in such form as may be prescribed.)

(ii) The Central Government or the Tribunal or the Appellate Tribunal before which any proceeding is pending may, *suo motu* refer any matter pertaining to such proceeding to such number of experts as it may deem fit.

(4) **Appointment of expert/s from panel:** The Central Government or the Tribunal or the Appellate Tribunal before which any proceeding is pending may appoint one or more experts from the Panel as may be deemed fit.

(5) **Fees, terms and conditions of the experts:** The fee and other terms and conditions of experts of the Mediation and Conciliation Panel shall be such as may be prescribed.

(6) **Procedure for the disposal of matter:** In order to dispose the matter, the Mediation and Conciliation Panel shall follow such procedure as may be prescribed.

(7) **Period for the disposal of matter:** The Mediation and Conciliation Panel shall dispose of the matter referred to it within a period of three months from the date of such reference and forward its recommendations to the Central Government or the Tribunal or the Appellate Tribunal, as the case may be.

(8) **Filing of objection on the recommendation of the panel:** Any party aggreived by the recommendation of the Mediation and Conciliation Panel may file objections to the Central Government or the Tribunal or the Appellate Tribunal, as the case may be.

Question 2 [RTP MAY 2018]] [NEW COURSE STUDY Q.]

What are the powers of the Central Government under the Companies Act, 2013 regarding:

(i) **To appoint company prosecutors**

(ii) **To Appeal against acquittal**

Answer

(i) **Power of Central Government to appoint company prosecutors :** This **section 443 of the Companies Act, 2013** has come into force with effect from 12th September, 2013. This section lays down the provisions seeking to provide that the Central Government may appoint company prosecutors with the same powers as given under the Cr. PC on Public Prosecutors.

(a) **Appointment of company prosecutors:** The Central Government may appoint (generally, or for any case, or in any case, or for any specified c lass of cases in any local area) one or more persons, as company prosecutors for the conduct of prosecutions arising out of this Act; and

(b) **Powers and Privileges:** The persons so appointed as company prosecutors shall have all the powers and privileges conferred on Public Prosecutors appointed under section 24 of the Cr. PC.

(ii) **Appeal against acquittal:** According to **section 444 of the Companies Act, 2013**, the Central Government may, in any case arising under this Act, direct –

(a) any company prosecutor, or

(b) authorise any other person either by name or by virtue of his office, to present an appeal from an order of acquittal passed by any court, other than a High Court.

Appeal presented by such prosecutor or other person shall be deemed to have been validly presented to the appellate court.

Question 3 [NOV 2015] [RTP NOV 2018] [NEW COURSE STUDY Q.]

What is the object of Constituting Panel for Mediation and Conciliation under the Companies Act, 2013? Who can file application for mediation and conciliation?

Answer

Under section 442 of the Companies Act, 2013, it is provided that the Central Government shall maintain a panel of experts for mediation between the parties during pendency of any proceedings before the Central Government or the Tribunal or the Appellate Tribunal under the Act. In common parlance, mediation means intervention of some third party in a dispute with the intention to resolve the dispute. Similarly, conciliation means the powers of adjusting or settling disputes in a friendly manner through extra judicial means. The object behind the panel is to dispose the matter pending before the Government / Tribunal as mentioned above.

Filing of application: Application for mediation and conciliation can be made by:

(A) any parties to the proceedings (It shall be accompanied with such fees and in such form as may be prescribed)

(B) The Central Government or the Tribunal or the Appellate Tribunal before which any proceeding is pending may, suo moto refer any matter pertaining to such proceeding to such number of experts as it may deem fit.

Question 4 [MAY 2016] [MTP MAY 2018] [NEW COURSE STUDY Q.]

Mr. Joseph, a member of Armaments Ltd., is aggrieved due to failure of the company to make payment of dividend declared in the AGM held in August, 2015. He makes a complaint, in writing, before the court of competent jurisdiction within the prescribed period of limitation, but the court refused to take cognizance of the alleged offence. Explain the legal position in this regard under the Companies Act, 2013.

Also state the offences under the Companies Act, 2013 which are cognizable and which are non-cognizable.

Answer

Cognizance of offence: A court shall take cognizance of any offence under this Act which is alleged to have been committed by any company or any officer thereof only on the written complaint of -

(a) The Registrar,

(b) A shareholder of the company, or

(c) Of a person authorised by the Central Government in that behalf.

Provided that the court may take cognizance of offences relating to issue and transfer of securities and non-payment of dividend, on a complaint in writing, by a person authorised by the Securities and Exchange Board of India.

In the present case, Mr. Joseph, a member of Armaments Ltd. is aggrieved due to failure of the company to make payment of dividend declared in the AGM held in August 2015. He makes a complaint, in writing, before the court of competent jurisdiction within the prescribed period of limitation, but the court refused to take cogniz ance of the alleged offence.

Here, the Court shall take cognizance of the offence relating to non payment of dividend as the shareholders have made a complaint in writing before the competent jurisdiction.

Cognizable and non-cognizable offences: Overriding the provisions given under the Code of Criminal Procedure, 1973, every offence under the Companies Act, 2013 except the offences referred to in section 212(6) of the Companies Act, 2013, which deals with the investigation into affairs of company by serious fraud investigation office, shall be deemed to be non-cognizable within the meaning of the said Code.

Therefore, the offences as covered under section 212(6) shall now be deemed to be cognizable where police officer may arrest person without warrant and are non- bailable. The Companies Act, 2013 establishes the offence covered under section 212(6) as a public wrong which has to be prevented and controlled. This non - bailable nature of the offences deter the offender and the others from committing fur ther and similar offences.

Question 5 **[RTP NOV 2017]**

State the law with respect to the Establishment of Special Court. Mr. A is judicial magistrate in a lower court. He was appointed to hold the office of the special court for the speedy disposal of the pending cases under the Act. Decide as per the applicable provisions of the Companies Act, 2013, whether the appointment of Mr. A is tenable.

Answer

Establishment of special court: As per section **435 of the Companies Act, 2013**, the Central Government may, for the purpose of providing speedy trial of offences punishable under this Act with imprisonment of two years or more, by notification, establish or designate as many Special Courts as may be necessary.

Provided that all other offences shall be tried, as the case may be, by a Metropolitan Magistrate or a Judicial Magistrate of the First Class having jurisdiction to try any offence under this Act or under any previous company law.

Appointment of judge: A Special Court shall consist of a single judge who shall be appointed by the Central Government with the concurrence of the Chief Justice of the High Court within whose jurisdiction the judge to be appointed is working. A person shall not be qualified for appointment as a judge of a Special Court unless he is, immediately before such appointment, holding office of a Sessions Judge or an Additional Sessions Judge.

Since in the given case, Mr. A who is a judicial magistrate in a lower court, was appointed to hold the office of the special court for the speedy disposal of the pending cases under the Act. As per the above provision, person shall be qualified for appointment as a judge of a Special Court if he, immediately before such appointment, holding office of a Sessions Judge or an Additional Sessions Judge. Here Mr A. was not complying with the eligibility criteria, so his appointment as a judge of special court is not tenable.

NCLT AND NCLAT

Question 6 [MAY 2017] [RTP MAY 2018] [NEW COURSE STUDY Q.]

Mr. D was appointed as a Technical Member of the National Company Law Tribunal (NCLT) on 1st July, 2012 for a period of 5 years. He will be completing 62 years on 30th June, 2017. Whether he can be re-appointed on the NCLT on completion of his tenure in 2017?

Answer

According to Section 413(1) of the Companies Act, 2013 the President and every other Member of the Tribunal shall hold office for a term of five years from the date on which he enters upon his office and shall be eligible for re appointment for another term of five years.

Under section 413 (2), a Member of the Tribunal shall hold office as such until he attains, -

(i) in the case of the **President**, the age of **sixty-seven years;**

(ii) in the case of **any other Member,** the age of **Sixty-five years.**

In the instant case, Mr. D was appointed as a technical Member of the NCLT on 1st July, 2012 for a period of 5 years. He will be completing 62 years o n 30th June, 2017. He can also be re-appointed after his initial term of five years is over. But since he shall be attaining the age of 65 years as on 30th June, 2020, he will have to step down from the post on his attaining the age of 65 years i.e. on 30th June, 2020.

Question 7 [RTP NOV 2017] [MOCK TEST PAPER MAY 2018 AND NOV 2018]

NCLAT was constituted by the Central Government consisting of a chairperson along with the Judicial and Technical members for hearing appeals against the orders of the NCLT. Later it was discovered that chairperson is a judge of a high court. Aggrieved parties to a case, challenged the sanctity of the order of the respective case on account of invalid appointment of Chairperson. Examine in the light of the given situations the validity of the act or proceedings of the NCLAT.

Answer

As per section 411 of the Companies Act, 2013, the qualification of chairperson of NCLAT shall be a person who is or has been a judge of the Supreme Court or the Chief Justice of a High Court. In the given case, chairperson is a judge and not a chief justice of a High Court, so his appointment is invalid. However, **Section 431 of the Companies Act, 2013** provides of the provisions that no act or proceeding of the Tribunal or the Appellate Tribunal shall be questioned or shall be invalid merely on the ground of the existence of any vacancy or defect in the constitution of the Tribunal or the Appellate Tribunal, as the case may be.

Accordingly, the act or proceeding of the Appellate Tribunal (NCLAT) shall not be invalid on the basis of defect in the constitution of the Appellate Tribunal.

Question 8 [MAY 2018]

Mr. PRTJ was appointed as a member of the National Company Law Appellate Tribunal. During the month of April, 2018, he was adjudged as an insolvent by a competent authority. The Central Government after consultation with the Chief Justice of India removed Mr. PRTJ from the membership of the National Company Law Appellate Tribunal. Being aggrieved by the decision of the Central Government, Mr. PRTJ approached you to confirm himself whether the decision of the Central Government was appropriate since, he was not given a reasonable opportunity of being heard as a matter of principle of natural justice. Advise him.

Also state the circumstances in which the Central Government after consultation with the Chief Justice of India can remove any person from the office of President, Chairperson or any Member of the National Company Law Appellate Tribunal.

Your answer should refer to the relevant provisions of the Companies Act, 2013.

Answer

According to **Section 417(1) of the Companies Act, 2013,** the Central Government may, after consultation with the Chief Justice of India, remove from office the President, Chairperson or any Member, who—

(a) has been adjudged an insolvent; or

(b) has been convicted of an offence which, in the opinion of the Central Government, involves moral turpitude; or

(c) has become physically or mentally incapable of acting as such President, the Chairperson, or Member; or

(d) has acquired such financial or other interest as is likely to affect prejudicially his functions as such President, the Chairperson or Member; or

(e) has so abused his position as to render his continuance in office prejudicial to the public interest:

Provided that the President, the Chairperson or the Member shall not be removed on any of the grounds specified in clauses (b) to (e)without giving him a reasonable opportunity of being heard.

As per the proviso stated above, in case of sub-clause (a), i.e. where there is a case of insolvency, there is no requirement of giving an opportunity of being heard by the member of the NCLAT. Hence, the action taken by the Central Government against PRTJ is valid.

Circumstances under which the Central government can remove the President, the Chairperson etc.,

According to **Section 417(2) of the Companies Act, 2013**, the President, the Chairperson or the Member shall not be removed from his office except by an order made by the Central Government on the ground of proved misbehaviour or incapacity after an inquiry made by a Judge of the Supreme Court nominated by the Chief Justice of India on a reference made to him by the Central Government in which such President, the Chairperson or Member had been informed of the charges against him and given a reasonable opportunity of being heard.

In the instant case, it is advised that the decision of the Central Government to remove (without giving reasonable opportunity of being heard) Mr. PRTJ, member of NCLAT who was adjudged as an insolvent by a competent authority is appropriate as per the clause
(a) of Section 417(1) of the Companies Act, 2013

Question 9 [RTP NOV 2018]

State the provisions of the Companies Act, 2013 relating to the qualifications prescribed of the Chairperson, Judicial Member and technical Member of the National Company Law Appellate Tribunal. Under what circumstances can they be removed from their respective offices?

Answer

Section 411 of the Companies Act 2013 prescribes the qualification of the chairperson and the members of the National Company Law Appellate Tribunal.

(i) **Qualifications of the Chairperson:** The Chairperson shall be a person who is or has been a Judge of the Supreme Court or the Chief Justice of a High Court.

(ii) **Qualification of Members**:

Judicial Member: A Judicial member shall be a person who is or has been a Judge of a High Court or is a Judicial Member of the Tribunal for 5 years.

Technical Member: A Technical Member shall be a person of proven ability, integrity and standing having special knowledge and experience of not less than 25 years in various specified disciplines related to the management, conduct of affairs, revival, rehabilitation and winding up of companies.

Removal of Members: As per **Section 417 of the Companies Act, 2013**, the Central Government may, after consultation with the Chief Justice of India and after providing an opportunity of being heard, remove from the office the President, Chairperson or any Member who:

a. has been adjudged an insolvent, or

b. been convicted of an offence, which in the opinion of the Central Government involves moral turpitude; or

c. has become physically or mentally incapable of acting as such president, Chairperson or Member;

d. has acquired financial or other interest as is likely to affect prejudicially his functions as such president, Chairperson or Member;

e. has so abused his position as to render his continuance in office prejudicial to the public interest.

Question 10 [NEW COURSE STUDY Q.]

As per the Companies Act, 2013, what are the required qualifications for appointment as President and Judicial members of the National Company Law Tribunal.

Answer

Section 409 of the Companies Act, 2013, deals with qualifications of the President and members of Tribunal.

(i) **Qualification for the President**: He shall be a person who is or has been a Judge of a High Court for five years.

(ii) **Qualification for the Judicial member:** A person shall not be qualified for appointment as a Judicial Member unless he is or has been—

(1) a judge of a High Court; or

(2) a District Judge for at least five years; or

(1) an advocate of a court for at least ten years.

For the purposes of clause (3) above, in computing the period for which a person has been an advocate of a court, there shall be included any period during which the person has held judicial office or the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law after he become an advocate.

Question 11 [NEW COURSE STUDY Q.]

Mr. Ram was appointed as the member of the National Company Law Tribunal. He (at the age of 63 years) has now resigned from his office by giving a notice to the Central Government, by stating that he will stop acting as a member to NCLT with immediate effect.

The Central Government tells him that you have to continue in office for 3 more months. Is the contention of Central Government correct?

Answer

According **section 416**, the President, the Chairperson or any Member may, by notice in writing under his hand addressed to the Central Government, resign from his office.

Provided that the President, the Chairperson, or the Member shall continue to hold office until the expiry of 3 months from the date of receipt of such notice by the Central Government or until a person duly appointed as his successor enters upon his office or until the expiry of his term of office, whichever is earliest.

Thus, Mr. Ram shall continue to hold office until the expiry of 3 months from the date of receipt of such notice by the Central Government or until a person duly appointed as his successor enters upon his office, whichever is earliest.

Hence, the contention of Central Goverenment is correct.

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Miscellaneous Provisions & Removal of Name of Company

Question 1 [RTP NOV 2015 & MAY 2018] [PRACTICE MANUAL] [NEW COURSE STUDY Q.]

Mr. Atharva, a director of Northway highway Tolls Private Limited, authorised by board of directors to prepare and file return, report or other documents to registrar on behalf of the company. He timely filed all the required documents to Registrar; however, subsequently it is found that the filed documents are false in respect to material particulars (knowing it to be false) submitted to registrar. Explain the penal provision under the Companies Act, 2013.

Answer

According to section 448 of the Companies Act, 2013, if any person makes a statement which is false in any material particulars, knowing it to be false or omits any material facts, knowing it to be material, such person shall be liable under section 447. As per Section 447, any person who is found to be guilty under this section shall be punishable with imprisonment for a term which shall not be less than 6 months but which may extend to 10 years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to 3 times the amount involved in the fraud. Provided that, where the fraud involves public interest, the term of imprisonment shall not be less than 3 years.

Hence, Mr. Atharva, a director of Northway highway Tolls Private Limited shall be punishable with imprisionment and fine prescribed as aforesaid.

Question 2 [PRACTICE MANUAL] [NEW COURSE STUDY Q.]

Gulmohar Ltd., a company registered under Indian law owns a factory in Calcutta, wherein it manufactures jute products. By a notification of the State Government, issued during October, 2013, due to a strike and lock-out, it was declared a relief undertaking. After four months, in February, 2014, the lock-out was lifted. However, during the said period the company's directors defaulted in payment of Provident Fund (PF) and other ancillary dues. During the month of December, 2013, the Regional PF Commissioner initiated criminal proceedings against the company and its directors under the Employees PF and Miscellaneous Provisions Act, 1952, for default and delay in payment of PF dues.

Immediately the directors of the company applied to the High Court for relief under Section 463 of the Companies Act, 2013, praying for relief from Iliability under the PF law. The petition is now pending before a single judge. The company desire to know from you, as to the tenability of their claim for relief at the High Court, and as to whether they would be excused and exonerated by the High Court, in respect of the contraventions committed under the PF law.

Briefly discuss the law on the subject and state whether the petition filed by the directors would be admitted or not under the Companies Act, 2013.

Answer

The crux of the matter involved in the above case, is whether under **section 463 (1)** the words "any proceeding" against an officer of a company, would mean only a proceeding under the Companies Act or any Criminal proceeding under any other law. The provisions of the Companies Act, define "officer" and "officer in default" but there is no definition for the word "proceeding". In the present case, the proceeding has not resulted from or has not been brought about as a consequence of default, refusal, contravention, non-compliance or failure under the Companies Act, 2013, but has come about as a result of certain acts and omissions committed by the directors of Gulmohar Ltd., under the Employees PF and Misc. Provisions Act, 1952.

It should be noted that the Court has powers under Section 463 to grant relief only to a director/officer of a company, and is not applicable to the company. Hence, the company cannot claim relief under section 463 of the Companies Act, 2013.

The significance of the words "in any proceeding" at the beginning of Section 463(1) require to be understood.

The facts of the case, bear resemblance to those which came up before their Lordships of the Supreme court in Rabindra Chamaria and Others Vs Registrar of Companies, West Bengal and others, 1992 (73) Comp. Cas. 257 (SC).

Going by the tenor of section 463 of the Companies Act, 2013 and the Supreme Court ruling the directors of Gulmohar Ltd., cannot avail of relief under Section 463 of the Companies Act, 2013 and their Petition is not likely to succeed. It is liable to be dismissed.

Question 3 [RTP NOV 2015 & MAY 2017] [PRACTICE MANUAL] [NEW COURSE STUDY Q.]

It is apprehended by the Directors of a Public Company that they are likely to be prosecuted for an offence under the Companies Act, 2013 which is not compoundable. Explain the provisions of the Companies Act, 2013 under which the Directors can seek relief from the liability for offence. What will be the position in case prosecution has already been launched?

Answer

Relief under Section 463: Under **section 463(1) of the Companies Act, 2013** if in any proceeding for negligence, default, breach of duty, misfeasance or breach of trust against an officer of a company, it appears to the court hearing the case he is or may be liable in respect of the negligence, default, breach of duty, misfeasance or breach of trust, but that he has acted honestly and reasonably, and that having regard to all the circumstances of the case, including those connected with his appointment, he ought fairly to be excused, the court may relieve him, either wholly or partly, from his liability on such terms, as it may think fit.

Provided that in a criminal proceeding under this sub-section, the court shall have no power to grant relief from any civil liability which may attach to an officer in respect of such negligence, default, breach of duty, misfeasance or breach of trust.

In the given case, the offence is not compoundable i.e. it carries imprisonment as a punishment either alone or with a fine. In either case, it would indicate that a criminal liability is indicated. Hence, the court will not have the power to grant relief under section 463. However, the nature of the offence will have to be examined.

Question 4 [MAY 2015] [RTP NOV 2016 & NOV 2018] [PRACTICE MANUAL]

[NEW COURSE STUDY Q.]

BUI Limited had filed certain documents with the Registrar of Companies. The said documents were authenticated by the ROC and kept on record. In a suit against the company the ROC produced the said documents in the court of law. BUI Limited intends to raise objection on the said documents on the ground that the documents need to be authenticated with further proof or production of the original document as evidence. Advise BUI Limited.

Answer

Admissibility of certain documents as evidence: Section 397 of the Companies Act, 2013 provides for admissibility of certain documents as evidence. According to the provisions of that section, any document reproducing or derived from returns and documents filed by a company with the Registrar on paper or in electronic form or stored on any electronic data storage device or computer readable media by the Registrar, and authenticated by the Registrar or any other officer empowered by the Central government in such manner as may be prescribed, shall be deemed to be a document for the purposes of this Act and the rules made thereunder and shall be admissible in any proceedings thereunder without further proof or production of the original as evidence of any contents of the original or of any fact stated therein of which direct evidence is admissible.

On the grounds stated above, BUI Limited cannot validly raise any objection on the documents already filed by it with the Registrar.

Question 5 [MAY 2015] [PRACTICE MANUAL] [NEW COURSE STUDY Q.]

Explain the meaning of 'Fraud' in relation to the affairs of a company and the punishment provided for the same in Section 447 of the Companies Act, 2013.

Answer

As per the explanation given to **section 447 of the Companies Act, 2013**, 'Fraud' in relation to affairs of a company or anybody corporate, includes any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss.

"Wrongful gain" means the gain by unlawful means of property to which the person gaining is not legally entitled.

"Wrongful loss" means, the loss by unlawful means of property to which the person losing is legally entitled.

Punishment:

(i) Without prejudice to any liability including repayment of any debt under this Act or any other law for the time being in force, any person who is found to be guilty of fraud, shall be punishable with imprisonment for a term which shall not be less than six months, but which may be extended to 10 years and shall also be liable to fine, which shall not be less than the amount involved in the fraud, but which may extend to 3 times the amount involved in the fraud.

(ii) Where the fraud in question involves public interest, the term of imprisonment shall not be less than three years.

Question 6 [MAY 2015] [RTP MAY 2015] [PRACTICE MANUAL] [NEW COURSE STUDY Q.]

JKL Research Development Limited is a registered Public Limited Company. The company has a unique business idea emerging from research and development in a new area. However, it is a future project and the company has no significant accounting transactions and business activities at present. The company desires to obtain the status of a 'Dormant Company'. Advise the company regarding the provisions of the Companies Act, 2013 in this regard and the procedure to be followed in this regard.

Answer

The provisions related to the Dormant companies is covered under **section 455 of the Companies Act, 2013.** According to provisions-

1. a company is formed and registered under this Act for the purpose of a future project or to hold an asset or intellectual property and has no significant accounting transaction.
2. Such company or an inactive company may make an application to the Registrar in such manner as may be prescribed for obtaining the status of a dormant company.
3. The Registrar shall allow the status of a dormant company to the applicant and issue a certificate after considerating of the application.
4. The Registrar shall maintain a register of dormant companies in such form as may be prescribed.

In case of a company which has not filed financial statements or annual returns for two financial years consecutively, the Register shall issue a notice to that company and enter the name of such company in the register maintained for dormant companies.

A dormant company shall have such minimum number of directors, file such documents and pay such annual fee as may be prescribed to the Registrar to retain its dormant status in the register and may become an active company on an application made in this behalf accompanied by such documents and fee as may be prescribed. However, the Registrar shall strike off the name of a dormant company from the register of dormant companies, which has failed to comply with the requirements of this section.

Thus, JKL Research Development Limited may follow the above procedure to obtain the status of a 'Dormant Company'.

Question 7 [MAY 2016] [PRACTICE MANUAL]

(i) Central Government and Government of Maharashtra together hold 40% of the paid-up share capital of MN Limited. A government company also holds 20% of the paid-up share capital in MN Limited.

(ii) PQ Limited is a subsidiary but not a wholly owned subsidiary of a government company.

Examine with reference to the provisions of the Companies Act, 2013 whether MN Limited and PQ Limited can be considered as Government Company.

Answer

According to section 2(45) of the Companies Act, 2013, "Government company" means any company in which not less than fifty-one per cent of the paid-up share capital is held by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments, and includes a company which is a subsidiary company of such a Government company.

(i) The Central Government and Government of Maharashtra together hold 40% of the paid-up share capital of MN Limited. A government company also holds 20% of the paid-up share capital in MN Limited.

In this case, MN Limited is not a Government company because the holding of the Central Government and Government of Maharashtra is 40% which is less than the 51% prescribed under the definition of Government Company. The holding of the government company in MN Limited of 20% cannot be taken into account while counting the prescribed limit of 51%.

(ii) PQ Limited is a subsidiary but not a wholly owned subsidiary of a government company

In this case, PQ Limited is a government company as the definition of Government Company clearly specifies that a Government Company includes a company which is a subsidiary company of a Government company. Whether the subsidiary should be a wholly owned subsidiary or not is not clearly mentioned under the definition of the Government company under section 2(45).

Question 8 [MAY 2018]

M/s Kashi Mutual Benefits Nidhi Ltd. is incorporated as a Nidhi Company under the Companies Act, 2013. The Board of Directors of the company seeks your advice on the following issues as per the provisions of the Companies Act, 2013 read with rules. Advise.

(i) The Board of Directors is planning to issue preference shares.

(ii) The Board of Directors have decided to provide Locker Facilities on rent to its members and have estimated that rental income from such letting will be around 30 of the gross income of the company.

(iii) The Board of Directors of the company is planning to declare dividend for the current year at 45%.

(iv) The Board of Directors of the company have decided to appoint Mr. Prince (a minor) as a member of the company.

Answer:

(i) According to **Rule 4(2) and 6(b) of the *Nidhi Rules, 2014***, no Nidhi shall issue preference shares. So, the boards of Directors of M/s Kashi Mutual Benefits Nidhi Ltd. cannot issue preference shares.

(ii) According to **Rule 6(e) of the *Nidhi Rules, 2014*, Nidhis** which have adhered to all the provisions of these rules may provide locker facilities on rent to its members subject to the rental income from such facilities not exceeding twenty per cent of the gross income of the Nidhi at any point of time during a financial year. So, the board of directors cannot provide locker facilities on rent to its members on which the rental income will be around 30% of the gross income of the company.

(iii) According to **Rule 18 of the Nidhi Rules, 2014**, a Nidhi shall not declare dividend exceeding 25% or such higher amount as may be specifically approved by the Regional Director for reasons to be recorded in writing and further subject to the following conditions, namely:—

a. an equal amount is transferred to General Reserve;

(a) there has been no default in repayment of matured deposits and interest; and

(b) it has complied with all the rules as applicable to Nidhis.

In the instant case, the Board of Directors cannot declare dividend at the rate of 45%.

(iv) According to **Rule 8(3) of the Nidhi Rules, 2014**, a minor shall not be admitted as a member of Nidhi. However, deposits may be accepted in the name of a minor, if they are made by the natural or legal guardian who is a member of *Nidhi.*

Hence, the Board of directors of the company cannot appoint Mr. Prince (a minor) as a member of the company

Question 9 [RTP NOV 2018]

Kajol Research Development Ltd. was registered to innovate unique business idea emerging from research and development in a new area. It is a future project and the Company has no significant accounting transactions and business activities. Therefore the company made an application to RoC for obtaining the status of a Dormant Company.

The application is under process. In the meantime, the Company without extinguishing all its liabilities filed an application to RoC for removing the name of the Company, after passing a special resolution giving effect to this.

In the light of the provisions of the Companies Act, 2013, analyse the following:

(1) Whether the application is tenable under the Act?

(2) What are the restrictions imposed under the Act for making application by a Company to remove the name of the Company from the register of RoC?

(3) What are the penal consequences in case of violation of restrictions?

Answer:

According to Section 248 (1) of the Companies Act, 2013, where the Registrar has reasonable cause to believe that—

(i) a Company has failed to commence its business within one year of its incorporation, or;

(ii) a Company is not carrying on any business or operation for a period of two immediately preceding financial years and has not made any application within such period for obtaining the status of a dormant Company under section 455,

he shall send a notice to the Company and all the Directors of the Company, of his intention to remove the name of the Company from the register of Companies and requesting them to send their representations along with copies of the relevant documents, if any, within a period of thirty days from the date of the notice.

According to **Section 248 (2) of the Companies Act, 2013**, a Company may, after extinguishing all its liabilities, by-

- a special resolution, or
- consent of seventy-five per cent. members in terms of paid-up share capital,

file an application in the prescribed manner to the Registrar for removing the name of the Company from the register of Companies on all or any of the grounds specified in sub-section (1) and the Registrar shall, on receipt of such application, cause a public notice to be issued in the prescribed manner:

(1) Whether the application is tenable under the Act?

In the light of the above provisions, since the Company has applied for the status of dormant Company and also without extinguishing its liabilities applied for the removal of the name of the Company from Register of members, such an application shall not be tenable.

(2) Restrictions

According to **Section 249(1) of the Companies Act, 2013,**

An application under **Section 248 of the Companies Act, 2013**, on behalf of a Company shall not be made if, at any time in the previous three months, the Company—

(a) has changed its name or shifted its registered office from one State to another;

(b) has made a disposal for value of property or rights held by it, immediately before ceases of trade or otherwise carrying on of business, for the purpose of disposal for gain in the normal course of trading or otherwise carrying on of business;

(c) has engaged in any other activity except the one which is necessary or expedient for the purpose of making an application under that section, or deciding whether to do so or concluding the affairs of the company, or complying with any statutory requirement;

(d) has made an application to the Tribunal for the sanctioning of a compromise or arrangement and the matter has not been finally concluded; or

(e) is being wound up under Chapter XX of this Act or under the Insolvency and Bankruptcy Code, 2016.

(3) Penal Consequences

According to section 249(2) of the Companies Act, 2013, if a Company files an application in violation of restriction as given in sub-section (1) as given above, it shall be punishable with fine which may extend to one lakh rupees.

Question 10 [RTP MAY 2015]

What do you mean by wrongful withholding of property under the Companies Act, 2013 and what is the prescribed penalty for it?

Answer:

Section 452 of the Companies Act, 2013 provides for penalty for wrongful withholding of property. According to this section:

(i) If any officer or employee of a company—

(a) wrongfully obtains possession of any property, including cash of the company; or

(b) having any such property including cash in his possession, wrongfully withholds it or knowingly applies it for the purposes other than those expressed or directed in the articles and authorised by this Act,

he shall, on the complaint of the company or of any member or creditor or contributory thereof, be punishable with fine which shall not be less than RS. 1 lakh but which may extend to RS. 5 lakh.

(ii) The Court trying an offence may also order such officer or employee to deliver up or refund, within a time to be fixed by it, any such property or cash wrongfully obtained or wrongfully withheld or knowingly misapplied, the benefits that have been derived from such property or cash or in default, to undergo imprisonment for a term which may extend to 2 years.

Question 11 [RTP MAY 2018]

An officer of a company was allotted one room for two years in a guest house owned by the Company at some other city where he used to stay while on tour. It came to notice of the company that he had not vacated the said room after the expiry of two years and is holding the unauthorized possession of that room and has been permitting to stay outsiders in the said room, at a rent of ` 500 per day. The record shows that he had permitted the outsider for 45 days and collected ` 22,500 and retained the said amount with him. As per the letter of allotment, there was no such clause which can be invoked against him for making any recovery on account of such wrongful occupation. The Manager of the company seeks your advice as to whether the recovery can be made from him under any of the provisions of his employment or Companies Act.

Answer:

Penalty for wrongful withholding of property: Section 452 of the Companies Act, 2013 provides for Penalty for wrongful withholding of property. According to the section:

(1) If any officer or employee of a company -

(a) Wrongfully obtains possession of any property, including cash of the company; or

(b) having any such property including cash in his possession, wrongfully withholds it or knowingly applies it for the purposes other than those expressed or directed in the articles and authorized by this Act, he shall, on the complaint of the company or of any member or creditor or contributory thereof, be punishable with fine which shall not be less than 1 lakh rupees but which may extend to 5 lakh rupees.

(2) The Court trying an offence may also order such officer or employee to deliver up or refund, within a time to be fixed by it, any such property or cash wrongfully obtained or wrongfully withheld or knowingly misapplied, the benefits that have been derived from such property or cash or in default, to undergo imprisonment for a term which may extend to 2 years.

Hence, as per the provisions of the Companies Act, 2013 and not giving any emphasis on the terms of employment, the manager of the company can recover possession of the room and the cash wrongfully obtained and the benefits that have been derived from such property or cash.

Question 12 [RTP MAY 2016]

The Board of Directors of Hi-tech company having its registered office at Chennai, decided to keep its books of accounts in Mumbai. Company failed to intimate the same and to file the relevant document to the registrar within the prescribed time. State the law with respect to submission of the document after the time specified in the relevant provision under the Companies Act, 2013.

Answer:

According to the section 403 of the Companies Act, 2013, any documents required to be submitted, filed, registered or recorded, or any fact or information required or authorised to be registered under this Act, shall be submitted, filed, registered or recorded within the time specified in the relevant provision along with the specified fees .

Submission after the time specified in relevant provision: Any document, fact or information may be submitted, filed, registered or recorded, after the time specified in relevant provision for such submission, filing, registering or recording, **within a period of 270 days from the date by which it should have been submitted, filed, registered or recorded**, as the case may be, on payment of such additional fee as may be prescribed as per the rule12 and 13 of the Companies (Registration Offices and Fees) Rules, 2014.

Even after the expiration of above 270 days, submission of documents may also be done on payment of fee and additional fee specified under this section. Further contravention on submission of documents may lead to the company liable for the penalty or punishment provided under this Act for such failure or default.

REMOVAL OF NAME OF COMPANY

Question 13 [RTP NOV 2017]

Honest Limited by a special resolution passed a motion of removal of name of the company from Register of Companies due to failure of its commencement of its business from one year of its incorporation. The company filed an application to the registrar for removing the name of company from Register of Companies. One of the member of the company filed a complaint to the Registrar that company had filed a fraudulent application for removal of its name to deceive the creditors and to defraud the other persons.

Discuss in the light of the above situations the consequences of filing of fraudulent application for removal of name of the company as per the Companies Act, 2013.

Answer:

Fraudulent Application for Removal of Name [Section 251]

Where it is found that an application for removal of Name by a company has been made with the-

- object of evading the liabilities of the company, or
- with the intention to deceive the creditors, or
- to defraud any other persons,

the persons in charge of the management of the company shall, notwithstanding that the company has been notified as dissolved—

(a) be **jointly and severally liable** to any person or persons who had incurred loss or damage as a result of the company being notified as dissolved; and

(b) be **punishable for fraud** in the manner as provided in section 447.

Recommendation for prosecution: The Registrar may also recommend prosecution of the persons responsible for the filing of an application.

Appeal to Tribunal: Any person aggrieved by an order of the Registrar, notifying a company as dissolved under **section 248,** may file an appeal to the Tribunal within a period of three years from the date of the order of the Registrar and if the Tribunal is of the opinion that the removal of the name of the company from the register of companies is not justified in view of the absence of any of the grounds on which the order was passed by the Registrar, it may order restoration of the name of the company in the register of companies.

Provided that before passing any order under this section, the Tribunal shall give a reasonable opportunity of making representations and of being heard to the Registrar to, the company and all the persons concerned.

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Insolvency and Bankcruptcy Code 2016

Question 1: [NOV 2017]

Nature India Limited filed a petition under the Insolvency and Bankruptcy Code, 2016 with National Company Law Tribunal (NCLT) against Tulip Limited and the petition was admitted. After that, Nature India Limited wanted to withdraw the petition based on a settlement arrived between the parties. Whether it is permissible to withdraw the petition after it has been admitted? Decide.

Also explain the rules relating to the admission and rejection of application by an adjudicating authority under the Insolvency and Bankruptcy Code, 2016.

Answer:

(a) Withdrawal of Application/ Petition: As per the facts given in the question, Nature India Limited filed a petition under the **Insolvency and Bankruptcy Code, 2016** with NCLT against the Tulip Limited and the petition was admitted. After that Nature India Limited wanted to withdraw the same due to settlement between the parties.

As per Rule 8 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, the Adjudicating Authority may permit withdrawal of the application made under rules 4 (Application by financial creditor), 6 (Application by operational creditor) or 7 (Application by corporate applicant), as the case may be, on a request made by the applicant before its admission.

Since in the given instance, Nature India Limited wanted to withdraw the petition after it was admitted by the adjudication authority. So it was not permissible to withdraw the petition after been admitted.

Provisions related to admission or rejection of application by an adjudicating authority in the Insolvency and Bankruptcy Code, 2016-

The Adjudicating Authority shall, on the receipt of the application within the given time period under the relevant provisions, ascertain the existence of a default and pass the order **[under Section 9(5) of the IBC, 2016**].

Where the Adjudicating Authority is satisfied, either—

Admit application when -	Reject application when-
• a default has occurred and, • and the application is complete • no disciplinary proceedings pending against the proposed resolution professional	• default has not occurred or • the application is incomplete • any disciplinary proceeding is pending against the proposed resolution professional • Adjudicating Authority shall, before rejecting the application, give a notice to the applicant to rectify the defect.

Further, the Adjudicating Authority shall communicate order of admission or rejection of such application within given time, as the case may be

Question 2 : [NOV 2017]

Standard International Ltd. who is a foreign trade creditor having its office in Hong Kong wanted to file a petition under the Insolvency and Bankruptcy Code, 2016 on default of the debtor in India. It moved a petition u/s 9 of the Code seeking commencement of insolvency process. The foreign company was not having any office or bank account in India. Because of this, it could not submit a "Certificate from a financial institution" as required under the Code. Whether the petition is permissible under the Insolvency and Bankruptcy Code , 2016? Decide.

Answer

As per the definition of the Creditor given in **Section 3(10) of the Insolvency and Bankruptcy Code, 2016**, it means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor, and a decree holder. So, Standard International Ltd. is a creditor under the purview of the Code.

As per the facts given in question, Standard International Ltd., is a foreign trade creditor. He wanted to file a petition under the under **Section 9 of the Insolvency and Bankruptcy Code, 2016** for commencement of Insolvency process against the defaulter in India. Standard International Ltd. was not having any office or bank account in India.

As per the requirement of section 9 of the Code, along with application certain documents were needed to be furnished by the creditor to the Adjudicating authority. Being a foreign trade creditor, Standard International Ltd was also required to provide a copy of certificate from the financial institutions maintaining accounts of the creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor. Since, Standard International Ltd. was not having any office or bank account in India, it cannot furnish certificate from financial institution. So, Petition under Section 9 of the Code is not permissible.

Question 3 : [MAY 2018]

M/s Systemtek India Private Limited (Appellant-Corporate Debtor) has challenged the order dated 3rd July, 2017 passed by the Adjudicating Authority (National Company Law Tribunal) Mumbai Bench, Mumbai, in the National Company Law Appellate Tribunal (NCLAT).

NCLT had admitted the application preferred by appellant under Section 10 of the Insolvency and Bankruptcy Code, 2016 and an order of Moratorium was passed and Insolvency Resolution Professional was ordered to be appointed by the Ld. Adjudicating Authority (NCLT).

The only grievance of the appellant in its challenge is that the movable and immovable property of Guarantor (promoter) has been attached pursuant to a Corporate Insolvency Resolution Process initiated under section 10 against the Appellant by the Ld. Adjudicating Authority (NCLT) which is violative of section 14(1)(c) of the Insolvency and Bankruptcy Code, 2016 though the Code prescribes a Moratorium for certain types of transactions. Decide.

Answer:

As per the given facts in the question, Appellant, M/S Systemtek India Private Limited, challenged the order passed by the NCLT on the ground stating that the movable and immovable property of guarantor (Promoter) has been attached pursuant to a Corporate Insolvency Resolution Process initiated under Section 10 of the Code against the Appellant.

As per Section 14(1) of the Insolvency and Bankruptcy Code, 2016, on the Insolvency commencement date, the NCLT shall by order declare moratorium prohibiting certain acts by /against the Corporate Debtor. According to clause (c) of the said provision, the order prohibits any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process.

The word 'its' used in clause (c) of sub-Section (1) of Section 14 of IBC, 2016, refers to corporate debtor and not the guarantors.

In view of this, the Order of NCLT under **Section 14(1)(c) of IBC 2016** is not violative. However M/s Systemtek India Private Limited can challenge the Order of the NCLT on the ground that until the liability of the Company is decisively crystallize, the guarantor cannot be held liable.

Question 4 : [MAY 2018]

BDLK Limited decided to go for voluntary winding up and accordingly the Board of Directors at a meeting of the Board are about to take the necessary steps to initiate the winding up proceedings. The Board of Directors of the company approached you for guidance in this regard. Please list out the steps required under the Insolvency & Bankruptcy Code 2016 before approval of such liquidation proposal with specific reference to meetings and actions of relevant stakeholders.

Answer:

Voluntary Winding Up: As per **Section 59 of the Insolvency and Bankruptcy Code, 2016**, the voluntary liquidation of a corporate person shall meet such conditions and procedural requirements as may be specified by the Board (IBBI).

Conditions of initiation of voluntary liquidation proceedings : Voluntary liquidation proceedings of a corporate person registered as a company shall meet the following conditions, namely:—

(a) a declaration from majority of the directors of the company verified by an affidavit stating that they have made a full inquiry into the affairs of the company and they have formed an opinion that either the company has no debt or that it will be able to pay its debts in full from the proceeds of assets to be sold in the voluntary liquidation; and the company is not being liquidated to defraud any person;

(b) the declaration given above shall be accompanied with the following documents namely:

  (i) audited financial statements and record of business operations of the company for the previous two years or for the period since its incorporation, whichever is later;

  (ii) a report of the valuation of the assets of the company, if any prepared by a registered valuer;

(c) within four weeks of a declaration under sub-clause (a) above, there shall be—

  (i) a **special resolution of the members of the company in a general meeting** requiring the company to be liquidated voluntarily and appointing an insolvency professional to act as the liquidator; or

  (ii) a **resolution of the members of the company in a general meeting** requiring the company to be liquidated voluntarily **as a result of expiry of the period of its duration,** if any, fixed by its articles, or

on the occurrence of any event in respect of which the articles provide that the company shall be dissolved, as the case may be and appointing an insolvency professional to act as the liquidator:

Provided that the company owes any debt to any person, **creditors representing two thirds in value of the debt of the company shall approve the resolution passed** under sub-clause (c) within seven days of such resolution.

Notification to Registrar of company and the Board: The Company shall notify the Registrar of Companies and the Board about the resolution to liquidate the company within seven days of such resolution or the subsequent approval by the creditors, as the case may be.

Question 5 : [MAY 2018]

M/s TAS Constructions Private Limited, an operational creditor on 2nd April, 2018 being the default date issued a demand notice through speed post to M/s Dheeraj Constructions Private Limited, an unpaid operational/corporate debtor demanding payment of its invoice dated 19th March, 2018 for `5,60,000 (15 days payment terms) towards supply of certain works contract services as per the provisions of section 8(1) of the Insolvency and Bankruptcy Code, 2016 and rules framed there under/s

Dheeraj Constructions Private Limited on receipt of the demand notice i nformed the operational creditor, that vide their e-mail dated 30th March, 2018, addressed to the company and all its directors, they have disputed the invoice on the quality of the services rendered and were withholding payment till the dispute is settled but without initiating any legal proceedings under any law for the time being in force. The operational creditor on expiry of the period of 10 days from the date of delivery of the demand notice and non-payment of its dues approached the Adjudicating Authority for the initiation of the corporate insolvency resolution process under section 9(1) of the Insolvency and Bankruptcy Code, 2016. Will the application of the operational creditor filed under section9 (1) read with section 8(2) (a) of the Insolvency and Bankruptcy Code, 2016 be permitted?

Answer:

The given problem is based on **Section 9(1) of the Insolvency and Bankruptcy Code, 2016**. According to the provision, after the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute, the operational creditor may file an application before the Adjudicating Authority for initiating corporate insolvency resolution process.

However, as per Section 8(2)(a) of the Code, the corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice bring to the notice of the operational creditor about existence of dispute, if any, and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute.

Facts given states that the Dheeraj Constructions Private Limited on receipt of the demand notice, informed M/s TAS Constructions Private Limited (Operational Creditor) that through email dated 30th March, 2018, addressed the company and all its directors, of the dispute on the invoice and withholding of the payment till the settlement of the dispute.

The provision of **Section 8(2)(a)** envisages existence of dispute, if any and record of the pendency of the suit or arbitration proceedings filed by the Corporate Debtor before receipt of such notice or invoice in relation to such disputes: thus existence of disputes and record of pendency of the suit or arbitration proceedings both are to be filed. Whereas, Section 5 (6) defines 'disputes" as disputes includes a suit or an arbitration proceedings relating to:

(a) The existence of the amount of the debt

(b) The quality of goods or service or

(c) The breach of the representation or the warranties.

The Supreme Court has settled the position in the case of Mobilox Innovations Private Limited Vs. Kirusa Soft Ware Private Limited and Innoventive Industries Vs ICICI Bank by deciding that "and" used in Section 8(2)(a) has to be read as disjunctively and "and" to be read as "or" else, the purpose of the IBC will be defeated.

Hence, the requirement of Section 8, to bring to the notice of the operational creditor about an existence of dispute only and not along with the record of the pendency of the suit or arbitration proceedings as settled by the Supreme Court in the cases referred above filed before the receipt of such notice or invoice in relation to such dispute have been complied with and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute, have been complied with.

So, the application of M/s TAS Constructions Private Limited (Operational Creditor) shall not be permitted under **Section 9 of the Insolvency and Bankruptcy Code, 2016** as Dheeraj Construction Private Limited has complied the provisions of Section 8(2)(a) of the IBC, 2016.

Question 6: [RTP NOV 2017]

State the manner of initiation of corporate insolvency resolution process by financial creditor under the Insolvency and Bankruptcy Code, 2016.

Answer

Initiation of corporate insolvency resolution process by financial creditor.

Section 7 of the Insolvency and Bankruptcy Code, 2016 state the manner of initiation of corporate insolvency resolution process by financial creditor. According to the provision, a financial creditor either by itself or jointly with other financial creditors may file an application against a corporate debtor before the Adjudicating Authority (Tribunal) when a default has occurred.

The financial creditor shall, along with the application furnish the following informations—

(a) **record of the default** recorded with the information utility or such other record or evidence of default as may be specified;

(b) **the name of the resolution professional** proposed to act as an interim resolution professional; and

(c) **any other information** as may be specified by the Board.

The Adjudicating Authority shall, within fourteen days of the receipt of the application, ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor. Adjudicating Authority if, satisfied that a default has occurred and complying with other requirements of the section, it may, by order, admit such application; or if, default has not occurred, it may, by order, reject such application.

Commencement of corporate insolvency resolution process: The corporate insolvency resolution process shall commence from the date of admission of the application. The Adjudicating Authority shall communicate— the order to the financial creditor within seven days of admission or rejection of such application and to the corporate debtor.

Question 7 : [RTP NOV 2017] [MOCK TEST PAPER MAY 2018]

State the circumstances when persons are not entitled to make an application to initiate corporate insolvency resolution process.

Suppose a corporate debtor has committed a default and is undergoing a corporate insolvency resolution process. A corporate applicant Mr. X thereof files an application for initiating corporate insolvency resolution process with an Adjudicating Authority. State whether he (Mr. X) is entitled to make an application to initiate corporate insolvency resolution process?

Answer:

Persons not entitled to make application.

The following persons shall not be entitled to make an application to initiate corporate insolvency resolution process –

(a) a corporate debtor undergoing a corporate insolvency resolution process; or

(b) a corporate debtor having completed corporate insolvency resolution process twelve months preceding the date of making of the application; or

(c) a corporate debtor or a financial creditor who has violated any of the terms of resolution plan which was approved twelve months before the date of making of an application under this Chapter; or

(d) a corporate debtor in respect of whom a liquidation order has been made.

In this section, a corporate debtor includes a corporate applicant in respect of such corporate debtor**. [Section 11]**

As per the facts corporate applicant Mr. X seems to be a separate individual and not a corporate applicant in respect of such corporate debtor who is undergoing a corporate insolvency resolution process. So he shall be entitled to make an application to initiate corporate insolvency resolution process.

Question 8: [RTP MAY 2018] [MOCK TEST PAPER MAY 2018]

Wisdom Ltd. commits a default against the debts taken from the financial creditors. Mr. F, a financial creditor initiated the corporate insolvency resolution process against the Wisdom Ltd. Mr. X, another financial creditor, thereof files an application for initiating corporate insolvency resolution process with an Adjudicating Authority. State the validity as to the filing of an application by Mr. X for initiation of corporate insolvency resolution process?

Answer:

In the given problem, on commission of default by the Wisdom Ltd., Mr. F filed an application for initiating corporate insolvency resolution process before adjudicating authority.Further,Mr.X another financial creditor moved an application for initiation of insolvency resolution process against the Wisdom Ltd.

According to the **section 6 of the Code**, where any corporate debtor commits a default, a financial creditor, Operational creditor or the Corporate debtor itself may initiate insolvency resolution process against such corporate debtor.

. But as per **Section 13 of the Code**, once an application is admitted by the Adjudicating authority, it shall by an order declare a moratorium for the purposes referred to in section 14. Then causes a public announcement of the initiation of CIRP by IRP and call for the submission of claims under section 15 and appoint an IRP in the manner as laid down in section 16 of the Code. Public announcement lays down all the relevant information related to the CIRP. So that the all creditors entitled under the law can raise their claim in this case.

So, no further application for initiation of CIRP against the same debtor (i.e, Wisdom Ltd.) can be initiated. So, Mr. X, cannot file an application on initiation of CIRP, however, is entitled under the law to raise his claim in this case against the Wisdom Ltd.

Question 9: [RTP MAY 2018]

Standard International Ltd. who is a foreign trade creditor havin g its office in Hong Kong wanted to file a petition under insolvency and bankruptcy code 2016 on default of the debtor in India. It moved a petition under section 9 of the code seeking commencement of insolvency process. The foreign company was not having any office or bank account in India. Because of this, it couldn't submit a "certificate from financial institution" as required under the code. Whether the petition is permissible under the Insolvency & Bankruptcy Code, 2016? Decide.

Answer:

Section 1 of the Insolvency and Bankruptcy Code, 2016 specifies of the extent, commencement and applicability of the Code. According to this, it extends to the whole of India and shall apply for insolvency, liquidation, voluntary liquidation or bankruptcy of any company incorporated under the Companies Act, 2013 or under any previous law.

In view of this, the IBC Code, 2016 applies to the corporate debtor incorporated under the Companies Act, 2013 or under any previous laws.

As per the definition of the Creditor given in **section 3(10) of the Insolvency and Bankruptcy Code**, 2016, it means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor, and a decree holder. So, Standard International Ltd. is a creditor under the purview of the Code.
As per the facts given in question, Standard International Ltd., is a foreign trade creditor. He wanted to file a petition under the under Section 9 of the Insolvency and Bankruptcy Code, 2016 for commencement of Insolvency process against the defaulter in India. Standard International Ltd. was not having any office or bank account in India.

As per the requirement of **section 9 of the Code**, along with application certain documents were needed to be furnished by the creditor to the Adjudicating authority.
Being a foreign trade creditor, Standard International Ltd was also required to provide a copy of certificate from the financial institutions maintaining accounts of the creditor confirming that there is no payment of an unpaid operational debt by the corpo rate debtor. Since, Standard International Ltd. was not having any office or bank account in India, it cannot furnish certificate from financial institution as defined under the section 3(14) of the code. So, Petition under section 9 of the Code is not permissible.

Question 10: [MOCK TEST PAPER NOV 2018]

Mr. Ramlal, an Insolvency professional was appointed as a resolution professional for a corporate insolvency process initiated against the corporate debtor, Monotech Ltd. Mr. Ramlal is a partner of consulting firm M/s supervision and company which is an entity recognized under the IBBI. It was discovered that M/s supervision and company had a transaction with the corporate debtor, Monotech Ltd. amounting to 11% of its gross turnover in the last financial year 2017-2018.
Analyse the given situation as per the Insolvency and Bankruptcy Code, 2016, and advise on the validity of appointment of Mr. Ramlal as resolution professional against Monotech Ltd

Answer:

As per **Regulation 3 of Insolvency and Bankruptcy (Insolvency Resolution Process for Corporate Persons) Regulation, 2016,** an insolvency professional shall be eligible for appointment as a resolution professional for a corporate insolvency process if he and all partners and directors of the insolvency professional entity of which he is partner or director are independent of the corporate debtor. However such an Insolvency professional who is appointed as an resolution professional shall not be an employee or proprietor or a partner of a legal or consulting firm that has or had any transaction with the corporate debtor amounting to ten per cent or more of the gross turnover of such firm in the last three financial years, subject to compliance of other requirements.

In the given instance, Mr. Ramlal, was appointed as Resolution professional for a corporate insolvency process initiated against the Monotech Ltd. During the process, it was discovered that Mr. Ramlal is a partner of a firm M/s supervision and company, which has made transaction of 11% of the gross turnover of the firm in the financial year 2017-2018 with Monotech Ltd.

Accordingly, Mr. Ramlal being a partner of the Firm had made a transaction of more than 10% of the gross turnover of the firm in the previous financial year 2017-2018. So his appointment as resolution professional against Monotech Ltd for initiation of CIRP, is not valid.

Question 11 : [RTP NOV 2018] [MOCK TEST PAPER NOV 2018]

Particulars relate to BigRammy (Private) Ltd. which has gone into Corporate Insolvency Resolution Plan (CIRP):

Sr. No.	Particulars	Amount in Rs.
1	Amount realized from the sale of liquidation of assets	14,00,000
2	Secured creditor who has relinquished the security	5,00,000
3	Unsecured financial creditors	4,00,000
4	Income-tax payable within a period of 2 years preceding the liquidation commencement date	50,000
5	Cess payable to state government within a period of one year preceding the liquidation commencement date	20,000
6	Fees payable to resolution professional	75,000
7	Expenses incurred by the resolution professional in running the business of the BigRammy (Private) Ltd. on going concern	25,000
8	Workmen salary payable for a period of thirty months preceding the liquidation commencement date. The workmen salary is equal per month	3,00,000
9	Equity shareholders	10,00,000

State the priority order in which the liquidator shall distribute the proceeds under the IBC.

Answer:

As per section 53 of Insolvency and Bankruptcy Code, 2016, the proceeds from the sale of liquidation assets shall be distributed in the following order of priority:

Insolvency Resolution Process Cost and Liquidation cost to be paid in full

(i)	Fees payable to Resolution Professional in full	75,000
(ii)	Expenses incurred by the Resolution professional in running the business on going concern	25,000
(iii)	Workmen salary outstanding for a period of 24 months (proportionate to 24 months only). The balance ` 60,000 is considered as remaining debts and dues and will be settled before preference shareholder/equity shareholder.	2,40,000
(iv)	Secured creditor who has relinquished the security	5,00,000
(v)	Unsecured Financial Creditors	4,00,000
(vi)	Income- tax payable with in the period 2 years	50,000
(vii)	Cess to State Government payable with in a period of one year	20,000
(vii)	Balance amount in workmen salary	60,000
	Total distribution in the above priority	13,70,000
	Amount realized from the sale of liquidation of assets	14,00,000
	Balance available to Equity share holder on pro rata basis	30,000

Question 12 : [MOCK TEST PAPER NOV 2018]

Discuss the Principles on the basis of which the Insolvency Professional Agency (IPA) is enrolled and regulate insolvency professionals as its members in accordance with the I & B Code, 2016 .

Answer:

The Code provides for establishment of insolvency professionals agencies (IPA) to enroll and regulate insolvency professionals as its members in accordance with the Insolvency and Bankruptcy Code 2016 and read with regulations.

Principles governing registration of Insolvency Professional Agency

- to promote the professional development of and regulation of insolvency professionals
- to promote the services of competent insolvency professionals to cater to the needs of debtors, creditors and such other persons as may be specified
- to promote good professional and ethical conduct amongst insolvency professionals
- to protect the interests of debtors, creditors and such other persons as may be specified
- to promote the growth of insolvency professional agencies for the effective resolution of insolvency and bankruptcy processes under this Code.

Question 13 : [MOCK TEST PAPER MAY 2018]

Mr. Naman was a resolution professional for the Corporate Insolvency Resolution process initiated against the corporate debtor, PQR Pvt. Ltd. However, attempt to resolve the insolvency of PQR Pvt. Ltd. failed. An order for liquidation of PQR Pvt. Ltd., was passed by the NCLT. Mr. Naman acted as liquidator. The resolution plan submitted by Mr. Naman was rejected for failure to meet the requirements. Board recommended for the replacement of Mr. Naman.

What steps may be taken for the appointment of another liquidator under the Insolvency and Bankruptcy Code. What are the other aspects related to the charge of fees for the conduct of liquidation proceeding.

Answer:

According to **section 34 of the Insolvency and Bankruptcy Code, 2016**, where the Adjudicating Authority passes an order for liquidation of the corporate debtor, the resolution professional appointed for the corporate insolvency resolution process, shall act as the liquidator for the purposes of liquidation unless replaced by the Adjudicating Authority.

The Adjudicating Authority shall by order replace the resolution professional, if—

(a) the resolution plan submitted by the resolution professional **was rejected for failure to meet the requirements**; or

(a) the **Board recommends the replacement of a resolution professional** to the Adjudicating Authority for reasons to be recorded in writing.

On rejection of resolution plan due to failure to meet the requirements, the Adjudicating Authority may direct the Board to propose the name of another insolvency professional to be appointed as a liquidator.

The Board shall propose the name of another insolvency professional within ten days of the direction issued by the Adjudicating Authority.

The Adjudicating Authority shall, on receipt of the proposal of the Board for the appointment of an insolvency professional as liquidator, by an order appoint such insolvency professional as the liquidator.

Charge of fees for conduct of liquidation proceedings: An insolvency professional proposed to be appointed as a liquidator shall charge such fee for the conduct of the liquidation proceedings and in such proportion to the value of the liquidation estate assets, as may be specified by the Board.

Payment of fees: The fees for the conduct of the liquidation proceedings shall be paid to the liquidator from the proceeds of the liquidation estate.

Question 14 **[MOCK TEST PAPER MAY 2018] [NEW COURSE STUDY Q.]**

What is the effect of order of moratorium?

Answer

Moratorium has been explained in **Section 14 of the Code**, during the moratorium period the following acts shall be prohibited:

a) The institution of suits or continuation of any pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

b) Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

c) Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the SARFAESI Act, 2002

d) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

[NEW COURSE STUDY QUESTIONS.]

Question 15

When will the provisions of insolvency and liquidation of corporate persons be applicable on a corporate person*?*

Answer

The provisions relating to the insolvency and liquidation of corporate debtors shall be applicable only when the amount of the default is one lakh rupees or more. However, the Central Government may, by notification, specify the minimum amount of default of higher value which shall not be more than one crore rupees.

Question 16

Who may initiate corporate insolvency process against a corporate person?

Answer

The corporate insolvency process may be initiated against any defaulting corporate debtor by -

(a) Financial creditor,

(b) Operational creditor

(c) Corporate debtor

Question 17

What is the Insolvency Resolution Process for financial creditors?

Answer

A financial creditor either itself or along with other financial creditors may lodge an application before the Adjudicating Authority (National Company Law Tribunal) for initiating corporate insolvency resolution process against a corporate debtor who commits a default in payment of its dues.

The financial creditor shall along with the application give evidence in support of the default committed by the corporate debtor. He shall also give the name of the interim resolution professional.

Where the Adjudicating Authority is satisfied that a default has occurred and the application by the financial creditor is complete and there is no disciplinary proceedings pending against the proposed resolution professional, it may admit such application made by the financial creditor. Otherwise, the application may be rejected. However, the applicant may rectify the defect within seven days of receipt of notice of rejection from the Adjudicating Authority.

Question 18

What is the Insolvency Resolution Process for operational creditors?

Answer

On the occurrence of default, an operational creditor shall first send a demand notice and a copy of invoice to the corporate debtor.

The corporate debtor shall within a period of ten days of receipt of demand notice notify the operational creditor about the existence of a dispute, if there is any and record of pendency of any suit or arbitration proceedings. He shall also provide the details of repayment of unpaid operational debt in case the debt has or is being paid.

After the expiry of ten days, if the operational creditor does not receive his payment or the confirmation of a dispute that existed even before the demand notice was sent, he may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.

The Adjudicating Authority shall within fourteen days of receipt of the application, admit or reject the application. However, before rejecting the application, an opportunity shall be given to the applicant to rectify the defect within seven days of receipt of rejection.

Question 19

What are the eligibility criteria for appointment of an Insolvency Professional as a Resolution Professional for a corporate insolvency resolution process?

Answer

As per **Regulation 3 of Insolvency and Bankruptcy (Insolvency Resolution) Regulation, 2016**, an insolvency professional shall be eligible for appointment as a resolution professional for a corporate insolvency resolution process if he and all partners and directors of the insolvency professional entity of which he is partner or director are independent of the corporate debtor i.e.,

- He is eligible to be appointed as an independent director on the board of the corporate debtor u/s 149 of the Companies Act, 2013, where the corporate debtor is a company.
- He is not a related party of the corporate debtor.
- He is not an employee or proprietor or a partner of a firm of auditors or company secretaries in practice or cost auditors of the corporate debtor in the last three financial years.

- He is not an employee or proprietor or a partner of a legal or consulting firm that has or had any transaction with the corporate debtor amounting to ten per cent or more of the gross turnover of such firm in the last three financial years

Question 20

What is the procedure of Insolvency Resolution Process for a Corporate Applicant?

Answer

Where a corporate debtor has committed a default, a corporate applicant thereof may file an application for initiating corporate insolvency resolution process with the Adjudicating Authority.

The corporate applicant shall furnish the information relating to books of account and other documents and a resolution professional shall be appointed as interim resolution professional.

The Adjudicating Authority may either accept or reject the application within fourteen days of receipt of application. However, applicant should be allowed to rectify the defect within seven days of receipt of notice of such rejection.

Question 21

Is there any time limit for completion of the Insolvency Resolution Process?

Answer

Section 12 of the Code states that any Insolvency Resolution Process shall be completed within a period of one hundred and eighty days from the date of admission of the application to initiate the process.

However the National Company Law Tribunal (NCLT) may on an application made by the resolution professional, under a resolution passed by the Committee of Creditors, by a vote of 75% of voting shares, after consideration provide one extension which shall not extend more than 90 days.

Question 22

What is a Resolution plan?

Answer

A resolution plan is a proposal agreed to by the Debtors and Creditors of an entity in a collective mechanism to propose a time bound solution to resolve the situation of insolvency.

As per **Section 30, the Insolvency Resolution Professional** (IRP) within the prescribed time i.e. 180 days or in case of extension 270 days, where Fast Track Resolution within 90 days or in case of extension 135 days, is required to submit the Resolution Plan to Adjudicating Authority (NCLT) prepared by the Resolution applicant on the basis of information memorandum.

The Resolution Plan should provide for:

(i) payment of insolvency resolution costs;

(ii) repayment of the debts to operational creditors;

(iii) management of affairs of the Company after approval of the resolution plan;

(iv) implementation and supervision of the resolution plan;

(v) does not contravene provisions of the law for the time being in force; and conforms to such other requirement as may be specified by the Board.

Question 23

When can a corporate person initiate voluntary liquidation process?

Answer

Section 59 of the Code empowers a corporate person intending to liquidate itself voluntarily if it has not committed any default to initiate voluntary liquidation proceedings under the provisions of this Code.

Any corporate person registered as a company shall meet the following conditions to initiate a voluntary liquidation process:-

(a) A declaration from majority of the directors of the company verified by an affidavit stating

i. That they have made a full inquiry into the affairs of the company and have formed an opinion that either the company has no debts or that it will be able to pay its debts in full from the proceeds of assets to be sold in the voluntary liquidation; and

ii. That the company is not being liquidated to defraud any person.

(b) The declaration shall be accompanied with the following documents, namely:

i. Audited financial statements and a record of business operations of the company for the previous two years or for the period since its incorporation, whichever is later.